LINKING, FRAMING AND COPYING: A NEW ZEALAND COPYRIGHT PERSPECTIVE

Rick Shera – February 1998
Acknowledgements and Copyright

I am grateful for the assistance (and forbearance) of Kas Shera and for the feedback provided by Clive Elliott in the preparation of this paper.

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Chapter 1

INTRODUCTION

1.1 Like other contagion, information – good, bad, ugly, aesthetically pleasing – is proliferating exponentially. So much so that already it seems unrealistic to characterise information as a valuable commodity in itself.

1.2 Value attaches to information only when it is useable; at the right time and in the right place. The world wide web of course allows us all potentially to access that crucial piece of information at the critical moment and renders the concept of being in the right place irrelevant – but only if one can find that pearl one is searching for.

1.3 One of the most powerful mechanisms in that quest is the inherent capability that the web provides of linking from site to related site. By framing the site which is linked to within a border containing helpful navigation aids (for example) this capability is enhanced.
1.4 However, the information accessed originates with someone – and that someone may not want it accessed other than temporarily, or may want to charge for the privilege. Is intellectual property law (and specifically copyright law) able to adjudicate between this invaluable capability the web has on the one hand and the protection of proprietary rights in information on the other?

1.5 James Boyle, a US Professor at the forefront of discussion of these issues, seems in little doubt:

*The more one moves to a world in which the message, rather than the medium, is the focus of conceptual, and economic interest, the more central does intellectual property become. Intellectual property is the legal form of the information age.*

1.6 The linking issue therefore raises questions that go to the heart of the philosophy of intellectual property protection. On the one hand there are the adherents of what might be called the more traditionalist or maximalist\(^4\) view. That view would have it that information placed on the web is no different to information placed in any other form of media and therefore intellectual property protections should apply equally. Furthermore, adherents of this view would suggest that if the advanced technology of the web puts intellectual property protections in jeopardy then those protections should be strengthened. On the other hand those who we might refer to as information liberals, minimalists or radical revisionists,\(^5\) tend to suggest that cyberspace is a completely new dimension and that rigorous intellectual property protections are no longer appropriate.
1.7 Questions of underlying philosophy arise commonly when one is looking at how a particular law has developed and whether and in what manner it might be reformed. We will look briefly at these issues later in this paper.

1.8 However, there is also another situation where it will be necessary to have recourse to philosophical underpinnings. That is where there is uncertainty in applying the particular law to a given set of facts. That can be the case whether the law is statute based or judge made.

1.9 The pace of change with respect to information technology is accelerating and is already at such a rate that the need for recourse to underlying philosophies will increase. In fact, it has been suggested that not only does the internet as the current infrastructure of cyberspace promote a collapsing of distance, with all the jurisdictional problems inherent in such collapse, but it may also lead to a weakening of the law’s traditional reliance on precedent - a collapse of time. As laws become outdated more and more quickly they lose relevance and, importantly, respect for such laws and any inclination to comply with them falls away.

1.10 Analysing New Zealand’s copyright laws as they struggle valiantly to keep pace with developments in cyberspace therefore requires recourse not only to *black letter law* but also to the philosophies on which that law is based.

1.11 Before proceeding any further, it should also be explained that there has only been scope in this paper to deal with copyright (and moral rights as part of that general topic). Fruitful areas such as trademarks, Fair Trading Act liability, passing off and comparative advertising have, reluctantly, not been covered.

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1 This paper was prepared in satisfaction of the requirements of paper 610790DC, a dissertation component of the University of Auckland, Department of Commercial Law, MComLaw degree.
2 The author is a partner in the Auckland specialist corporate, commercial and information technology law firm, Lowndes Jordan.


JURISDICTION

2.1 If one were to argue a linking case in the Courts, it would be likely that the first threshold issue to deal with would be jurisdiction. Of its very nature, linking is likely to involve the transfer of information across borders and between jurisdictions whose laws may, but very often will not, be consistent. After all, one of the primary values of the web is that it does collapse distances. For example, when researching this paper, links were followed from New Zealand, to Australia, to the US, to Germany, to Israel, and to various other places in between and backwards and forwards amongst them.

2.2 What would the position be then, in terms of jurisdiction and applicable law, if a site created and owned by a New Zealand company and held on a New Zealand server was alleged to have infringed the intellectual property rights of a company in the United States by framing that company’s site? To date, there are no cases or even reported instances that can give any guidance as to how this issue would be resolved. All of the cases or reported instances of disputes which have arisen thus far deal, somewhat surprisingly, with linking to or framing of sites where both sites in question are governed by the same laws. That is not to say that extraterritoriality will not be claimed in a cross-jurisdictional linking or framing dispute.
2.3 The issue is an extremely difficult one and is not something that this paper gives scope to review in any detail. However, it can be expected that until some form of international understanding is reached, there will be opportunities for forum shopping which will be difficult to resist. In the example given above, it may be that the US company bringing the action would effectively have a choice as to not only the jurisdiction in which to bring the case but also a de facto choice of the applicable law. One can imagine that there will be sufficiently strong arguments either way to suggest that either US or New Zealand law applies and therefore it may be to the plaintiff’s advantage to attempt to have the action heard under the laws of one of those jurisdictions rather than the other. For instance, a US company might decide to address the issue using New Zealand law if it concludes that the behaviour complained of might fall within the *fair use* exception to copyright protection in the US. Alternatively, since damages in the US would be likely to exceed those which might be attained in New Zealand, US law might be argued for.

2.4 Issues of jurisdiction are intriguing and in many cases do and will continue to prove practically determinative in all but the most *valuable* cases. For simplicity however, in the remainder of this paper we will focus on New Zealand law and leave the jurisdiction issue to one side.  

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7 The TotalNews case (*The Washington Post Company and subsidiaries, Cable News Network, Inc., Times Mirror Company (Los Angeles Times), Dow Jones & Company, Inc., and Reuters New Media Inc. v TotalNews, Inc. & Ors, 97 Civ. 1190 (PKL)*) in the United States District Court, Southern District of New York, was to deal with federal law, however, parts of the plaintiffs’ pleadings did address issues of jurisdiction. See paras 11-13 of the complaint at <http://www.ljextra.com/internet/complain.html>.
8 For example see *Minnesota State v Granite Gate, Inc.*, a copy of which can be viewed at <http://www.ag.state.mn.us/consumer/news/OnlineScams/> and which cites a similar case, *Inset Systems, Inc v Instruction Set, Inc* (937 F. Supp. 161 (D. Conn. 17 April 1996)) a copy of which can be found at <http://www.leepfrog.com/E-Law/Cases/Inset_v_Instruction.html>.
9 As in the monetary value of the rights involved making it worthwhile spending significant sums suing and enforcing judgement in another jurisdiction.
NEW ZEALAND ON THE NET

3.1 New Zealand has a good take-up of technology. In 1995, New Zealand was fifth behind Iceland, Finland, the US and Norway in terms of number of computers connected directly to the internet per capita and at that stage connections to the internet were slowing down from the 1994 level of almost 400% growth to more a more normal (in world terms) 80-100%.\(^{11}\) It has been reported that a census of Internet service providers towards the end of 1997 showed there to be approximately 215,000 Internet access accounts in New Zealand.\(^{12}\) New Zealand is also a largely deregulated economy where legislation seeks to set the outer parameters of fair and equitable behaviour. Within those parameters, competition is seen as the market regulator. It is therefore likely that the disputes that have already arisen in relation to linking\(^{13}\) will merely be the forerunners of more serious disputes to come.


\(^{12}\) *Growth in Internet Use Runs Ahead of Forecasts*, Chris Barton, *New Zealand Herald*, Tuesday, January 6, 1998 at D3, however, such figures are notoriously inaccurate and it is preferable to take the number of hosts which Jackson (*idem*) reports stood at approximately 53,600 in 1996.

\(^{13}\) There are two reasonably well known disputes that have arisen in New Zealand both relating to linking simpliciter. These involved both Television New Zealand and Independent Radio News separately
attacking ClearNet in respect of the latter’s links to their respective sites or to a third party’s site on which their material resided. For a report on the disputes see <http://aardvark.co.nz/av1125.htm>.
4.1 Introduction

4.1.1 The introduction above contained a brief description of what we mean when we refer to linking or framing. However, it is necessary to understand these processes in detail before we go any further. In fact, as we shall see, the distinction between the two whilst outwardly not great, is important in determining possible legal treatment of each process.

4.1.2 To understand the two processes is really to understand how the web as part of the wider Internet works. As most will by now know, the Internet is a network of networks. The common protocols (particularly in the case of the web, hypertext transfer protocol (http)) enable different networks to interact together notwithstanding that each network may use different hardware and software platforms. In turn, participants in each network who may themselves use different hardware and software platforms can interact both within their own network and across networks.
4.2 Finding the Information

4.2.1 In order to do so, the individual user must obviously know where to look to find the information they are seeking – in other words, an address. That address takes the form of a uniform resource locator (URL); a standardised address which enables anyone accessing the web to locate a particular address or site where the information they are seeking is held.

4.2.2 A URL is technically just a series of numbers. Overlaid on those numbers is an alphanumeric address phrase that forms the outward appearance of the URL. It is constructed on the basis of an internationally accepted hierarchy of domains starting with the Top Level Domains (TLDs) which are found on the right of the domain name, followed by, moving left, second level domains which are subsections of the TLDs often allocated by a particular country using their own hierarchical system. For example, the law firm site of Lowndes Jordan has the URL - http://www.lojo.co.nz.

4.3 Accessing and Capturing the Information

4.3.1 Having reached an understanding of how information may be located, it is important also to understand how the information may be retrieved and perhaps captured either temporarily or permanently. There are in fact a number of different ways in which information may be passed from the site at which it is held to the user and dealt with once retrieved. As web technology changes at an ever-increasing pace, these methods will no doubt
be expanded. In this paper the following distinctions will be drawn:

4.4 **Downloading**

4.4.1 Like retrieving a file using file transfer protocol (a previous protocol now almost superseded by http), downloading involves the actual transfer of a file (whether that be a document, a sound or video file or a piece of multimedia) to the hard drive of the user’s computer where it is saved in a directory or folder in the same way as any other file would be saved. That file can then be accessed on that computer provided the owner has the appropriate computer programs to activate the file. That activation may (but usually does not) involve further access to the web.

4.5 **Browsing**

4.5.1 With the advent of the *Mosaic* browser software in 1993 and latterly programs such as *Netscape Navigator* and *Microsoft Internet Explorer*, the web came of age. These programs, carrying graphical user interfaces or *GUIs*, allow users to access sites of information holders by simply pointing to the URL (whether that is embedded in text or an image) and clicking. The information which is then accessed is not downloaded in the sense used above but is simply passed to the random access memory (*RAM*) of the user’s computer.
4.6 Caching

4.6.1 At the same time, as a function of the user’s browser software, the site that is accessed may be saved automatically to the user’s hard drive in what is called a cache. Normally the cache has a limited amount of hard disk space which is overwritten with new material once it is full. Sites are cached in this manner as a mechanism to speed up delivery of access since it can often take some time for a site to be accessed if there is limited bandwidth available.

4.6.2 Caching may also enable retrieval where, at a later time, the online connection to that material cannot be established for whatever reason. Usually, such caching occurs automatically (and may occur without the user understanding how, or knowing that it does occur). It is also possible to find and retrieve from the hard drive a particular image which has been cached by simply searching through the appropriate cache file directory (albeit in a hit or miss manner). In other words, caching is exactly the same as downloading and saving the web page in question apart from the fact that the caching occurs automatically.

4.7 Streaming

4.7.1 This method is perhaps the most ephemeral of the methods of information access. In this context, the term is used generally to describe the process whereby information is continuously updated or streamed from the web site to the user. Examples of this are real time audio broadcasts which, whilst accessed through the browser interface, treat the computer in a similar fashion to a television or radio in that the information being retrieved is
converted by the computer to sound or visuals and is not saved at all.\textsuperscript{22}

4.8 Developments

4.8.1 Technology in this area is by no means standing still and already the advent of the \textit{Java} language has blurred the difference between the three categories. Using Java, information is provided to the user, however, the computer program necessary to access or use that information is also passed from the web site to the user at the same time. These programs, called \textit{applets}, and the data that they manipulate are passed into and out of RAM.

4.9 A bit more about RAM

4.9.1 In fact, as technology advances, different forms of RAM are being introduced. For example, currently there are at least two general categories of RAM. As described in \textit{Advanced Computer Services of Michigan, Inc. v MAI Sys. Corp.}\textsuperscript{23} (\textit{Advanced Computer}), RAM can be either Dynamic Random-Access Memory (\textit{DRAM}) which must be continually updated otherwise it will be lost from memory, or Static Random-Access Memory (\textit{SRAM}) which does not need such updating.

4.9.2 In both cases however, when the computer is switched off, all contents of RAM are lost. Conversely, as long as the computer remains on, the material will remain in RAM (assuming the RAM size is sufficient) and it is the RAM version of a page which is retrieved when the \textit{back} button in Netscape Navigator, for
example, is used, rather than the page from the actual site itself.

As development of RAM proceeds along with new browsing technologies (e.g. the streaming technologies referred to above) it is likely that accessing information by computer and modem or network links will move closer to the type of access we experience when we use a television or listen to the radio. It is important to bear this in mind when considering the issues we will deal with in terms of copying.

4.9.3

At this stage however, it is enough to focus on the fact that different methods of accessing information on the web do result in differing degrees of permanence of the information retrieved and in a blurring of what process the user is actually engaged in - reading, listening, viewing, saving, copying or even experiencing a performance.

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14 Throughout this paper, the word user will be used to refer to someone accessing a web page using browser software such as Netscape Navigator.
15 URLs have been in widespread use since 1990. See Tim Berners-Lee, CERN Network Working Group, Request for Comments 1630 - Uniform Resource Locators in WWW at <http://andrew2.andrew.cmu.edu/rfc/rfc1630.htm/>.
16 Currently:

- .edu educational, academic
- .com commercial
- .net internet network entities
- .org organisations/sites that do not fit any other categories
- .gov reserved for the US Government
- .mil reserved for the US military
- .int international treaty organisations/sites;

the so-called generic Top Level Domains (gTLDs) which can be used internationally (apart from .gov and .mil) and the Country domains such as .nz (New Zealand), .au (Australia) and .uk (United Kingdom).
17 Under delegated authority from US based IANA (the Internet Assigned Number Authority).
18 This can be confusing at first. For example most commercial sites in the US do not register in the .us country domain but rather in the gTLD .com domain. Whereas a commercial entity in New Zealand will usually register in the .co second level domain which is in the .nz TLD. To make matters even more confusing, Australia uses the second level domain (under the .au TLD) of .com so that commercial entities there will normally register in .com.au.
19 Domain name hierarchy, structure and administration is currently undergoing review. In late 1997 IAHC (the International Ad-Hoc Committee) acting under the auspices of the gTLD-MOU (generic Top Level Domain - Memorandum Of Understanding) produced its final report which recommended the formation of 7 new TLDs to add to the existing generic and country ones referred to at note 16 above. The report can be found at <http://www.gtld-mou.org/draft-iahc-recommend-00.html>. This proposal
was scheduled to be implemented in February - March 1998, however, its future is now in doubt as a result of the US Government’s alternative *Proposal To Improve Technical Management of Internet Names and Addresses* issued on 30 January 1998 on the web at <http://www.ntia.doc.gov> which, among other things, proposes only five new gTLDs.


20 Usually, the browser software will provide a mechanism for altering the size of the cache and for deleting its contents.

21 Bandwidth in this context is shorthand for the capacity of the communication network.

22 Generally, a file will be saved in the cache which indicates the location of the information streamed. Unlike other information which is cached, the streamed information itself is not saved in the cache file and in order to access it it will be necessary to establish an online connection again. Note that with the latest form of browser, if the information is streamed in a particular fashion then it may be possible to save that information for later use.

Chapter 5

LINKING

5.1 General Description

5.1.1 Linking in its widest definition includes framing.

5.1.2 As we have seen, the web utilises an infrastructure of agreed protocols, principally http. That protocol is based on a language, hypertext markup language (html), which enables packets of information written on whatever platform and using whatever computer program to be transmitted over the internet from computer to computer through differing networks.

5.1.3 The beauty of html and one of the primary factors in the explosive growth of the web is the ability to include on a web page or in a document html references called hypertext links.24

5.1.4 Those links are effectively URL references written in html. Many recent versions of popular word-processing packages (e.g. Microsoft Word Version 7.0) will automatically recognise text which appears to be a reference to a URL and will set that text in html. Often html links are
recognisable in a document by virtue of their being highlighted in some way, usually in a different colour or by being underlined.

5.1.5 Links of course do not need to be text based and with the web’s ability to present detailed graphics, links will now often be embedded in a graphic (such as the graphic following).

5.1.6 The link may refer to another site, to another page on the same site or (as with the graphic link above), to another part of the same document or web page.

5.1.7 In simple terms this gives an understanding of how the user is able to surf the web from page to page, web site to web site. The user simply places their cursor on the hypertext link (whether that is highlighted text, a graphic or some other indicator) and clicks. The browser program recognises this instruction and links to the URL which has been requested.

5.1.8 So far this description applies equally to all types of linking. However, the differences between the two become apparent in terms of how the information that is retrieved will then appear to the user using their browser.

5.2 Href and Img Links

5.2.1 There are two types of links. An href (hypertext reference) link takes the user to the site of the URL link they have specified. On the other hand, an img (image) link does not move the user to another site but
instead *inlines* an image (which may be on the same web site or on another one entirely) in the page being viewed.

5.2.2 For example, a web page may contain text referring to an etching by the artist M.C. Escher. If the web page designer has used an img link, the etching referred to could then be retrieved from the M.C. Escher online gallery (if there is one) and placed immediately above that text. To the user, it would appear that the text and the etching are all part of the same web page. In fact they have been sourced from two different locations. It would not necessarily be obvious to the user that the image had been retrieved off-site.

5.2.3 This highlights the difference between an img and an href link. With an href link the user will always be aware that he or she has moved locations either because they can see that they are on a different page or because the URL reference has changed whereas with an img link, they will not.

5.2.4 With an img link, the URL reference in the location box at the top of the screen remains the same and the image is inlined. It is as if a window has been cut into the page the user is on through which an image on another page is viewed.\(^\text{26}\)

5.2.5 An img link is however still only a link. It does not entail the copying of that image into the current page.\(^\text{27}\)

5.2.6 Hence, as Norderhaug & Oberding\(^\text{28}\) point out, the original of that information still resides on the owner’s page. If the owner wishes to sever the link, then it can do so - i.e., it retains control of the original and can stymie attempts at inlining if it becomes aware of them. Similarly,
if, because of a network problem, the link to the inlined image is unavailable, then the image will not appear.

5.2.7 The other danger of course for the inliner (the person who is inlining the image) is that the location where the image is stored may change the image to something which, when inlined, is inappropriate for the inliner’s site.

5.2.8 This therefore shows one difference between digital and hard copy practices that might appear the same. An image in a newspaper can be copied (in breach of copyright) and there is little practically that the publisher can do to stop the practice other than ex post facto litigation if the copying is of sufficient scale to warrant it. With digital inlining, the owner need only change the image or shift it so that the link no longer works.\(^{29}\)

\(^{24}\) Similar comments were made in the US District Court level hearing of *ACLU v Reno*, 929 F.Supp. 824 (*Reno*), the case which eventually, in the US Supreme Court, overturned part of the US Communications Decency Act on the grounds that it infringed the US Constitution. *The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.* (Reno at 832).

\(^{25}\) The first recorded use of the word *surf* in reference to the internet was apparently made by Jean Armour Polly in *Surfing the Internet: An Introduction* in June 1992. An explanation of the background to this reference and a copy of the original article can be found at <http://www.well.com/user/polly/about/surfing.htm>.

\(^{26}\) Inlining was the focus in the *Dilbert Hack page* dispute. Briefly, Mr Wallach, an afficianado of the *Dilbert* comic strip, inlined the comics by providing an img link from his page to that of the copyright owner United Media. After threats from United Media and much online discussion and controversy Wallach decided to remove the link. See the archive of the dispute at <http://www.cs.princeton.edu/~dwallach/dilbert/>.

\(^{27}\) It is actually quite difficult to describe the process of inlining without falling into the trap of using language which suggests that the inlined image has been copied. Suggesting that the image has been inlined *into* or *onto* the page the user is actually on, in themselves, to suggest some form of copying when this is in fact incorrect.


\(^{29}\) That is not to say that copyright owners should necessarily be forced to spend time and money inactivating someone else’s *freeloading* but it is an indication of one of the arguments that many of the copyright minimalists use - that technical measures rather than copyright restrictions are more appropriate if valuable intellectual property requires safeguarding.
Chapter 6

FRAMING

6.1 Framing, as the name suggests, involves the web page being divided into rectangular sections, each of which can then be treated separately. The most obvious manifestation of this separation is that within each frame it may be possible to view information by scrolling up and down without affecting the view seen in the other frames on the page. Normally the frames are divided into rectangles on the site by clearly marked borders although in some cases the borders themselves may not be visible at all.  

6.2 Within any given frame, there may be links of either the href or img sort.

6.3 Framing technology was only introduced in 1996 with the release of the Netscape Navigator 2.0 upgrade, but has now become a *de facto* standard.

6.4 It is important to note that there is no direct analogy in the hard copy print medium for framing. At first glance, one would think that it would be possible to argue that the owner of the framing site is in the same position as, say, a newspaper editor might be if they cut out a story from a competing newspaper and pasted it into their own. However, on closer analysis there is a fundamental difference which it is important to understand.
6.5 The framing site does **not** copy the information from the framed site, whereas, in the hard copy medium, quite clearly a copy has been taken. This goes some way to explaining why there is such difficulty and controversy over imposing or extending copyright laws formulated to cater for physical media on or to digitised material, since whilst the means may be different (copying vs. not copying) the end result is exactly the same. As Brian Negin, legal advisor to the Israeli Government Internet Committee, points out:

> One has the feeling that the defendant may have done something improper but finds it hard [to] pinpoint precise legal grounds for said misconduct since appropriate legislation and legal precedents are lacking.\(^3\)

6.6 Another point to note about framing is that the URL indicator in the location box at the top of the screen will continue to show the address of the site from which the user accessed the framed site. This is logical since the user has not transferred to the framed site although it does tend to suggest a misappropriation of the framed material. No doubt a technical cure can be found which would change the URL reference in the location box when the cursor is placed on the framed material.

6.7 The difference between frames and img links is that with frames a whole web page can be viewed within the frame whereas with img links only the specific image is shown and none of the functionality of the page on which the image is located is available. In effect, framing allows the viewer to look through the site where they are located to the site being framed.

6.8 The beauty of frames is that they enable areas of the page to be treated independently. For example, in one frame, advertising (including automatically scrolling banners implemented by Java or other similar effects) may be used; in
another frame a static list of tools to navigate around the web site appear. The text or information, whether from the local site itself, or from another site, can be framed in a third frame, and so on.

6.9 By doing so, the local site can have the best of all worlds - its own advertising and logos surrounding information that has been prepared by someone else. The difficulty is that in some cases it is not obvious at all that the information retrieved does not belong to the local site. This parasitic use of content by the framing site and loss of control by the framed site is often at the heart of complaints, but, as we shall see, copyright is not the method by which such activity will necessarily be able to be restrained.

6.10 To visualise exactly how framing compares with linking, it is useful to look at before and after examples. Since we will be looking at the TotalNews case\(^ {32}\) (TotalNews) in more detail later it is appropriate to use the TotalNews site in this analysis. At Figure One below, the TotalNews site is shown as it appeared in early January 1998 when first accessed by the writer. Figure Two shows the result of clicking on the CNN button on the right of the screen - an example of linking simpliciter to the site of one of the Plaintiffs in the TotalNews\(^ {33}\) case. Figure Three shows the result of clicking on the CBS button – the result being an example of framing.
Figure One: Screenshot of TotalNews, Inc. home page as it appeared on 5 January 1998 (NZ time) when first accessed.
Linking, Framing and Copying: A New Zealand Copyright Perspective

6. Framing

Figure Two: CNN homepage viewed on 5 January 1998 (New Zealand time) after linking from the TotalNews homepage. Note that the URL is now CNN’s and all connection to the TotalNews site has been lost.
6.11 An analogy with the physical world may help at this stage:

6.11.1 In Ponsonby, a suburb of Auckland, around the turn of the Century, detached houses were built side by side with the same orientation to the road. Since the sections were relatively small, often this would mean that a window from one house would be exactly adjacent to a window in the next house. Therefore, it is often possible to look out of one window directly into the window of the house next door and into the room itself.
6.11.2 To explain the difference between linking and framing, we can use this adjacent window analogy. If we imagine that the curtains are closed in the room we are in, we are in a similar situation to that which occurs when we are about to click on a link to another site. We know at this stage that if we opened the curtains we may be able to see into the house next door. Similarly, when we wish to access the linked site, we know that by clicking a button we will be able to link (either by hyperlinking or framing) to the indicated site.

6.11.3 The difference between linking and framing, using the adjacent window analogy, is that in a linking situation, we would open the curtains, climb out of the window of our house, through the window of the adjacent house and into the room to see what was going on. With framing however we would open the curtains but would remain in our house to view through both windows what was going in the room in the adjacent house. We would still see the curtains and the inside wall of our house containing any of our artwork and our view of the room next door would be framed by the size of the window. Therefore, we may not see some of the content of the room next door - although we could do so by moving so that the angle of view changed.

6.12 What is important to note is that neither situation involves an actual transfer of the next door room or its contents into the room in our house. That is exactly the same with the web. All that is happening is that there are some items in the frame surround, which remain in place no matter where we link to.

6.13 Some commentators get this point wrong and state somewhat confusingly that framing is analogous to img linking. It is not. Also, as has already been mentioned, it is difficult to discuss these topics without slipping into use of
physical verbs such as transfer or movement or downloading\textsuperscript{36} of information, and this can lead to unintentionally misleading conclusions suggesting that framing does involve copying by the framing site.

\textsuperscript{30} The Lowndes Jordan site at <http://www.lojo.co.nz> is an example of this. Another example can be found at The Copyright Website at <http://www.benedict.com/> which we will look at again later.


\textsuperscript{32} \textit{Supra} note 7.

\textsuperscript{33} \textit{Idem}.

\textsuperscript{34} The writer is grateful to Roman Godzich of TotalNews, Inc. for, among other things, the advice Mr Godzich has given on some of the technical aspects of framing.

\textsuperscript{35} For example see Emily Madoff, \textit{Frontier to link under Attack}, New York Law Journal, 23 June 1997 which can be found at <http://www.ljx.com/internet/0623link.html>.

ADVANTAGES OF FRAMING

7.1 Advantages for the Framing Site

7.1.1 For the framing site, the advantages are reasonably obvious. First, it enables the material that the framing site wishes to continue to place before the viewer to remain permanently on the screen. Commonly this will comprise navigation panels, the framing site logo and name, and often the ubiquitous advertising banners which may scroll or change having been javacized or otherwise programmed to move.

7.1.2 The frame may also contain such useful items as a news ticker (a continuously scrolling strip, usually across the bottom of the page, where brief text headlines move from the right to the left or vice versa on the screen).

7.1.3 Secondly, for the framing site, frames provide a method of keeping the page easily navigable by the user. The user can see which areas of the screen are devoted to which types of information; advertising in one area, navigation in another and content elsewhere. Compare this to sites
that do not use frames and where it can be difficult to determine what is
advertising and what is content.

7.2 Advantages to the User and the Framed Site

7.2.1 Arguments that the site which is being linked to may benefit do not
appear to have been accepted by the Court in the Shetland Times case \(^{37}\)
\textit{(Shetland Times)} which dealt with linking simpliciter, although it is
difficult to analyse exactly what arguments were made and how they
were dealt with by the Court, the Judge merely concluding:

\ldots there was, in the circumstances, no substance, in my view, in
the suggestion that the pursuers \textit{[Shetland Times Ltd]} were
gaining an advantage by their newspaper items being made
available more readily through the defenders’ \textit{[Zetnews’ and its
owner, Dr Jonathan Wills’]} web site.\(^{38}\)

7.2.2 The case was only decided at interlocutory level and went no further.
Therefore it is likely that these issues were dealt with only in a cursory
manner as part of a consideration of the balance of convenience. On a
balance of convenience ground, without proper argument, it is quite
understandable that the possibility of a linked to site being advantaged
might be dismissed.

7.2.3 It is to be hoped that if any substantive argument comes before the
Courts the following advantages would be presented:

7.2.3(a) \textbf{Ease of navigation} - framing is useful for the user
because it means that the user can follow a link within
the main framing window first to the framed site then,
by virtue of links from that site, elsewhere around the
web. However, the user has the luxury at any time of
being able to return to the original framed site or indeed
to any of the other sites which are directly linked to by
the framing site. This provides a far more efficient
manner of obtaining information on a given topic from
various different sources. If the links were href links,
the only way of returning to the start of the trail and
heading off in another direction would be to use the
other capabilities of the browser (the back button, the
history list and possibly the user’s bookmarks/favorites).

7.2.3(b)

**Competition** - In a wider sense, having various
different sites directly available from one metasite is
advantageous to users because it will promote
competition between the sites that are linked to. Those
sites will know that the user can instantaneously discard
their site and move to another one if the quality of their
information is not high enough, interesting enough, up
to date enough or even aesthetically pleasing enough.
One can even argue that this will promote general
increases in quality across the web. Whilst there is only
a question of degree between shifting from a site which
has been hyperlinked to and using the frames
mechanism to shift between sites, it cannot be disputed
that when frames are used, users who visit the framed
site are less *captured* by those sites than would be the
case with hyperlinks. In other words, the user’s power
of choice is enhanced in a framing regime.
7.2.3(c) **Increased Hits** - The very advantage of metasites to users is also presumably an advantage to the framed site. Metasites great advantage to users is that it gathers together references to various sources of information in one place. This is particularly the case with metasites devoted to particular issues or specialisations. Since we have already seen that a framing site does give advantages to users over a site which does not frame, it is therefore likely that users will use a framing metasite over a site which merely provides hyperlinks if given the choice. In turn, this will surely mean that sites that are framed by the framing site will receive more hits. Since the common model of advertising on the web encourages increased revenue from advertisers based on the number of hits, this must be to the advantage of the framed site.\(^\text{39}\)

7.2.3(d) **Editorial Promotion** - Another advantage to the framed site is that unlike search engines, the framing site does exercise editorial discretion over the sites that are framed. Of course in theory, it is possible for the framing site to include any number of links to sites that can be framed. However, beyond a relatively small number (probably the number which can appear in the navigation bar on the screen without having to be scrolled), the number of links become unwieldy. Assuming that this number is around 10 - 20, that is a far more focused group than would be obtained with a search engine. For example, the TotalNews site linked and provided frames for about 10 other news sites.
However, if a search had been made using the Alta Vista search engine for example it would no doubt have come up with links to hundreds of newspaper sites. Therefore, the framed sites can have some assurance that they have been chosen and are therefore considered exceptional because of the editorial discretion that the framing site must exercise. If a framing site does not promote exceptional sites then it itself will no longer be visited.

7.2.3(e) **Shared Resources** - There are many Government, academic and other non-profit organisations which provide a wealth of information but which, through lack of funds, are unable to provide the value adds which commercial sites do. For example, the Australian legal information site of AustLII at <www.austlii.edu.au> is an impressive resource but is not and does not claim to be anything but a primary legislation and case law reference. It is not difficult to imagine the benefits which a small legal publisher, AustLII and the public would receive if the AustLII site were to be framed with navigation tools linking also to various commentaries for example.

38 Per Lord Hamilton, *Shetland Times* case idem.
39 There are of course balancing disadvantages to the framed site in terms of how its advertising is viewed in the frame, however, that does not detract from the point that even though a user may not see the advertisement on the framed site when it first links (because the frame may obscure it), that is still a hit on the site which can be taken into account when presenting figures to advertisers or potential advertisers to attract their business.
Chapter 8

DISADVANTAGES OF FRAMING

As we will see some of the disadvantages of framing are in fact the basis for potential legal challenge. However, there are also some practical disadvantages. These include:

8.1 **Frames within Frames within…** - One disadvantage is that if the framed site itself uses frames then the page viewed by the user can become very cluttered. Browser technology reduces the size of the framed site proportionally in the framing window and therefore viewing a framed site which has a number of frames can be very difficult. There are technological methods of avoiding this by simply ensuring that when such a site is linked to, rather than it being framed, it appears in a full screen browser window. In effect, this opens up another browser window meaning that the ability to return to the original framing site quickly is not lost. However, obviously, this is not as advantageous for the framing site since its material is no longer shown on screen because the new site browser window obscures it.

8.2 **Redundant Frames** - The very advantage of framing in that it allows a path to be followed in the framing window from site to site without losing the ability to come back to the framing site is also a possible disadvantage. It may be that the user no longer needs the framing site (for example, the user may have arrived at a final destination where he or she wishes to view information in detail). The
fact that the final destination site is reduced in size and framed by information which is no longer necessary may be an annoyance. However, there is a simple method of avoiding this which is to open the final destination site in a new browser window.

8.3 **URL confusion** - One technical problem which has not yet been overcome is that when a site is framed, instead of showing its URL in the location box at the top of the screen, the URL of the framing site remains.\(^{40}\)

8.4 **Obscuring Content** - Finally, probably the major commercial rationale for disputes in relation to framing is the effect it may have on the advertising on the framed site. Often, such advertising appears at the bottom of the framed site’s page and therefore will be obscured by a frame across the bottom of the framing site.\(^{41}\) If, as in the *TotalNews* case, the framing site’s bottom frame is devoted to advertising, in effect, its advertising is replacing that of the framed site.\(^{42}\)

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\(^{40}\) As seen in *Figures One, Two and Three* above.

\(^{41}\) Many Internet Service Providers in the US and elsewhere provide their own customised browser software which does this.

\(^{42}\) It is important that it is recognised that this is only an initial effect. In most cases, the frame around the framed site will be scrollable and therefore if the user scrolls down, he or she will eventually see the advertising on the framed site.
FACT SCENARIO

In order to look at this issue from a New Zealand law perspective, it is useful to focus on a fact scenario. This provides both ease of reference and, hopefully, some practicality to the conclusions reached.

\[ABC \text{ Building Supplies Ltd is a building supply company incorporated and resident in New Zealand. Until recently it was just like any other building supply company providing building products and services from its premises in Auckland.}\]

\[Recently, the company was sold to Mr X who has engaged in an aggressive marketing strategy, which includes the development of a web site.\]

\[That web site uses frame technology and includes a banner advertisement in one frame for XYZ Timber Merchants who are the major supplier of timber to ABC.\]

\[The web site, apart from providing information about ABC also enables browsers to do the following:\]

\[**Price comparisons** - ABC claims to provide guaranteed cheap prices for its products. Under the banner “Cheapest prices guaranteed - we can prove it” one of the site pages provides navigation links to various other building suppliers. In fact, those links, when clicked on, frame those other building suppliers.\]
suppliers’ price catalogues. In all cases those online price catalogues are sub-pages of those suppliers’ sites which would normally be accessed by going to the home page for the supplier and tracing through to the pricing catalogue from there.

- **Information services** - the ABC site also provides links to various other information services and organisations such as the Master Builders’ Federation, builders themselves, architects etc.

Permission has not been obtained from any of the site owners whose sites are framed or linked to.

One of the sites which is framed on ABC’s site when linked to is that of ZZZ. ABC and ZZZ are both located in Auckland and have over a number of years competed vigorously for the same type of business. There is no love lost between them. When ZZZ’s site price catalogue appears in the frame on the ABC site, it is neatly framed so that all prices appear in the frame but the terms and conditions associated with the price catalogue do not. Neither does the banner advertisement which appears on the ZZZ page, since it is obscured by the advertising banner on ABC’s page for XYZ Timber Merchants.33

One of the links takes the user from the ABC site to the Building Accreditation Agency (BAA). The BAA is a newly formed organisation which, in a short time, has proved remarkably successful in promoting a series of quality standards for companies in the building industry including builders and plumbers. It has been in discussions with ABC and other building suppliers to compile a standard for building suppliers, however, it does not currently have such a standard.

The link is positioned alongside an inlined image of the BAA logo.
As we have seen already above, provided the ABC site provides a scroll bar, it will be possible to scroll down the ZZZ page in which case the advertising banner will be revealed as will the terms and conditions of the pricing catalogue.
Chapter 10

A WORLDWIDE DEBATE

10.1 Introduction

10.1.1 The above fact scenario is designed to take advantage of the discussions surrounding the directly relevant\textsuperscript{44} sets of proceedings which have arisen to date (all arose in 1997) around the world and various disputes which have flared but not made it to the stage of proceedings being issued. Since we will be referring to three proceedings throughout this paper it is timely to briefly review the facts of each:

10.2 \textit{TotalNews}\textsuperscript{45}

10.2.1 TotalNews, Inc. is a small corporation in the US which has a metasite enabling users to access various news services within a frame on its web page. We have already seen examples of how its web site now works above at \textit{Figures One, Two and Three}. Previously however all access to other news services was through the central frame.

10.2.2 In \textit{TotalNews}\textsuperscript{46} the news services sued TotalNews and its owner Roman Godzich and others claiming, among other things, that the framing of
their sites was a copyright infringement. In a David and Goliath battle, despite vocal\textsuperscript{47} support from the internet community, it soon became clear that TotalNews would be unable to sustain its defence and the case was settled before getting to court. Interestingly, the settlement comprised a form of revocable licence that allows TotalNews to link to but not frame the plaintiffs’ sites.\textsuperscript{48}

10.3 \textit{Shetland Times}\textsuperscript{49}

10.3.1 With a potential readership of only 23,000 people, the Shetland Times provided both hard copy and online news.

10.3.2 Shetland News also had an online service which used the headlines of the stories from the Shetland Times online version to link to those stories. By clicking on a headline, a user was able to link to the story on a page in the Shetland Times site, although that location was not apparent to the user. From there, the user could not access the rest of the Shetland Times site but had to return to the Shetland News site.

10.3.3 Shetland Times sued for copyright infringement and succeeded in obtaining an interim interdict (injunction/restraining order) preventing Shetland News from continuing the practice.

10.3.4 Again, the case was settled before reaching a substantive hearing and again, a type of link licence was agreed.\textsuperscript{50}
10.4 Ticketmaster

10.4.1 After attempting to negotiate an arrangement whereby Microsoft’s Seattle Sidewalk site would take local content on upcoming events in Seattle from the Ticketmaster site, failed, Seattle Sidewalk went ahead and linked anyway.

10.4.2 The links were directed to specific pages on the Ticketmaster site thereby bypassing various advertising and other marketing information on Ticketmaster’s main pages - a practice for which the phrase deep linking has been coined. There are obvious similarities to the Shetland Times case and it will be interesting to see how the US courts will deal with this in the absence of the fairly specific statutory provision pursuant to which the award was made in that case.

10.5 Scope of Analysis

10.5.1 It would be interesting indeed to run the slide rule of all applicable New Zealand laws and principles over the ABC fact scenario in the light of the commentaries and analysis that the above disputes have sparked. However, this paper does not give scope for such an analysis and since in all of the cases it is copyright that seems to be the weapon primarily used by the complainants, that is the area this paper focuses on almost entirely. As a practicing lawyer, the writer adopts this approach out of necessity rather than desire since it is a compartmentalisation of a problem which, in the real world would fall to be dealt with under a number of heads of law. In New Zealand at least, our fact scenario would certainly give rise to questions of trademark infringement, fair trading liability under the Fair Trading Act 1986, passing off and perhaps even competition law and the embryonic unjust enrichment and
There are obviously other cases which impact on these issues and we will look at some of these in passing, but only four proceedings to date have involved arguments made by owners of sites seeking to prevent linking or framing. Of these only three are of any real guidance. In the other, Playboy, Inc v Web21, Playboy sued Web21 for framing and thereby allegedly misappropriating the material on Playboy’s site. Web21 conceded immediately and removed the link on terms (if any) which were not disclosed. For a report on the dispute see MA Stapleton, *Playboy Settles Internet “Framing” Trademark Case*, Chicago Daily Bulletin, 21 May 1997, 1

If the numerous articles and newsgroup comments in support of TotalNews can be said to be *vocal*. The terms of settlement can be found on the Law Journal Extra site at <http://www.ljextra.com/internet/totalse.html>. The *imposition* of a licence is highly relevant to the New Zealand position as we shall see below.

For a description of the terms of the settlement see Jonathon Wills’ (first defender (sic) in the case) article on the Shetland News site at <http://www.shetland-news.co.uk/headline/97nov/settled/settled.html>. *Ticketmaster Corporation v Microsoft Corporation* (*Ticketmaster*). Thus far this dispute is only at an interlocutory stage with the parties having filed claims and counterclaims. It is understood that no settlement has yet been reached and that the parties are involved in the discovery process. The parties’ filings and various related articles together with links to their sites can be found on the Law Journal Extra site at <http://www.ljx.com/LJXfiles/ticketmaster.html>.

Chapter 11

COPYRIGHT INGREDIENTS

11.1 When New Zealand’s Copyright Act (the Act)\textsuperscript{53} was passed in 1994 (after a lengthy gestation but an unseemly haste in its drafting)\textsuperscript{54} one of its aims was to clarify the position of electronic works. Hence the Act specifically provides that computer programs are literary works and therefore given much the same protection as hard copy printed matter.\textsuperscript{55}

11.2 Unfortunately, perhaps due to the haste with which it was implemented, the Act, whilst a vast improvement on the 1962 version, is deficient in a number of respects, particularly in relation to multimedia works of which web pages are now the foremost example. As we shall see the stop gap attempt to introduce coverage for such works under the heading of compilations could perhaps have done with some more thought at the time.

11.3 The linking and framing issue is a very good example of how the law will increasingly have difficulties in keeping up with technology. At the time the Act was drafted (let alone when it was passed in 1994) framing had not been made commercially available. Also, the web was only in its formative stages since the graphical browsers had only been commercially available for little over a year or so.\textsuperscript{56}
11.4 In this paper, we shall see how the Act has coped with this change in
technology.

11.5 Since jurisdiction is not an issue under our fact scenario, we are left with the
three basic ingredients of copyright law:

11.5.1 Is the material in question capable of being protected by copyright?

11.5.2 If the answer is yes, who is the owner of that copyright?

11.5.3 Has that owner’s copyright (if any) been infringed by the action
complained of?

53 The Copyright Act 1994 can be browsed online, section by section, at
54 In the period between the previous Copyright Act of 1962, and 1994, numerous reports were produced
discussing changes which might be made to not only the copyright regime but the other intellectual
property regimes of patents and designs also. No real progress was made until out of a knee jerk reaction
to TRIPs, it was decided that New Zealand had to adopt a new statute. In the space of a few months, the
copyright provisions of the UK Copyright, Designs and Patents Act 1988 (already 6 years old and
probably more years than that out of date) were copied into the New Zealand statute book as the
Copyright Act 1994. A process of patch[ing], retrofit[ting] and expand[tion] that John Perry Barlow,
one of the founders of the Electronic Frontier Foundation would no doubt characterise as...a frenzy of
derck chair rearrangement. See John Perry Barlow, The Economy of Ideas: A Framework for Re-
Thinking Patents & Copyrights in the Digital Age (Everything You Know About Intellectual Property Is
Wrong), in Wired Online (1993) at <http://www.wired.com/wired/2.03/features/economy.ideas.html>
(Barlow).
55 Whilst computer programs are literary works they are dealt with separately in various parts of the Act
and we shall look at some of these particularly in relation to moral rights at chapters 24 – 28 below.
56 Mosaic, the first graphics based browser, was introduced in 1993.
12.1 Introduction

12.1.1 As with most traditional copyright statutes sourced from the Copyright Act 1710(UK), the Copyright Act 1994 divides copyright works into literary, dramatic, musical or artistic works. It adds to this the more recent developments of sound recordings, films, broadcasts and cable programmes as well as typographical arrangements.

12.1.2 The challenge that the web presents to these traditional categorisations of intellectual property is that many digital web pages will straddle more, and sometimes many more, than one category. For example, a web page designed by a graphic designer with plenty of graphics, movement, and inserts of video and with streamed audio may be very difficult to categorise. Does the streamed music that forms part of the page take the whole page out of the category of a literary work?

12.1.3 There are several reasons why it is important to identify which category of copyright protection a web page falls into:
12.1.3(a) Ownership of the page may depend on it. In particular, section 21(3) of the Act provides that a person who commissions particular types of work will be the first owner of copyright rather than the author.\(^{59}\)

12.1.3(b) The Act provides different protection regimes for different types of work.

12.1.3(c) Each regime carries with it different types of exceptions allowed to behaviour which would otherwise constitute copyright infringement.

12.1.3(d) It is possible that the intellectual property rights in a particular part of the page, if the page is subdivisible into categories, may be dealt with separately and therefore be treated differently in any fact scenario.

12.1.4 Unfortunately the New Zealand Act was rushed into law with undue haste, ostensibly to comply with New Zealand’s obligations under TRIPs (Trade Related aspects of Intellectual Property Rights) which was concluded as a result of the Uruguay round of GATT. In doing so one of the aims of the Act, to bring copyright legislation forward in a way that would cope with technological change, was undermined and the categorisation problem is one result of that haste.

12.1.5 This is doubly unfortunate since it has been recognised that the UK statute, passed some 6 years earlier, from which the New Zealand Act was copied, had significant flaws. As has been said of the UK statute:
... with convergence technologies and products, problems can arise as a result of the way in which the [Copyright, Designs & Patents Act 1988] applies different provisions to different types of work. For example, many multimedia products could be said to fit the statute definition of a “film”, as well as including works which are in themselves literary, musical or artistic works or sound recordings. This has implications for the definitions of the Acts restricted by copyright, the acceptance to each right, ownership, moral rights and so on. There is an obvious need to simplify and streamline the legislation in this respect.60

12.1.6 Since almost all web pages contain some form of multimedia nowadays (i.e., differing combinations of some or all of; text, graphics, sound, moving images etc), these comments are very pertinent. Similar comments have also been made in the US.61

12.1.7 New Zealand’s Act repeats these same problems, with, as we shall see, similar results.

12.1.8 The categories of work in which copyright exists are set out in section 14 of the Act.62

12.2 Literary Work63

12.2.1 The first and most obvious category is literary works. Given the extended definition of writing in section 2(1) of the Act,64 a web site could be argued to be a literary work on a number of levels. Since it is entirely made up of code it is a literary work at its most basic level. However, the difficulty with this approach is that whilst all parts of the page (whether text, speech, music, graphics etc) will be written in code
and therefore prima facie covered, the parts which are musical or
dramatic works will be excluded from the literary work coverage.

12.2.2 Much of the web site will usually be made up of text so those parts will qualify separately.

12.2.3 Also, under the section 2(1) definition of literary works, compilations and computer programs are specifically included. We will look more closely at computer programs later, however, it is useful to look at whether a web page can be a compilation here.

12.3 Compilation

12.3.1 To look at the definition of compilation also contained in section 2(1) one would have thought that this would cover a web page admirably - a compilation consisting of a number of works or parts of works.

12.3.2 However, it does seem that a compilation can only be a literary work. Whilst compilation is defined separately, for the purposes of its treatment in copyright, it forms part of, and therefore must be considered to be governed by, the main definition of literary work. Compilations are not works in their own right since they are not referred to in section 14.

12.3.3 Since the definition of literary work excludes musical works (and dramatic, works which are less relevant for our purposes), it is difficult to see how any web page which includes music could be a compilation. Therefore, unless one can conclusively show that the musical elements of a web page are separate and distinct, it would not seem possible to categorise the whole web page as a compilation. In terms of protection
offered by copyright to a web page, this distinction may not be critical since all parts of a web page will be covered under one or more categories. However, the necessity this may bring of having different parts of the same page treated differently under copyright law depending on what category they can be crammed into, can lead to inconsistencies.

12.3.4 It is unfortunate that the seeming desire of those who drafted the Act, to cater for multimedia type works, was not better implemented. 67

12.4 Dramatic Work 68

12.4.1 The next category of protected work is dramatic works. Whilst it is possible that a work of dance or mime or a scenario or script for a film might be included on a web site, they certainly do not appear on any of the three sites in our fact scenario.

12.5 Musical work 69

12.5.1 The sites we are dealing with include musical works although it is important to note that under section 2(1) a musical work does not include …any words intended to be sung or spoken with the music …. As a consequence, The Copyright Website’s very useful discussion of a leading US fair use case 71 in which the band 2 Live Crew successfully defended allegations of copyright infringement in the Roy Orbison song Pretty Woman would, under New Zealand law, need to be divided into different categories in terms of the protection given to that site’s analysis. That is unless of course the whole site can be argued to be a literary work of computer code.
12.6 Artistic work

12.6.1 Quite clearly, a web page may in whole or in part be an artistic work and the mere fact that it also qualifies in another category or other categories will not preclude this. In particular, many web pages will in whole or in part be or include graphic works. It could also be argued that a web page is a work of artistic craftsmanship as referred to in paragraph (a)(iii) of the definition of artistic work in section 2(1) of the Act. In fact, it could also be said that a web page is a digital collage and therefore included in the category of artistic work referred to in paragraph (a)(i) of the definition of artistic work.

12.7 Sound recordings

12.7.1 As both web sites in our example include sound bites, they therefore include the next form of protected work, sound recordings. There is an interesting issue here though in relation to the streaming of sound. By definition, in order to fall within this category, the sound must be recorded. If no record has been made by the person streaming the audio (e.g. where a live broadcast is involved) then, as we have seen, it is quite possible that the first sound recording might be made by the user’s computer making the user the author.

12.7.2 There would be two arguments against this:

12.7.2(a) That a recording was made before the streaming of the audio to the user as in *Green v Television New Zealand Limited*;
12.7.2(b) That the work is in fact a cable programme or broadcast and that authorship therefore rests with the person providing it.

12.7.3 The first of these arguments will depend entirely on the facts. The second is fraught with difficulty, as we shall see. 79

12.8 Films 80

12.8.1 As was suggested by the Clifford Chance commentary quoted above, it is likely that most web pages nowadays will include films.

12.9 Cable programmes and Broadcasts

12.9.1 The next two categories are broadcasts and cable programmes. Before we proceed to look at these, it will be apparent that there is a distinction that can be drawn between the categories we have already looked at and these next two categories of what are usually referred to as neighbouring rights. They will comprise one or more of the primary categories. As we shall see in relation to digital works, this differentiation, whilst understandable, can cause confusion.

12.10 Cable Programmes 81

12.10.1 This confusion starts to become apparent when we look at the definition of a cable programme which is defined by reference to what is meant by a cable programme service in section 4 of the Act.
12.10.2 The major difference between the primary and neighbouring rights is that the former (apart from artistic works) requires a degree of what in the US is referred to as fixation. In New Zealand, by virtue of section 15 of the Act with respect to literary, dramatic and musical works and by virtue of the definitions of sound recordings and films themselves, some form of recording is necessary.

12.10.3 In Shetland Times, which dealt with a very similar provision to the New Zealand one, it was accepted (albeit at only interim level) that a web site provider is engaged in providing a cable programme service. The basis for this finding is his Lordship’s conclusion that the web page of itself is a cable programme service.

12.10.4 On first principles, without looking at the definitions involved, this may seem a strange conclusion. Surely, if anything, the web page is a cable programme which is transmitted over the internet, which is therefore the cable programme service. However, rather than attempting to define a cable programme per se, the section works in reverse by first defining a cable programme service and then simply allowing that any item included in a cable programme service is a cable programme.

12.10.5 Lord Hamilton, the Judge in Shetland Times, made it clear that no detailed technical information was put before him, but was able to conclude that a web page is a cable programme service.

12.10.6 To do so, he overcame two arguments which would be equally relevant under the New Zealand section 4.

12.10.7 Essentially, the cable programme service definition requires that information (a cable programme) be sent by electronic transmission over
a telecommunication system (other than a wireless system) from time to time at the request of different users of the system or by way of transmission to the public.

12.10.8 The first issue therefore is whether the information is sent. As Lord Hamilton stated, after hearing argument on the point:

In my view [Shetland Times’] contention that the service provided by them involved the sending of information is prima facie well founded. Although in a sense the information, it seems, passively awaits access being had to it by callers, that does not, at least prima facie, preclude the notion that the information, on such access being taken, is conveyed to and received by the caller. If that is so, the process may arguably be seen to involve the sending of that information [emphasis added].

12.10.9 This is certainly an arguable proposition. The mere fact that the word send is a verb tends to imply some form of action on the part of the web site provider in response to requests or in transmitting the programme to the public. The efficiency with which a web site is able to provide information on request suggests that the requisite level of active involvement by the web site provider is not present. Analogies can easily be drawn which support either view. Dictionary definition would tend to support a more active means of providing the information than the mere residence of that information on a server which will often not even be owned or controlled by the web page provider. In other words, the retrieval of the information is not an action of the web site provider but of the user using his or her browser software.
12.10.10 This may readily be contrasted with two current forms of provision of information on the internet:

12.10.10(a) **List servers** - by subscribing to a list server service, a user will automatically receive all email messages sent to that server. Since many users may subscribe to the same list server, the ultimate effect is the formation of an online discussion group where users post messages and reply to each other in connected series of discussions which are called threads.

12.10.10(b) **Push technology** - of even more relevance is a recent technology on the web which allows information held on web sites to be sent automatically to users in accordance with pre-determined instructions to the web site provider or to a third party who is responsible for the push software.\(^95\)

12.10.11 The writer therefore has some difficulty with the acceptance by some that a web page, of itself, is a *cable programme service* and therefore that the components of that page are *cable programmes*.\(^96\) It can surely be argued that the page (and any items included in it) of itself is neither *sent* nor is it a *service*. To argue otherwise risks confusing a cable programme with the cable programme service itself. However, to follow this line of reasoning to its logical conclusion would mean that no work transmitted over the internet could ever be a cable programme since, given that, as yet, no one person *provides* the internet, information could never be transmitted by the *person providing the cable programme service* which is a requirement of subsection 4(6) of the Act.
12.10.12 The issue is not a simple one however, and it is useful to take the matter further.

12.10.13 The other possible argument against a web site being a cable programme service is that it falls within the exception for an interactive service set out in subsection 4(2)(a) which excludes:

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

12.10.14 Lord Hamilton’s treatment of this point in *Shetland Times*\(^\text{97}\) is cursory at best. If it is accepted that a web site is a prima facie a cable programme service under subsection 4(1) then whether it is excepted because of its interactivity will be a question of fact in each case.

12.10.15 Clearly Lord Hamilton considered that to qualify under this exception, something more than just the ability to email the web page provider would be required. It is likely that the level of interactivity required for the exception to apply will be reasonably high – something more than a response form should be required - but whether the inclusion of a search engine on the site would be enough is difficult to forecast. Such a
facility does seem to fall within the wording of the subsection, and, on a large site, must arguably be an essential feature.\textsuperscript{98}

12.10.16 To bring this issue to a conclusion as far as we are able, despite the vagaries of the section, it is likely that a website will be a cable programme service unless the degree of interactivity brings it within the exception in subsection 4(2)(a).

12.11 \textbf{Broadcasts}\textsuperscript{99}

12.11.1 Similarly, a broadcast is:

\begin{quote}
A transmission, whether or not encrypted, of a programme\textsuperscript{100} by wireless communication, where the transmission is -
\begin{quote}
Capable of being lawfully received, in New Zealand or elsewhere by members of the public; or
For presentation to members of the public in New Zealand or elsewhere …
\end{quote}
\end{quote}

Further clarification of what is meant by that definition is given in section 3 of the Act and in particular subsection 3(2).

12.11.2 It will therefore be apparent that a web page and any information contained in a web page may be a programme and that since such a programme is transmitted, whether by ordinary browsing or by using streaming technology, and may be transmitted by using wireless communication\textsuperscript{101} a web page can be broadcast.
12.12 **Performance**

12.12.1 Finally, it is also relevant to note that certain content of a web page may, when transmitted, constitute a performance under the definition of performance in section 2(1).

12.13 **Summary**

12.13.1 To summarise, depending on what the web page comprises and how it is transmitted, it may in whole or in part fit within any of the categories of works in which copyright can arise under section 14. At the very least, it is likely to be a literary work (either in its own right or as a compilation) which, if transmitted by wireless transmission (assuming the other conditions are satisfied) would be a broadcast and if transmitted over a physical telecommunications network, arguably, would be a cable programme.

12.13.2 These categories whilst gradually extended to take account of developments in technology are still saddled with their dependence on physical attributes. In a system such as the internet and its web pages, where all information is provided using the same basic building block of a series of noughts and ones, and where that information is infinitely malleable without loss of quality, it may be that the time has come make an attempt to dispense with these distinctions.

12.13.3 Having established that a web page is copyrightable under any number of categories of work, for the sake of completeness, we should note that in order to qualify for copyright protection in New Zealand, a work must also fall within what could loosely be described as the *place of origin* provisions contained in sections 18, 19 and 20 of the Act. In our fact
scenario, since the web page has been produced and published\textsuperscript{104} on the web by a company and an organisation respectively, both of which were incorporated in New Zealand and remain resident in New Zealand, the requirements of both sections 18 and 19 are satisfied. In fact, it is possible that if one could characterise the web page as a broadcast, section 20 would also be satisfied.

12.13.4 Thus, it is relatively easy for us to conclude that the web sites of ZZZ and BAA respectively are capable of qualifying for copyright protection. The issue will be whether in fact they do and whether the category of cover makes any difference.\textsuperscript{105} Before we look at this however, it is appropriate at this juncture to briefly check the position with regard to ownership of any copyright that may subsist.

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\textsuperscript{57} Modern Anglo-American style copyright statutes can be traced to English Copyright Act 1710 passed in the reign of Queen Ann, indirectly, as a response to the loss of the monopoly previously enjoyed by the Stationers Guild because of the introduction of the Gutenberg printing press. See WR Cornish, Intellectual Property, (3rd ed 1996, Sweet & Maxwell) (Cornish) at 297 and the authorities referred to there.

\textsuperscript{58} Literary work is defined in section 2(1) of the Act as meaning …any work, other than a dramatic or musical work, that is written, spoken or sung; and includes -

(a) A table or compilation; and

(b) A computer program. [Emphasis added].

\textsuperscript{59} See below at notes 106 and 186 for further discussion of this point

\textsuperscript{60} Taken from the web site of the international law firm, Clifford Chance, at <http://www.CliffordChance.com/library/publications/internet/section5.html#1> at section 5.1 - Copyright.

\textsuperscript{61} The somewhat strained analysis needed to find a category for multimedia works and the increasing "cross-breeding" of types of works demonstrate that categorization may no longer be useful or necessary. While the Working Group does not recommend at this time the consolidation or elimination of categories (and harmonization of the differing application of rights and limitations on those rights), it is likely that such consolidation or elimination will be appropriate in the future. White Paper, supra note 5 at 44. See also, Pamela Samuelson & Robert Glushko, Intellectual Property Rights for Digital Library and Hypertext Publishing Systems, (1993) 6 Har. J. L. & Tech. 237 at 241.

\textsuperscript{62} Supra note 53.

\textsuperscript{63} See note 58 for the definition of literary work.

\textsuperscript{64} "Writing" includes any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded; and "written" has a corresponding meaning.

\textsuperscript{65} Compilation is defined in section 2(1) of the Act as including:

(a) A compilation consisting wholly of works or parts of works; and

(b) A compilation consisting partly of works or parts of works; and
A compilation of data other than works or parts of works

Compare this with the more pragmatic situation in Canada where a compilation is deemed to be a compilation of the category of copyright work making up the most substantial part of that compilation. See section 5 of The Internet Content-Related Liability Study, a report commissioned by Industry Canada in 1997 to determine the existing state of Canadian law in relation to the Internet. At <http://strategis.ic.gc.ca/SSG/it03315e.html#E14E5>.

At least New Zealand has made some attempt. This area is not covered at all in the UK statute or in the Australian Copyright Act 1968.

The Act in section 2(1) defines a dramatic work as including-
(a) A work of dance or mime; and
(b) A scenario or script for a film;

“Musical work” means a work consisting of music, exclusive of any words intended to be sung or spoken with the music or any actions intended to be performed with the music: (Section 2(1) of the Act).

A graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality; or

A work of architecture, being a building or a model for a building; or

A work of artistic craftsmanship, not falling within subparagraph (i) or subparagraph (ii) of this definition; but

Does not include a layout design or an integrated circuit within the meaning of section 2 of the Layout Designs Act 1994 (Section 2(1) of the Act).

Anacon Corporation Limited & anor v Environmental Research Technology & anor [1994] FSR 659. Interestingly, in this case it was held that a circuit layout design was an artistic work which would tend to suggest that even the most primitive web site would qualify.

See Bonz Group (Pty) Limited v Coogee, [1994] 3 NZLR 216, at 224 where it was stated that:

...for a work to be regarded as one of artistic craftsmanship, it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in their craftsmanship. An artist is a person with creative ability who produces something which has aesthetic appeal.


“Sound recording” means-
(a) A recording of sounds, from which the sounds may be reproduced; or
(b) A recording of the whole or any part of a literary, dramatic, or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced (Section 2(1) of the Act).

Author in the context of a sound recording is ...the person by whom the arrangements necessary for the making of the recording ... are undertaken (Section 5(2)(b) of the Act).


See para 12.10.

“Film” means a recording on any medium from which a moving image may by any means be produced (Section 2(1) of the Act).

4. Meaning of “cable programme service”, and associated definitions-
(1) In this Act, unless the context otherwise requires--
“Cable programme” means any item included in a cable programme service:
“Cable programme service” means a transmission service where the transmission is-
(a) For reception at 2 or more places, either simultaneously or at different times, in response to requests by different users; or
(b) For presentation to members of the public;
but does not include a transmission service that is, or so far as it is, excepted by or under any provision of subsections (2) to (4) of this section:
“Transmission service” means a service that consists wholly or mainly in sending visual images, sounds, or other information by means of a telecommunications system, otherwise than by wireless communication.

(2) A cable programme service does not include-
(a) A transmission service or part of a transmission service of which it is an essential feature that while visual images, sounds, or other information are being transmitted, by means of a telecommunications system, by the person providing the service, there will or may be transmitted from each place of reception, by means of the same system or, as the case may be, the same part of the system, visual images, sounds, or other information (other than signals sent for the operation or control of the service) for reception by the person providing the service or other persons receiving it:
(b) A transmission service run for the purposes of a business where-
(i) No person except the person carrying on the business is concerned in the control of the equipment used for the purposes of the telecommunications system through which the service operates; and
(ii) Visual images, sounds, or other information are transmitted by the system solely for purposes internal to the running of the business and not by way of rendering a service or providing amenities for others; and
(iii) The system is not connected to any other telecommunications system:
(c) A transmission service run by a single individual where-
(i) All the equipment used for the purposes of the telecommunications system through which the service operates is under his or her control; and
(ii) The visual images, sounds, or other information transmitted by the system are conveyed solely for his or her private and domestic purposes; and
(iii) The system is not connected to any other telecommunications system:
(d) A transmission service where-
(i) All the equipment used for the purposes of the telecommunications system through which the service operates is situated in, or connects, premises that are in the occupation of a single occupier; and
(ii) The system is not connected to any other telecommunications system, except where the service operates as part of the amenities provided for residents or inmates of premises ran as a business:
(e) A transmission service that is, or to the extent that it is, run for persons providing broadcasting or cable programme services or providing programmes for such services...

(5) References in this Act to the inclusion of a cable programme in a cable programme service are to the transmission of the programme as part of the service.
(6) References in this Act to the person including a work in a cable programme, including a work in a cable programme service, or including a cable programme in a cable programme service, are to the person providing the cable programme service.(Section 4 of the Act).

82 This is perhaps another reason why bringing the web page within the artistic work category might be advantageous to the web page owner - to avoid the need for any permanence in terms of the web page content.
The requirement for fixation stems from 17 U.S.C. (the 1988 codification of the US Copyright Act of 1976) which provides that for copyright to arise, the work in question must be *fixed in a tangible medium of expression*. 17 U.S.C. § 101 then provides that:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord by or under authority of the author, is sufficiently permanent or stable to permit it to be received, reproduced, or otherwise communicated for a period of more than transitory duration...

The material part of section 15 reads as follows:

15. Recording Necessary for Some Works - (1) Copyright does not exist in a literary or dramatic or musical work unless and until the work is recorded, in writing or otherwise.

*Supra* note 37.


The use of the word *item* is confusing since the restricted act in relation to a cable programme is not transmitting an *item* but transmitting a work. (See section 16(1)(f) of the Act)

*Supra* note 37.

*Idem.*

Pro: It is analogous to cable TV or an automated subscription to an online magazine (or ezine as they are referred to); Con: It is analogous to an unattended newspaper stand where papers are simply provided in a locked box and can be retrieved by depositing the correct change.

The *Concise Oxford Dictionary* (9th ed, 1995, Clarendon Press) defines *send* as order or cause to go or be conveyed; propel; cause to move.

Many web pages are hosted by third parties who charge the web page provider for the use of the third party’s server capacity.

E.g., see the push technology site of Pointcast at <http://www.pointcast.com>.

See for example Cathie Harrison, *Copyright and the Internet* a paper delivered to the New Zealand Law Librarian’s Group Conference *Challenges To Tradition - Law And Knowledge For The New Millennium* held in Auckland, New Zealand on 10 - 13 February, 1998 a copy of which can be found at <http://io.knowledge-basket.co.nz/nzllg/harrison.html>.

*Supra* note 37.

Section 4(2)(a), *supra* para 12.10.13 and note 81.

“Broadcast” means a transmission, whether or not encrypted, of a programme by wireless communication, where the transmission is-

(a) Capable of being lawfully received, in New Zealand or elsewhere, by members of the public; or

(b) For presentation to members of the public in New Zealand or elsewhere;-

and “broadcasting” has a corresponding meaning (Section 2(1) of the Act). Note that *broadcast* is further defined by reference to section 3 of the Act:

3. Associated definitions for purposes of broadcasting-

(1) For the purposes of this Act, an encrypted transmission shall be regarded as capable of being lawfully received by members of the public only if decoding equipment has been made available to members of the public by or with the authority of the person making the transmission or the person providing the contents of the transmission.

(2) References in this Act to a programme, in relation to broadcasting, are to the visual images, sounds, or other information transmitted.

(3) References in this Act to the person making a broadcast, broadcasting a work, or including a work in a broadcast are-

(a) To the person transmitting the programme, if he or she has responsibility to any extent for its contents; and

(b) To any person providing the programme, when that person makes with the person transmitting it the arrangements necessary for its transmission.

(4) For the purposes of this Act, in the case of a broadcast by satellite transmission,-
(a) The place from which the broadcast is made is the place from which the signals carrying the broadcast are transmitted to the satellite; and
(b) The person making the broadcast is the person who transmits those signals to the satellite.

(5) References in this Act to the reception of a broadcast include reception of a broadcast relayed by means of a telecommunications system.

Programme is not defined.

Because of the scarcity of bandwidth over landlines, some information providers and internet service providers are now transmitting web page information by satellite.

Performance”, except in Part IX of this Act,-
(a) In the case of a literary work that is a lecture, address, speech, or sermon, includes delivery of that work; and
(b) In general, includes any mode of visual or acoustic presentation of a literary, dramatic, musical, or artistic work, including presentation of the work by means of a sound recording, film, broadcast, or cable programme

This view is by no means novel and is similarly presented in Cornish (supra note 57) … The curious feature of digitisation is that it provides a homogenous medium for storing and transmitting a whole range of works which previously seemed distinct. (Cornish at 465 para 13-49), and in Barlow (supra note 54) … Now, as information enters cyberspace, the native home of Mind, these bottles are vanishing. With the advent of digitization, it is now possible to replace all previous information storage forms with one metabottle: complex and highly liquid patterns of ones and zeros.

It seems reasonably clear that a web page is published. Section 10 of the Act states that publish has a corresponding meaning to the word publication which includes …in the case of a literary, dramatic, musical, or artistic work, making it available to the public by means of an electronic retrieval system. In the US, it has been accepted that a web page is published. See ACLU v Reno, 929 F.Supp 824, at 837 a copy of which can be found through the Findlaw Supreme Court Decisions search page at <http://www.findlaw.com/casecode/supreme.html>. When information is made available it is said to be "published" on the web.

It is reasonably well settled that a particular item may be covered by a number of different categories (see J Albert & Sons Pty Ltd v Fletcher Construction Limited [1974] 2 NZLR 107). However, as mentioned, where an item straddles different categories, the level of protection and the extent of any exceptions to that cover may differ as between the various categories, leaving room for argument in any particular case.
WHO OWNS THE COPYRIGHT?

13.1 With a compilation (and interactive CD roms are a good example) there may often be a number of copyright owners. Separate copyrights may be retained in the various distinct parts of the web page - text, graphics, audio, video etc. As we have seen a web site or page may or may not be a compilation, however, assuming in this instance that both ZZZ and BAA have either created their respective web pages\textsuperscript{106} or, in respect of any material obtained from another source, are licensees,\textsuperscript{107} then for our purposes they will be the holders of the copyright in their respective pages.

13.2 Before leaving this point, as a practical issue, it should be recognised that the advertising banner on the ZZZ page will be copyrighted to the advertiser (although as part of a compilation a separate copyright may subsist in the web page author). The advertiser may not complain about the appropriation of its banner advertisement by virtue of ABC framing the ZZZ page which includes that advertisement since this increases its exposure, unless of course that advertiser did not consider the page within which its advertisement was framed to be appropriate (for example, if the page framed by a pornographic site).

13.3 In our example, it is also possible that the advertiser on the ZZZ site might object on the basis that its advertising has effectively been supplanted by that of
XYZ Timber Merchants on the ABC page. Since no copying is involved on ABC’s part, copyright in its traditional sense will have no impact on this issue but, as we shall see in chapters 25 and 26, moral rights may be implicated. Also, as mentioned already, questions of trademark infringement, comparative advertising, fair trading liability and passing off may be involved.

13.4 For our purposes however, it must be concluded that the advertiser is expecting something that the web (and copyright for that matter) cannot deliver and never promised it would and that is guaranteed placement – the guarantee that the user will definitely see the advertisement.

106 Since both ZZZ and BAA are incorporated entities, they would obviously need to act through individuals. For ZZZ, it would be likely that any works produced would have been produced by its employees and therefore copyright would automatically vest in it by virtue of section 21(2) of the Act. However, in the case of the BAA, it is quite possible, as with many organisations, that work is performed by members of the organisation who devote their spare time to doing so and are not employees as such. Copyright ownership might then be an issue, however, we can assume that those members would, in the current circumstances, assign any copyright they might hold to the organisation in order for it to pursue any infringer.

Alternatively, the web page might have been commissioned. This presents a far more difficult issue since unless it can be shown that the web page is a computer program, painting, drawing, diagram, map, chart, plan, engraving, model, sculpture, film, or sound recording made pursuant to the commission then it will be owned not by ZZZ or the BAA as the commissioner but by the person who actually created the page (see section 21(3) of the Act). If we look at that definition closely, it would appear that the only possible scope for the web page as a whole to be a commissioned work is for it to be characterised as a computer program, which, as we have concluded above, seems unlikely.

107 The terms of the licences to ZZZ and BAA will be determinative of the scope that they have to take action in respect of any intellectual property infringement of the copyright in the page as a whole or its different components. In many cases, a licensor will require control of any action in respect of infringement of its intellectual property rights.
Chapter 14

COPYRIGHT INFRINGEMENT

14.1 Having established that copyright can subsist in a web page, potentially under a number of categories, and having looked at ownership, we now move to look at whether ABC has actually infringed that copyright.

14.2 It is useful before starting a detailed discussion as to whether ABC has infringed either ZZZ’s or BAA’s copyright, for us to have an overview of how the Act works in terms of copyright infringement.

14.3 We come now to the crux of the linking/framing controversy. In order to infringe copyright, ABC would have to be shown to have performed a restricted act. A restricted act (as defined in section 2(1) of the Act) means any of the acts described in section 16 of [the] Act.

14.4 It is here that the Act seems to lose its way a little since section 16 does not contain restrictions as such but instead sets out the exclusive rights of the copyright owner. In order to convert those exclusive rights to restrictions on what anyone else may do (without a licence from the copyright owner), section 16 then refers to the more detailed restrictions contained in sections 30-34. Therefore, by a somewhat circuitous route, one must focus on sections 30-34 to
determine whether, in any given situation, there has been an infringement of copyright. In turn, sections 30 – 34 are triggered by section 29.

14.5 Section 29\textsuperscript{110} is therefore the operative provision in terms of a primary infringement. This section contains an exception for acts which would be infringing but which have been licensed by the copyright owner. Sections 30-34 then go on to provide the specific provisions which interrelate with section 29 which itself is subject to the many exceptions in Parts III and VIII of the Act.

14.6 Part III contains a number of exceptions centred on fair dealing type provisions. Part VIII deals with licensing schemes.\textsuperscript{111}

14.7 Sections 35-37 comprise the provisions relating to secondary infringement - that is infringement, broadly speaking, by providing the means or assistance for someone else to infringe copyright.

14.8 Therefore, in order to decide whether a particular fact scenario gives rise to an infringement of copyright, it is necessary to, and in this part of the paper we shall, follow logical steps:

14.8.1 Is there prima facie a primary infringement?\textsuperscript{112}

14.8.2 Is that infringement overcome by virtue of a licence?\textsuperscript{113}

14.8.3 Is the primary infringement subject to any of the exceptions in Part III?\textsuperscript{114} (Note that it is not intended to look at each exception but rather to focus on exceptions which are relevant to our fact scenario and which assume particular importance in relation to the web).
14.8.4 If the primary infringement has not been committed by the person in question (in our case, ABC), has that person nonetheless committed a secondary infringement?\textsuperscript{115}

14.9 Before we proceed any further, there is a critical point which must be recognised. As will have been noted from the technical descriptions of linking and framing, ABC does not copy, take possession of, or use (in any sense of the word) the material on either ZZZ’s site or the BAA site. All that ABC does is provide a link or conduit enabling the user to access the information that is held on those sites. What the user then does (whether that be simply viewing, caching or even downloading) is a matter as between the user and those sites and does not involve ABC at all.

14.10 If ABC is to be held liable in respect of any infringement, it can therefore only be as a secondary infringer. That liability will only arise if there has in fact been a primary copyright infringement by the user. If there is primary infringement, it will then be necessary for us to look at whether there has also been secondary infringement under sections 35 – 37 which attach liability, broadly speaking, for activities relating to infringing copies.

14.11 Again, the definition of infringing copy in section 12 of the Act leads to sections 30-34 by a circuitous route. Section 12 states, for our purposes, that an object is an infringing copy if its making constitutes an infringement of the copyright in the work in question. As we have already seen, infringement depends on sections 30-34.

14.12 To summarise, if ZZZ and the BAA are to succeed in having ABC held liable for primary or secondary infringement of copyright, their first hurdle will be to place it’s or the user’s actions within one of sections 30-34. Since the sections deal with each of the differing types of infringement, we will do likewise.
This is an opportune time to recognise the contribution which the Linking Controversy site of Stefan Bechtold at <http://www.jura.uni-tuebingen.de/~s-bes1/lcp.html> has provided to the linking/framing debate.

Section 29 of the Act, supra note 110.

29. Infringement of copyright-

(1) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, does any restricted act.

(2) References in this Act to the doing of a restricted act are to the doing of that act-

(a) In relation to the work as a whole or any substantial part of it; and

(b) Either directly or indirectly;-

and it is immaterial whether any intervening acts themselves infringe copyright.

(3) This Part of this Act is subject to Parts III and VIII of this Act.

We will not be dealing with the licensing scheme exception but see in particular section 148 which sets out the types of licensing schemes to which the provisions of Part VIII of the Act apply.

Section 29 and sections 30-34.

Section 29(1).

Section 29(3).

Sections 35 – 37. Note that the secondary infringements are not subject to the exceptions in Part III. Therefore, there is only need for the exceptions to operate in respect of the primary infringements. There has apparently been some confusion over this seemingly logical inter-relationship of primary and secondary infringements and exceptions in the US. See references in John Donald, Copyright on the Internet, at <http://best.com/~jdonald/jrd/crweb.htm#N_10_>. This confusion may have arisen because in some cases the Courts have expanded the consideration of the fair use exception in the US until its consideration becomes part of the substantive issue of whether there has been a prima facie infringement. If the defendant in the case is logically a secondary infringer (eg an ISP or web site provider) then rolling the fair use exception into the substantive infringement question tends to suggest that this exception is also available for secondary infringers. There is no need for this since, by definition, a secondary infringer cannot be liable if there is no primary infringement and therefore any exception only needs to be applied at the primary infringement hurdle.
Chapter 15

INFRINGEMENT BY COPYING

15.1 Distillation

15.1.1 In order to determine whether there has been a breach of section 30 we need to distill the relevant parts of the Act including the various definitions that impinge on a consideration of this section. By doing so, we arrive at the following:

Copyright in a web page\(^{116}\) is infringed by a person\(^ {117}\) who, other than pursuant to a licence to copy that web page,\(^{118}\) copies it.\(^ {119}\)

15.1.2 We therefore have a two stage test;

15.1.2(a) Has the web page been copied?

15.1.2(b) Was the person who copied the web page authorised to do so by some form of licence?
15.2 Copying?

[C]yberspace is not merely an environment where widespread copyright infringement is possible: the medium itself looks like little more than a colossal worldwide copying engine.\(^{120}\)

15.2.2 Has ABC copied? There is little difference technically between the hyperlink that ABC operates to the BAA page and the same hyperlink which it operates in respect of ZZZ’s page. At least for the purposes of analysing copying. When the link is coded as an href link, the information appears by itself on the user’s screen; when the link is coded with frames, the same material is framed - however, it is exactly the same material.

15.2.3 As we have already seen, ABC does not copy the material at all. Therefore, it does not perform the restricted act of copying under section 30 of the Act and it follows that it does not trigger the infringement provision in section 29.

15.2.4 This is a point which seems to have been overlooked in TotalNews\(^{121}\) and also in the Jet Report dispute.\(^{122}\) Under copyright law at least, it also makes the deep linking claim at the heart of Ticketmaster\(^{123}\) irrelevant. Since ABC is not copying the ZZZ or BAA sites, it does not matter, for copyright purposes, whether it is linking to the home page or to subsidiary pages on these sites.\(^{124}\)

15.2.5 Having found that there is no primary infringement in terms of our analysis structure, it is therefore necessary to consider whether there may have been any secondary infringement. To recap, for there to be a secondary infringement, there must be a breach by some other person of
sections 29 and 30 and that breach must be one to which one of the secondary infringement provisions contained in sections 35-39 apply.

15.2.6 We therefore first need to consider whether the person accessing the site could be considered to be a primary infringer. This is one of the most contentious issues which has been raised by the advent of the web and its linking capabilities. As we have seen in our technical description of linking and framing, when the user accesses a page, that page is loaded into random access memory on the user’s computer. It may also be cached by its browser software for access at a later time. We need to deal with these two aspects, RAM and caching, separately.

15.3 Copying into RAM

15.3.2 In our example, where the user accesses the ABC site, it will copy the information on the ABC site and will also, by virtue of the link provided by the ABC site, go to the linked site and copy that information. Both copies will, at least initially, reside in RAM. Is this copying for the purposes of the Act?

15.3.3 If we look at the definition of copying in section 2(1) of the Act, there is little doubt, having regard to the technical details we have looked at already, that a web page is copied when it is accessed by a user.

15.3.4 The only argument against this is that the temporary nature of RAM is not sufficient for there to be a recording, or storage for the purposes of the definition, or that if the page has been recorded then it has not been recorded …in a material form.
15.3.5 Reference can be made to US law on this issue although it is important to recognise that their provision\textsuperscript{129} gives a clear indication that the recording must be more than transitory whereas, arguably, the New Zealand provision does not.

15.3.6 Therefore, we can say that US cases and commentary which suggest that the lodging of web page information into a user’s RAM is sufficient to fix that material for the purposes of 17 U.S.C. § 101 will support an argument that an infringing copy has been made for New Zealand purposes since our section 2 threshold is arguably lower or at least no higher in terms of the permanence of the lodgment required.

15.3.7 On the other hand, cases and commentary in the US which suggest that lodgment into RAM does not support a sufficient degree of fixation, whilst relevant, do not necessarily support the same conclusion in New Zealand. In other words lodgment into RAM may entail an infringing copy in New Zealand but not in the US.

15.3.8 The argument against this is that the concepts of record and store, at the heart of copying under section 2 of the Act, of themselves, carry the implication that permanence is required.\textsuperscript{130}

15.3.9 With these conclusions to guide us, it is useful, at least briefly, to examine the US position. As mentioned at the start of this discussion, this is one of the most contentious issues in US copyright law. On the one hand reports such as The Final Report of the National Commission on New Technological Uses of Copyright Works (usually referred to as CONTU)\textsuperscript{131} and the White Paper regard it as almost self-evident that lodgment of material into RAM is a copy for the purposes of copyright law. The White Paper in particular takes that position from Advanced
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Computer132 and from the earlier decisions of MAI Sys. Corp v Peak (MAI)133 and Triad Sys. Corp. v Southeastern Express134 in the traditionally strong copyright law arena of the 9th circuit. It is argued that RAM is a tangible means of expression and that as long as power continues to the computer, RAM will continue to store the contents indefinitely enabling reception or reproduction for a period of more than transitory duration.135

15.3.10 Similarly, in the UK an analogy can be drawn with the case of Bookmakers Afternoon Greyhound Services v Wilf Gilbert (Staffordshire) Limited136 where it was held that a materialisation of images on a television screen was sufficiently permanent to be considered reproduction despite the fact that no permanent record was actually kept.

15.3.11 On the other hand, there are strong and vocal supporters of the contrary position; that lodgment of material into RAM is not a sufficient degree of fixation. They warn that:

...[b]rowsing through a borrowed book, lending a magazine to a friend, copying a news article for your file [will be made illegal] for works distributed via digital networks137

...[r]eading one’s mail or picking up one’s telephone messages these days requires many of us to commit acts that the government’s information infrastructure task force now tells us ought to be viewed as unauthorized reproductions or transmissions.138
... there is the essentially ludicrous proposal that every storage of information in a computer’s Random Access Memory is a “copy” for the purposes of copyright law, so that reading becomes a potential copyright violation.\textsuperscript{139}

15.3.12 Many of these claims seem outlandish and have been criticised by others.\textsuperscript{140} The debate is fanned further in the US by the confusion over the extent of the fair use exception, which has been referred to above.

15.3.13 In this context, the comments of the copyright minimalists are confronted with the argument that the fair use exception will excuse those somewhat extreme problems. The problem with this is that the fair use exception in the US and the extent of the fair dealing exceptions in New Zealand and other countries where similar exceptions apply, are dependent on equitable or at least interpretative reasoning. Whilst this allows the Courts to meet the needs of perceived justice in individual cases it does add a significant degree of uncertainty and is not, in the writer’s view, a legitimate argument to be used in favour of extensive prima facie protection. Certainty would be better created by aiming for a definition of fixation or, in the New Zealand context, recording or storing which does not need to rely completely on a fair use or fair dealing exception to define its boundaries.

15.3.14 As technology develops, no doubt methods of access and capture of information will change. Already, as we have seen, there are gradations of permanence in terms of information capture – ranging from mere streaming, to RAM without caching, caching and on to downloading with variations in between such as screenshot capture and simply using the \texttt{save as} command in the browser software. The Courts will continue to struggle as they have done in cases such as \textit{Advanced Computer}\textsuperscript{141}
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with where to draw the line but, in New Zealand, based on a literal interpretation of the definition of *copying,* it would appear that the degree of permanence required may be low.

15.3.15 Let us therefore assume that, prima facie, there is copying whether by virtue of lodgment into RAM or more permanent saving of the information by caching or knowingly saving to the hard drive, which constitutes a restricted act for the purposes of section 30 of the Act.

15.3.16 It is therefore necessary to see whether that prima facie infringement is excused either by a licence or by one of the exceptions in Part III of the Act.

116 We have already determined above that copyright is capable of subsisting in a web page under any number of copyright work categories.
117 Under New Zealand’s Acts Interpretation Act 1924, section 4, in the interpretation of a New Zealand statute, reference to persons are, in the absence of any express provision otherwise, deemed to include references to… *a corporation sole, and also a body of persons whether corporate or unincorporate.*
118 The reference to a licence is imported by the words *copyright licence* in section 29. In turn these words refer to the definition of a copyright licence in section 2(1) of the Act. - a licence to do, or authorise the doing of any restricted act.
119 The restricted act which we are dealing with here is that referred to in section 30, namely, copying.
120 Post - New Wine; supra note 4.
121 For example, see paragraph 10 of the claim in *TotalNews* (supra note 7) which read:

Simply put, the defendants are engaged in the Internet equivalent of pirating copyrighted material from a variety of famous newspapers, magazines, or television news programmes...

122 The report of a joint inquiry team of Police and social workers in the UK in the aftermath of the UK’s first satanic ritual abuse case (the *Broxtowe* case) (usually referred to as the JET report) was *mirrored* (ie copied around the world on different servers) despite the attempts of the Nottinghamshire County Council (who alleged that they owned the copyright) to prevent this. In the course of the dispute, their solicitors alleged that linking to various sites where the report had been mirrored was a breach of copyright. For a detailed examination of the developments in respect of the propagation of the JET report in the internet community and the Nottinghamshire County Council’s eventual realisation that it could not prevent this, see Newsletters 2 (June) and 3 (September) 1997 of the Cyber-Rights & Cyber-Liberty (UK) Organisation which can be found at their web site <http://www.leeds.ac.uk/law/pgs/yaman/yaman.htm>.
123 Supra note 51.
124 As already mentioned, there may be issues with deep linking under trademark legislation, the law off passing off, comparative advertising/unfair competition and the Fair Trading Act 1986.
125 “*Copying*”:

(a) Means, in relation to any description of work, reproducing or recording the work in any material form; and
(b) Includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and
(c) Includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
(d) Includes, in relation to a film, television broadcast, or cable programme, the making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme;-
and "copy" and "copies" have corresponding meanings

126 Ibid paragraph (a).
127 Ibid paragraph (b).
128 Ibid paragraph (a).
130 The Concise Oxford Dictionary, (9th ed, 1995, Clarendon Press) defines record as convert (sound, a broadcast, etc) into permanent form for later reproduction and store as enter or retain (data) for retrieval.
132 Supra note 23.
133 991F.2d511 (9th cir. 1993).
134 31 U.S.P.Q.2d 1239 aff’d, Nos. 94-15818 & 95-15552, 1995 WL 514132, at *3 (9th Cir. 31 Aug. 1995).
135 See Advanced Computer at 363; MAI at 519, CONTU at 13 and the White Paper at 24-27.
137 Samuelson - Copyright Grab, supra note 4.
141 Supra note 23.
142 Supra note 125.
143 Note that copyright infringement does not require any guilty knowledge or any knowledge or recklessness at all for that matter.
A LICENCE TO COPY

16.1 Introduction

16.1.1 We next need to consider whether there is any licence which the web page provider (and in the case of framing, that would include both the framing site and the framed site) can be considered to have been provided to the user. We are looking for what is referred to in section 29 as a copyright licence which is defined in section 2(1) of the Act as …[a] licence to do, or authorise the doing of, any restricted act.

16.1.2 It is important to note that the copyright licence need not be in writing and there is nothing to suggest that the licence may not be implied by a course of conduct or other surrounding circumstances. Therefore, if we assume that neither ZZZ nor BAA has expressly licenced anyone to copy their site, then a copyright licence will need to be established by other means.

16.1.3 Those providing web sites fall roughly into three categories:
16.1.3(a) Providers of information (whether public or private/personal information);

16.1.3(b) Conductors of information (such as the TotalNews site or search engines); or

16.1.3(c) Vendors of services or products selling their wares.

16.1.4 In any of those cases, it is now highly unlikely that the people in question (or certainly those who design the web site for them) are unaware of the linking capabilities that the web has. Indeed, this is often the primary reason for devoting significant resource to a cyberspace presence.

16.1.5 Links are what makes the web what it is. They add significantly to the chances that the information provided (whether it be information for its own sake or detailing products or services) will be accessed by persons who are interested in it rather than just people who might buy a newspaper and see various ads of no relevance whatsoever to them. In other words, those who put information on the web, expect it to be accessed.

16.1.6 Since clearly the information provider has not sold to any particular user the exclusive rights to that information or granted an exclusive licence, it must follow that some form of non-exclusive licence has been granted. That much seems to be agreed by most commentators. What is more difficult to assess is the exact extent of the licence granted.

16.1.7 There would appear to be four broad alternatives:
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16.1.7(a) A licence simply to view the information upon its being lodged in RAM.

16.1.7(b) A licence to view the information in RAM and have it cached.

16.1.7(c) A licence to view and cache or actively download the information to a file of the user’s choosing on the hard drive of the user’s computer for the purposes of viewing that information privately at a more convenient time.

16.1.7(d) A licence to view and download the information and to pass it on or otherwise use it either with or without charge.

16.1.8 We will look at each of these in turn.

16.2 Licence to View Only

16.2.1 Here, the arguments of Litman et al\textsuperscript{146} do have force. Notwithstanding that in technical terms a copy of the web page is being lodged in RAM, it must be accepted that, in the absence of any terms indicating otherwise,\textsuperscript{147} anyone who puts their information on the web has extended a licence for this viewing (or hearing) to take place.

16.3 Licence to View and Cache

16.3.1 Like many aspects of the discussion on the appropriate limits of intellectual property protection in respect of digital information, an
argument that the implied licence extends only to the viewing of the information, even if it were to be accepted in principle, flies in the face of reality. Common browser software automatically caches web pages for later access as we have seen.\textsuperscript{148} Whilst this feature can be eliminated,\textsuperscript{149} the caching mechanism is a very valuable one and will remain so until bandwidth scarcity and technical instability issues have been remedied.\textsuperscript{150}

16.3.2 That is not to say that laws which are unrealistic or incapable of enforcement should be disregarded or reinterpreted so that they are not, however, if we are positing simply that the information may be viewed and cached automatically without anything further then this does not in any way impact on the value which the owner of that information might otherwise obtain.\textsuperscript{151}

16.3.3 Against this, it may be argued that copyright infringement in New Zealand does not rely on any concepts of economic loss or culpability and that these issues are more properly relevant in considering the grant of any discretionary remedy.

16.4 Licence to View, Cache and Save to Hard Drive

16.4.1 The main difficulty with allowing an implied licence to extend to caching is that in technical terms and in terms of what can potentially be done with the cached file, there may be no difference between this and the user actively saving the information. It is therefore perhaps more useful to look at whether the licence extends to this practice. Can it be argued that the licence extends to allowing the user to save the information to a file on the user’s hard drive? If so, are there then any limits on what the user may do with that file?
16.4.2 Before we go on to consider this question, it is worth noting that if a web page is considered to be a cable programme for the purposes of the Act (as it would appear was the case under the analogous provision in the UK legislation in *Shetland Times*\(^{152}\)), then section 84\(^{153}\) of the Act will provide the authorisation for the recording of the web page for later viewing or *time shifting* as it is called. But does an implied licence extend beyond this?

16.4.3 Also, if the web page is not a cable programme or broadcast (and we have seen that there is doubt on this issue) then we need to consider whether the time shifting exception would apply in any case.

16.5 **Time Shifting**

16.5.1 It is certainly arguable that the Act implies that time shifting for anything other than cable programmes or broadcasts is not allowed. This could be argued on the basis that if time shifting generally were allowed, the time shifting provision relating to broadcasts or cable programmes comprised in section 84 of the Act would not be required.

16.5.2 It might also be argued that if time shifting were allowed for any type of copyright work then that would severely undermine copyright protection. Imagine if one could copy a book to read later when more time was available.\(^{154}\)

16.5.3 In the US it has been held that the recording on video for private non-commercial use and for the purposes of viewing at a more convenient time is part of the fair use exception.\(^{155}\) What must not be lost sight of however, is that we are talking here of an **implied** licence. Therefore,
the court will look at all surrounding circumstances to determine the existence and extent of that licence.

16.6 Saving Web Pages Generally

16.6.1 As already mentioned above, people who place information on the web know that it is to be browsed using the common browsers. Both Netscape Navigator and Microsoft Internet Explorer have extensive capabilities of copying and saving web pages as separate files. It is therefore possible to argue that since the people who place the information on the web are aware of these capabilities, if they have not taken any steps to advise the user that such activities are prohibited, they can be argued to have implicitly licensed the user to do so. The argument is a dangerous one however since, if accepted, it might suggest that just because authors are aware of the capabilities of photocopiers, they have implicitly licensed their use. Against this the writer would argue that the distinction is that the browser software is necessary in accessing the web page whereas the photocopier is not in respect of a book. Perhaps we have found the line beyond which the implied licence should not extend – we shall see.

16.6.2 It is argued by some commentators\textsuperscript{156} and seems to have been accepted in \textit{Shetland Times}\textsuperscript{157} that the copying of information on the web in this manner for private non-commercial use does not affect the owner of that information. This coincides with the view of the copyright minimalists that information is no longer a public good, the scarcity of which will necessarily increase its value. Instead, in a digitised world, information has become \textit{third wave customized knowledge [which] is by nature a private good}.\textsuperscript{158} As such, information may \textit{...in many cases, increase in value with distribution}.\textsuperscript{159}
16.6.3 But even the likes of John Perry Barlow would admit that some forms of information do have value because of their scarcity.\textsuperscript{160} Therefore, the argument that mere private copying for non-commercial use does not affect the value that can be obtained by the copyright owner can often be fallacious. For example, assuming that it is or will soon be technologically possible to copy an online book without paying for it, then, if this were done enough times, the revenue generated by sales of the book would be substantially diminished.

16.6.4 It is not suggested that all online information may be copied. Rather it is suggested that if one does not want something copied then it will be necessary to displace an implied licence established by the course of conduct that is constituted by accessing the web with common browser software.

16.6.5 This view does have some support by analogy with the Television medium. In \textit{Television New Zealand Limited v Newsmonitor Services Limited}\textsuperscript{161} (\textit{Newsmonitor}), Blanchard J held that TVNZ had impliedly waived copyright in a programme to the extent “\ldots necessary to allow taping for “private purposes”\ldots”. He then went on to hold that in that case the copying was not for private purposes and generally that private use could not involve any commercial exploitation.\textsuperscript{162} Although Blanchard J was dealing with the Copyright Act 1962, since this part of his judgment is not predicated on that statute, there is no reason why the holding should not be equally applicable today to the copying of a web page.

16.7 Licence to Copy and Use
16.7.1 What then do we make of the fourth category? If a user is to be allowed to copy the web page and store it permanently on the user’s hard drive, is the user then able to distribute it freely to friends or even to sell it or incorporate it in their own commercial products?

16.7.2 There seems to be a fundamental difference between this activity and the previous ones we have looked at. That difference is that the previous activities - viewing, caching, copying for private non-commercial use - are ones which are well known to be within the capabilities of common browsers and are effectively part and parcel of a user accessing information on the web. There is also the implication that such private activities are recognition of one of the fundamental aims of copyright - to promote innovation.

16.7.3 However, the further distribution of that information is not, in this writer’s view, something which would necessarily be expected or condoned by the information provider.

16.7.4 Therefore, it is difficult to see how the web site owner could be taken to have impliedly licensed any such activity. Newsmonitor supports this conclusion.

16.7.5 In our fact scenario therefore, it is unlikely that a Court would accept that ZZZ has implicitly licensed a user to save its price catalogue and those of other suppliers accessed through the ABC site, to produce a weekly newsletter of building material prices on a paid subscription basis.
16.7.6 Certainly some forms of information provided by some information providers are explicitly or impliedly expected to be copied across the web, however, this cannot be said to be the case for all information.

16.7.7 If we therefore revert to our fact scenario, on the basis of the above analysis thus far, we can conclude that a user who accesses ABC’s page (including any framed pages) copies that information, at least if the information is cached and possibly even by lodging it in RAM. However, provided the user does not further distribute that information and only retains it for private use in order to access it later at a more convenient time, then that copying is the subject of an implied copyright licence and therefore is not a restricted act in terms of the Act. In other words, the fact that the action is licensed takes the copying from an infringing to a non-infringing action.

16.7.8 The difficulty with using this analysis is that it does create significant uncertainty. It depends to a large extent on the commonality of browser functions and the saturation of these in the market. There is also the difficulty of drawing a line between using information for private non-commercial purposes and using it for commercial ends. Some guidance can be gained from Newsmonitor,\textsuperscript{164} where provision of excerpts of a TVNZ broadcast to paying customers of a news service was held to be non-private infringement, but each case will turn on its own facts.

16.7.9 Whether one sees such discretion allocated to the Courts as a necessary flexibility enabling them to do justice in particular cases, or unnecessary vagueness causing uncertainty (and an invitation to judicial activism) for those who must operate in a competitive commercial world, will no doubt depend on ones own personal philosophy. For the writer’s part, a
little less flexibility would seem to be in order and we will look at this in chapter 30.

16.7.10 But let us suppose that in our fact scenario, something has occurred which displaces the implied licence which we have formulated. For example, perhaps the web page actually says no copying. Given what we now know about copying, this may prevent even the loading of information into RAM.165

16.7.11 Although it may be shown that the implied licence has been displaced, and therefore that, prima facie, there is an infringement by copying, that infringement may be excused by one of the exceptions contained in the Act. As noted above, primarily those exceptions are contained in Part III.

144 For example Madoff (supra note 35) states that in the first 9 months of 1996, US businesses spent more than $150 million advertising on web sites.
145 See, by way of example only, Timothy Hughes, Intellectual Property and Browsing the Web, at <http://www.gtlaw.com.au/gt/bin/frameup.cgi/gt/pubs/browsingweb.html>; The Internet Content-Liability Study, section 5, (Canada) (supra note 66) – the authors consider that the Canadian law of implied licence already provides for a type of “browsing exemption”.
146 See para 15.3.11.
147 Those contrary terms might either be express (set out prominently on the page or site itself) or implied. Without a prior course of conduct indicating such a prohibition, it is difficult to see how such a term could be implied.
148 Internet Service Providers also cache heavily accessed web pages on their servers to speed up access and in doing so also save valuable bandwidth which they usually pay for by volume or time measurement.
149 Either by switching it off (if this function is available) or by reducing the size of the cache to nil.
150 It is quite conceivable that the bandwidth scarcity problem is not one which is capable of remedy. Whilst the information superhighway as a description of the internet is a simplistic one, it is in this case an apt analogy in that it is quite possible that, just as with physical roads, expanding the highway and providing more capacity simply leads to an expanded demand and more users.
151 This of course assumes that the owner is not actually selling the information in question. If the information is being sold then the owner will have implemented terms and conditions and presumably technical measures by which the information will be paid for, which will displace the terms of any implied licence.
152 Supra note 37.
153 84. Recording for purposes of time shifting-
 (1) The making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of enabling the recording to be viewed or listened to at a more convenient time does not infringe copyright in the broadcast or cable programme or in any work included in the broadcast or cable programme.
(2) A recording that is-
   (a) Made under subsection (1) of this section; and
   (b) Retained for any longer than is necessary---

   (i) To enable the recording to be viewed or listened to at a more convenient
time; and

   (ii) If the person who viewed or listened to the recording wishes to make a
complaint, to enable that person to prepare and despatch a complaint,
including the recording, to any person or body having responsibility for
dealing with complaints about the content of broadcasts or cable programmes
or advertising contained in broadcasts or cable programmes-

infringes copyright in the broadcast or cable programme recorded and in any work included in
the recording, and shall be treated as an infringing copy.

This begs the question of why exactly the same process should be available if the book is included in a
cable programme or broadcast.


For example see Donald supra note 115.

Supra note 37.

See Barlow supra note 54 and also Esther Dyson, George Gilder, Jay Keyworth and Alvin Toffler, A
Magna Carta for the Knowledge Age (1994) New Perspectives Quarterly, Volume 11, No. 4 a copy of
which can be found at <http://www.uludag.edu.tr/~serdar/makale/m58-5>.

Barlow idem.

Barlow ibid under the heading Exclusivity Has Value.

[1994] 2 NZLR 91; see also the Longman case referred to at para 17.3.3

There is a marked similarity in his Honour’s analysis to that which can be seen in US fair use cases
such as Acuff (supra note 71) and the leading case of Harper & Row Publishers, Inc. v Nation
Enterprises 471 U.S. 539 (1985). As an interesting aside, Blanchard J’s disapproval of the activities of
Newmonitor Services Limited seems to have been borne out in that they have recently been found to
have breached the terms of the injunction granted in the case. See Television New Zealand Ltd v
Newmonitor Services Ltd & Anor (unrep. HC Auckland, CL 79/91, 21/10/97).

Supra note 162.

Idem.

It is not possible to canvas here whether this would in fact be the case. Certainly there would be an
argument that any such term would be overridden by the necessity that in order to view the page (which is
what the web page owner is encouraging), it must be copied into RAM. Hopefully, common sense will
prevail on this point. Interestingly, the point was specifically reserved by TotalNews in its settlement.
Supra note 7 at para 4(d) of the proposed Stipulation and Order of Settlement and Dismissal.
Chapter 17

EXCEPTIONS TO COPYING RESTRICTION

In this chapter we will look at some of the exceptions which are particularly likely to arise in respect of copying, linking to and framing web pages.

17.1 Incidental Copying

17.1.1 The first point to note is that section 41 is limited in scope. It only applies to artistic works, sound recordings, films, broadcasts or cable programmes. Presumably, it was thought that it was not realistically possible for anyone to argue that a literary work could be incidentally copied. Therefore compilations are not covered by the exception.

17.1.2 Does the ABC site come within one of the categories which are covered?

17.1.3 As an example of how difficult this question may be to answer, section 41(1)(a) of the Act allows the incidental copying of a work contained in a cable programme.
17.1.4 If the work is a cable programme then section 41(1)(a) applies and the work is excepted. This however provides a ridiculous result since it would effectively mean that a piece of text on a web page could be incidentally copied whereas the same text in hard copy would not benefit from the same exception. Or, to put it another way, the protections which apply to literary works for some reason are lessened if those works are included in web pages transmitted via a cable programme service.

17.1.5 The same comments can be made in respect of the section 41(1)(a) exceptions for sound recordings, films and possibly even broadcasts if one takes into account the streaming technology which has been referred to earlier in this paper.

17.1.6 Assuming that the ABC page does fit within one of the section 41 categories, a user will therefore be excused from any copying infringement if it can be said that their copying of the web page was incidental. But there is no definition of what is meant by incidental copying (other than in section 41(2), which only relates to musical works or words spoken or sung to music).

17.1.7 Some assistance is given by paragraph (b) of the definition of adaptation in section 2(1) of the Act, where it refers to the conversion of computer language or code necessary to run a computer program as being incidental. This may suggest that if it is similarly a function of a computer program (browser software) to place a copy in RAM then that would also be incidental.

17.1.8 The implication that reference to incidental copying is a reference to copying which happens automatically or as a consequence of performing
another action is also supported by the definition of *incidental* in the
*Oxford English Dictionary*.\(^{168}\)

17.1.9 More relevantly, *Words and Phrases Legally Defined*\(^{169}\) quotes from *Re Fahy’s Will Trusts, McKnight v Fahy*\(^{170}\) per Plowman J:

> “*Costs of and incidental to the negotiations*” means “*costs of and consequent on the negotiations*”[Emphasis added]\(^{171}\)

17.1.10 In the New Zealand context, the *Credit Contracts Act 1981*, whose main focus is on the regulation of provision of credit, in section 2(1), defines *incidental services* as … benefits (not being benefits that consist of the provision of credit) such as…. In other words, benefits which fall outside the main purpose – the activity of providing credit.

17.1.11 Whilst section 31 of the UK Copyright, Designs and Patents Act 1988, on which the NZ section 41 was based, refers to *incidental inclusion* [emphasis added] of a work, in practice there would seem to be little difference between the sections since New Zealand’s section 33 restricted act refers to *inclusion*, as we shall see in chapter 21. *Halsbury’s Statutes*\(^{172}\) opines in its commentary on the UK section 31 that:

> *It is thought that this means inclusion by way of background or inclusion in some other way which is only incidental to the principal matters represented in the … work.* [Emphasis added]\(^{173}\)

17.1.12 All of this suggests that if the copying occurs as a consequence of the principal activity (in this case the accessing of the web page), and that
copying is therefore merely a subordinate or fortuitous occurrence which does not form an essential part of the activity, then it will be incidental. Accessing a web page and thereby copying it can therefore be argued strongly to be incidental copying covered by this exception.

17.1.13 In fact this takes us no further than the implied licence we have looked at above. However, if we recall the four categories of potential implied licence which we reviewed earlier, it is likely that the conscious saving of the web page by the user into a separate file would be considered to be deliberate (rather than an automatic consequence) and therefore would not be excused by the incidental copying exception in section 41. The action of saving is not a subordinate activity which follows as a consequence of browsing but is a principal activity in its own right.

17.2 Criticism, Review and News Reporting

17.2.1 It is unlikely that the next exception provided in the Act under section 42 for criticism, review, and news reporting would be relevant to the ABC site since it is unlikely that anyone accessing this type of site would be doing so for those purposes.

17.3 Research or Private Study

17.3.1 It is however quite possible that the next exception in section 43, for research or private study, may be relevant. What is interesting to note about sections 42 and 43 is that whilst they both provide exceptions for fair dealing for the particular purposes they refer to, section 43(3) gives guidance as to what is meant by fair dealing in subsection 3. Section 42 gives no such guidance and we are left with simply having to determine
what the words *fair dealing* in section 42(1) mean. By not providing any definition in section 42 whilst providing one in section 43, an argument is created (which may not have been intended) that fair dealing in section 42 must mean something different to fair dealing in section 43.\(^{176}\)

17.3.2 In respect of section 43,\(^{177}\) the inclusion of section 43(3) indicates that US authorities on fair use will be relevant but may only be relevant in respect of this limited research and private study exception. In the same vein Jacobs J in the UK case of *Ibcos Computers v Barclays Mercantile Highland Finance & Anor*\(^{178}\) criticised the extensive references to *US Computer Associates v Altai*\(^{179}\) and warned against over citation of US authority where dealing with the UK Copyright, Designs and Patents Act 1988. The same must be said in respect of the use of UK case law in New Zealand since the UK section 29 does not include the criteria set out in section 43(3).

17.3.3 It is not possible to review fair dealing/fair use exceptions to copyright infringement in this paper however an overview would suggest that commercial use of copied works will fall outside the exception. Reference is made to *Newsmonitor*\(^{180}\) and also to *Longman Group Limited v Carrington Technical Institute Board of Governors*\(^{181}\) which seems to go further to indicate that commercial use may not even be necessary for infringement to occur as long as the copy factually competes with the original.\(^{182}\)

17.4 **Creation of Further Works in a Series**\(^{183}\)

17.4.1 Section 77 (making of subsequent works by same artist) does seem to create a major possibility for exception in respect of web pages.
17.4.2 This applies where the author of an artistic work who is not the copyright owner makes another artistic work which will infringe copyright. The exception provides that there will be no infringement provided that the main design of the earlier work is not repeated or imitated. This exception is understandable in relation to artistic works and would cover the common situation where an artist produces a series of related works. For example, the stolen *Urewera Triptych* might fall within this exception assuming that Colin McCahon had also assigned the copyright to the Centre where the paintings were displayed.

17.4.3 It is less clear how this exception would apply to a web page which, taken in its entirety, may well comprise an artistic work. An example might be where a web page designer produces a web page, the copyright of which is vested in the person who commissioned the designer to do so, and then produces a similar page but with a different design for someone else. Section 77 seems to provide a potentially major exception for the copying of web pages. The question will be whether the main design (whatever that may mean) of the earlier work has been repeated or imitated. One can also imagine that there will be arguments made that if only one page of an entire web site has been copied then the main design of the entire work (i.e. the web site) has not been repeated or imitated.

17.4.4 Note that it is the design which is focused on and not the actual iteration of that design. This seems to come very close to, if not all the way towards, allowing the breakdown of the idea/expression dichotomy. The section almost seems to turn this dichotomy on its head by providing that as long as the idea [the main design] is not copied then an artist may make as many copies of their work as they like even though they do not own the copyright in it. Since a web page may be comprised of a
number of different parts including text, graphics, film, sound etc all of which might comprise an artistic work, it would appear that one reading of section 77 would allow those individual parts to be copied and perhaps re-ordered in a different design (i.e., a different idea) without infringing copyright.

17.4.5 Since that copy will be of the same quality as the original, this seems a dangerous exception and one which an assignee of artistic copyright would do well to have waived by the copyright assignor.

17.4.6 Let us assume that there has been an infringement by the user copying the ZZZ price catalogue and publishing (as a hard copy and online) a weekly summary of product prices for various suppliers together with news items taken from the BAA page and other unrelated sources.\textsuperscript{186}

17.4.7 As we have already concluded, ABC has not itself copied the works in question. Therefore, it now needs to be decided whether ABC has committed any secondary infringement.

\textsuperscript{186} Incidental copying of copyright work-
(1) Copyright in a work is not infringed by---
(a) The incidental copying of the work in an artistic work, a sound recording, a film, a broadcast, or a cable programme; or
(b) The issue to the public of copies of an artistic work, the playing of a sound recording, the showing of a film, the making of a broadcast, or the inclusion of a cable programme in a cable programme service, in which a copyright work has been incidentally copied; or
(c) The issue to the public of copies of a sound recording, film, broadcast, or cable programme to which paragraph (a) or paragraph (b) of this subsection applies.
(2) For the purposes of subsection (1) of this section, a musical work, words spoken or sung with music, or so much of a sound recording, broadcast, or cable programme as includes a musical work or such words, shall not be regarded as incidentally copied in another work if the musical work or, as the case requires, such words or that sound recording, broadcast, or cable programme is deliberately copied.

One point which is surprising is that section 41 does not extend to include computer programs (unless of course a computer program can be considered to be part of an artistic work, sound recording, film, broadcast or cable programme). This would appear to leave the somewhat strange result whereby a user can make a back-up copy of a computer program (section 80 of the Act) but cannot use the computer
program since in order to use it it will ordinarily be necessary for the program to be loaded in RAM on the user’s computer.

And yet it is clearly envisaged by paragraph (b) of the definition of adaptation in section 2(1) of the Act that running a computer program will involve incidental copying. Again, the Act in its differentiation between categories of work leads to inconsistency.

With Java, not only is web page information loaded into RAM but so also are the Java applet programs which are necessary to run that information. Computer programs are included in literary works but literary works are not covered by section 41. Therefore, it is entirely possible that a user accessing a web page would have the benefit of the incidental copying exception in respect of information lodged in RAM but not in respect of the computer program required to operate on that information.

17. Exceptions to Copying Restriction

169 [1962] 1 All ER 73.
170 Ibid at 75.
174 See para 16.2 – 16.3.

43. Research or private study-

(1) Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work.

(2) For the avoidance of doubt, it is hereby declared that fair dealing with a published edition for the purposes of research or private study does not infringe copyright in either the typographical arrangement of the edition or any literary, dramatic, musical, or artistic work or part of a work in the edition.

(3) In determining, for the purposes of subsection (1) of this section, whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to-

(a) The purpose of the copying; and
(b) The nature of the work copied; and
(c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and
(d) The effect of the copying on the potential market for, or value of, the work; and
(e) Where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work …


77. Making of subsequent works by same artist-

Where the author of an artistic work is not the copyright owner, he or she does not infringe copyright in that work by copying the work in making another artistic work, if the main design of the earlier work is not repeated or imitated

In 1997 the three panels forming a series known as the Urewera Triptic painted by leading New Zealand artist, Colin McCahon, were stolen from a National Park visitor centre in the the North Island of New Zealand. Although the perpetrators have been apprehended, the paintings, thought to be worth many hundreds of thousands of dollars, have never been recovered.
Note that there is a somewhat arbitrary distinction between digital works which are computer programs (where copyright is automatically vested in the commissioner) and other digital works (where copyright remains with the author until assigned in writing). (See Section 21(3) re first ownership of copyright and section 114 re assignment).

It is also assumed for present purposes that the copying of this information is an infringement. In respect of the pricing catalogue, this may be arguable given that it may not comprise material with sufficient originality, however, it would possibly qualify for protection as a compilation. (With regard to the non-protection of facts versus the protection of compilations, see the leading decision of *Feist Publications v Rural Telephone Service Co* 499 U.S. 340 (1991)).
18.1 Secondary Infringement re Copying

18.1.1 The provision which might be relevant to ABC is section 37 (providing means for making infringing copies)\textsuperscript{187}

18.1.2 The relevant parts of section 37(1) provide that ABC will be liable for the secondary infringement if it:

\begin{quote}
Makes; or ...possesses in the course of a business; ... an object specifically designed or adapted for making copies of that work, knowing or having reason to believe that the object is to be used to make such infringing copies.
\end{quote}

18.1.3 ABC is simply not caught by this provision.

18.1.4 First, the only way in which ABC could be held liable under this provision is if it could be successfully argued that its web site is specifically designed or adapted for making copies of the ZZZ and BAA materials. That is clearly not the case. ABC’s site merely provides directions to the ZZZ and BAA sites. It does not contain any
functionality which is specifically designed for copying. That functionality is contained in the user’s browser software.

18.1.5 Secondly, the ABC web site must be an object. This conjures up a physical world rather than a digital one. One can possibly imagine that if a Court considered the activities promoted by the ABC site worthy of censure then it might be able to stretch the meaning of object by analogy to include a web site – although, in the writer’s view this would be more than a stretch.

18.1.6 Thirdly, ABC must have knowledge or reason to believe that the user will use its web site to make infringing copies. Unless the web site is specifically promoting copying, it is difficult to see how this test could be met.¹⁸⁸

18.2 Summary - Copying

18.2.1 We have analysed how the Act operates to determine whether an infringement has occurred in some detail above solely in relation to copying. A similar process is necessary in relation to any other types of restricted act and we will look at these in the following sections of this paper.

18.2.2 To summarise in relation to copying however:

18.2.2(a) ABC does not copy the web page and is therefore not liable for primary infringement under sections 29 and 30 of the Act.
18.2.2(b) ABC may be liable if the user in accessing/using the material on the web page, copies that material.

18.2.2(c) The accessing of a web page by any means will technically involve the copying of the material on that page or the page itself no matter which method (downloading, browsing or streaming) is used, but it is arguable that this is not copying for the purposes of the Act because the copy is not sufficiently permanent.

18.2.2(d) Under any of those processes, a copy of the work will be loaded, at the very least, into RAM, and it may be that it is also saved to a file on the user’s hard drive either consciously or unconsciously (by caching).

18.2.2(e) A licence will be implied allowing the user to access the material by having it lodge in RAM. It is also likely that the licence would extend to the automatic caching of the web page and possibly to the conscious saving of the page for later use although the latter is more doubtful.

18.2.2(f) It is unlikely that a New Zealand court would allow the licence to extend to further use or distribution of the page without exceptional circumstances indicating that such a licence was intended.

18.2.2(g) Even if the implied licence does not cover copying into RAM or caching, they should be covered by the incidental copying exception in section 41 of the Act.
18. Secondary Infringement re Copying & Summary

18.2.2(h) Whether any further use of the material copied will be allowed will depend on whether that use falls within one of the exceptions in Part III of the Act.

18.2.2(i) However, even if a user infringes sections 29 and 30 and no licence or exception excuses that copying, it is highly unlikely that ABC as a mere conduit to the information that the user has copied, will be liable for secondary infringement.

187 37. Providing means for making infringing copies-
(1) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence,-
   (a) Makes; or
   (b) Imports into New Zealand; or
   (c) Possesses in the course of a business; or
   (d) In the course of a business or otherwise, sells or lets for hire; or
   (e) In the course of a business, offers or exposes for sale or hire-
       an object specifically designed or adapted for making copies of that work, knowing or having reason to believe that the object is to be used to make such infringing copies.
(2) Copyright in a work is infringed by a person who, other than pursuant to a copyright licence, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in New Zealand or elsewhere.

Chapter 19

INFRINGEMENT BY ISSUE OF COPIES TO PUBLIC

19.1 Issue to the Public

19.1.1 Section 31 provides that:

*The issue of copies of a work to the public is a restricted act in relation to every description of copyright work.*

19.1.2 As with section 30 (copying), this section is triggered by section 29, which is the operative provision in respect of infringement.

19.1.3 If we look at what ABC is doing and compare its actions with the real world activities that the distribution right in section 31 is designed to protect, there will often be similarities. Here is a person who takes material belonging to the copyright owner and makes it more readily available to others at no cost, thereby depriving the copyright owner of revenue that sale of that material would have brought in.

19.1.4 On closer examination however, this analogy fails. There are two reasons:
19.1.4(a) First, ABC does not issue (as is required by the section) anything, since, to do so, it would need to first possess it, which it does not. As we have seen, ABC is merely a conduit and never comes into possession (i.e. copies to its site) any of the material on the ZZZ or BAA sites. In fact a better analogy of ABC’s actions in this context might be to compare it to a pair of spectacles enabling the user to see something which would have been more difficult for him or her to see otherwise.

19.1.4(b) Secondly, even if ABC were held to be issuing the material, that material is not a copy of the original but the original itself – it is not copied until it reaches the user’s computer.\(^{189}\)

19.1.5 ABC is not issuing copies of the material on the ZZZ or the BAA site to anyone. Therefore, it is not liable under section 31.

19.2 Secondary Infringement re Distribution

19.2.1 In order to decide whether ABC might be liable for secondary infringement, as we have seen above, it is necessary to decide whether a user would be liable under section 31. Given what we now know with respect to the ability of a user to copy the material obtained to its hard drive, it goes without saying that in a digital world, it is equally simple for that user to provide copies to anyone else.
19.2.2 In fact, this is one of the major concerns of publishers, since, with electronic copies, there is no loss whatsoever in quality. This they argue is therefore a ground for strengthening copyright protection.\(^{190}\)

19.2.3 One point to note however is that the phrase *issue to the public* is defined in section 9 of the Act as meaning:

\[\text{...the Act of putting into circulation copies not previously put into circulation...}\] [Emphasis added].

19.2.4 This seems to require more than just an isolated instance of passing a copy on to one or two others. Circulation does tend to imply wider dissemination and that concept is perhaps implicit in the words *issue to the public*.\(^{191}\)

19.2.5 Therefore, there is certainly the potential for infringement by a user of the ABC site providing copies of the materials obtained from ZZZ and BAA to third parties. Note that there does not need to be any commercial gain obtained in respect of the provision of the copies for there to be a breach, however, this would obviously go to the nature of the remedy. Also, as has been briefly discussed above at paragraph 17.3.3, commercial gain will likely remove the possibility of falling within the fair dealing exceptions.

**19.3 Implied Licence to Issue**

19.3.1 The next issue is whether the user who does issue copies of the material obtained to the public is somehow excused from infringement by virtue of a copyright licence under section 29 of the Act. Again, let us assume
that the ZZZ and BAA sites do not contain any terms which would prevent an implied licence arising.

19.3.2 To allow an implied licence to extend to the provision of copy to third parties would strike at the very heart of copyright law notwithstanding the comments of those who see information as a free spirit striving for release. Under New Zealand law, as it currently stands, a Court would not accept this position unless there were circumstances (such as the web page provider having condoned the circulation of its information in the past) which would support such a licence.

19.4 Exceptions re Issuing Copies to Public

19.4.1 If a prima facie case of infringement is found, it is then necessary to see whether any of the exceptions in Part III of the Act apply. This will of course depend on exactly what the issue of the work to the public entails. For example, if the issue involves a dealing for the purposes of criticism or review, and that issue is determined to be a fair dealing and is accompanied by a sufficient acknowledgment then the user will have the benefit of the exception in section 42(1). Another example would be the research or private study exception in section 43.

19.4.2 What will not be allowed however is the complete copying of all or a substantial part of the material from the ZZZ and BAA sites and the issuing of that material to the public.
19.5. Secondary Infringement

19.5.1. Therefore, given that a user of the ABC site could be liable for primary infringement if it issues material obtained from the ZZZ and BAA sites to the public, ABC itself could potentially be liable as a secondary infringer if it falls within one of the secondary infringement sections 35-39 of the Act.

19.5.2. Obviously, if a distributor of a copy has itself made that copy then it will be liable under section 30 (copying) and in turn ABC might be argued to be secondarily liable as we have seen. However, we are here considering the situation where the user has been held to have distributed copies.

19.5.3. In fact there is no provision which would render ABC liable even if it could be said to have assisted the user in making the distribution.

189 Other copies may also be taken along the way by the various computers that process or route the user’s request but they are not relevant for present purposes.
190 Any number of commentators make this fairly self-evident point, however, there is an interesting analysis in, Trotter Hardy, Contracts, Cyberspace & Pre-Emption, (1995) 1 Rich. J.L. & Tech. 2 <http://www.urich.edu/~jolt/v1i1/hardy.html>.
191 By way of analogy, although the Securities Amendment Act 1978 attempts to define what is meant by issue to the public in relation to the issue of securities, there has been much commentary as to what the phrase actually means, which commentary would be relevant here. See for example, G H Weiss, The Concept of Public Offering under the Securities Act 1978 (1982) Victoria University of Wellington Law Review 105.
192 See Barlow supra note 54.
193 Sufficient acknowledgement is defined in section 2(1) of the Act and essentially refers to an acknowledgement identifying the title of the work and the author, unless the author is anonymous or cannot be identified.
194 For example by posting it to a useenet group or publishing it on an open website (web sites can of course be closed and accessed only by specified persons by use of passwords or indeed by virtue of physical limitations in terms of cabling eg, intranets).
Chapter 20

INFRINGEMENT BY PERFORMANCE

20.1 Infringement

20.1.1 In the discussion on which categories of work a web page would fall into under the Act, we concluded that it was possible with streaming technology that a web page could provide the means for a broadcast, cable programme or even a performance to be given.

20.1.2 Section 32\textsuperscript{195} sets out details of where the performance of a work in public or the playing or showing of a work in public will be a restricted act. Section 32(1) deals with performance of a work in public which applies only to literary, dramatic or musical works. Section 32(2) applies to the playing or showing of a work in public and deals solely with sound recordings, film, broadcasts or cable programmes. It is also important to note that section 32(3) makes it clear that neither the person sending the work or the performers are to be regarded as responsible for any infringement. But, pursuant to section 32(4) that exception does not extend to a person who re-transmits the work.
20.1.3 Again, it is reasonably clear that ABC will not be liable for infringement of section 32. It does not perform, play, show or re-transmit any visual images or sounds that comprise the works dealt with by section 32.

20.1.4 However, it is quite possible that the person accessing ABC’s site might do one or more of those things if that person copies and re-issues the work to the public.

20.1.5 In fact, this is a situation where the web collapses the distinctions between copying, performing, broadcasting and issuing cable programmes to the public. As we shall see, this therefore means that there may be uneven treatment of both the exceptions and the liability for secondary infringement depending on what type of material is contained on the web page which is copied or how it is categorised. If that web page contains only literary works then the provisions which deal with playing films or broadcasting for example will not apply.

20.1.6 Conversely, where the work is a sound recording, the protections afforded to literary works will not apply. This of course made sense in a world where those categories were easily distinguishable. However, with digital information presented on the web page those works effectively take the same form since they are all made up of a binary code stored either temporarily in RAM or permanently on the hard drive of the user’s computer. It is the computer itself using browser software which then interprets that code and re-converts it into a work which, under traditional analysis, would fall into a particular category.

20.1.7 Again, it is unlikely that a New Zealand court would extend any implied licence under section 29 of the Act to include the performance, playing or showing of a work in public. Therefore, any such activity would be
likely to give rise to a primary infringement unless covered by one of the exceptions in Part III.

20.2 Exceptions re Performance

20.2.1 There are various exceptions that might apply to the works referred to in section 32. Apart from the general exceptions in sections 41-43 and some of the more generic exceptions which we have already referred to, the works which are restricted acts under section 32 could potentially be subject to specific exceptions as follows:

20.2.1(a) Section 47 (performing, playing or showing work in the course of activities of educational establishment);\textsuperscript{196}

20.2.1(b) Section 70 (public reading or recitation);

20.2.1(c) Section 81 (playing and sound recordings for purposes of club, society etc);

20.2.1(d) Section 82 (recording for the purposes of maintaining standards of broadcasts and cable programmes);

20.2.1(e) Section 83 (recording for the purposes of complaining);

20.2.1(f) Section 84 (recording for the purposes of time shifting);

20.2.1(g) Section 85 (incidental recordings for the purposes of broadcasts or cable programmes);
20.2.1(h) Section 87 (free public playing or showing of broadcasts or cable programmes);

20.2.1(i) Section 88 (reception and re-transmission of broadcasts in cable programme service);

20.2.1(j) Section 89 (provision of sub-titled copies of broadcast or cable programme);

20.2.1(k) Section 90 (recording for archival purposes);

20.2.1(l) Section 91 (recording by media monitors).

20.3 Free Performance Exception

20.3.1 Section 87\textsuperscript{197} is an interesting exception. If a web page is a broadcast or cable programme, the section may be read as allowing that programme or broadcast to be re-transmitted (i.e., played or shown in public) provided no charge is made.

20.3.2 This was probably not the intention of the section. It is more likely that the section was designed to allow, for example, the playing of a broadcast on a screen outside a venue to members of the public who have been unable to gain access to the venue for lack of space. Hence, references in section 87(1) are to the place or a place.

20.3.3 However, New Zealand’s Acts Interpretation Act 1924, section 4, provides that singular references may be taken to include the plural. When this rule is applied to section 87(1) of the Act, it is at least arguable that copying of a web page (as a broadcast or a cable
21. Infringement by Inclusion in Broadcast or Cable Programme

20.3.4 In the language of the section, the original broadcast or cable programme has been played or shown in public to an audience (i.e., persons accessing the web) who have not paid for admission to the places\textsuperscript{198} where the broadcast or cable programme (i.e., the web page) is to be heard or seen.

20.3.5 However, here again confusion arises because of the categorisation of works when applied to a web page. Section 87(1) goes on to provide that provided the above conditions are satisfied, there will not be any infringement on copyright in:

(a) A broadcast or cable programme; or
(b) Any sound recording or film included in the broadcast or programme.

20.3.6 There is an issue as to what this means in relation to works which are not sound recordings or films but which are nonetheless included in the broadcast or cable programme. Are these protected simply by virtue of subsection 87(1)(a) because they are broadcasts or cable programmes or are they unprotected because section 87(1)(b) indicates that protection is only extended to copyright in underlying components of the broadcast or cable programme which are films or sound recordings?

20.3.7 It is suggested that the word or between subsections (a) and (b) of section 87(1) would be read disjunctively. However, it is not entirely clear why subsection (b) does not extend to include other forms of work since the definition of cable programme service clearly envisages that

programme) and the placing of that copy on the web (provided no charge was made by the provider of that copy), would be allowed.
works other than films or sound recordings could be included in a cable programme.\textsuperscript{199}

20.3.8 Some may argue that this warps the intention of section 87, however, this is not necessarily the case. It may be argued against that proposition that distinguishing between one place and many places is an arbitrary distinction provided the other condition (i.e., free access) is satisfied.

20.3.9 In any case, what exactly does a place mean even if used in the singular? Does this mean that where a rugby ground is sold out there could not be screens outside that ground viewable from different locations around that ground? Surely not. What then is the difference between that and that cable programme or broadcast being viewed on a screen at another rugby ground where free access has been given for the purposes of letting one of the team’s supporters view the game? If that is allowed then why is that any different from providing a web page of that cable programme or broadcast for free access in people’s homes over the web?

20.3.10 Again, there seems no logical reason why the section cannot be extended in this manner, however, it does drive the proverbial coach and horses through copyright protection of web pages. It also highlights the inconsistencies in the Act which are raised by web pages.

20.3.11 On the one hand, a person who accesses and copies a web page may be liable for infringement by copying. The exceptions which would normally be thought of as applying to copying may not excuse his or her behaviour.

20.3.12 On the other hand however, if the web page in question is a cable programme or broadcast then it would appear that it can be played or
shown over the web. Since this by definition must involve copying, there is an inconsistency which presumably would work in favour of the user - there is nothing in the Act to suggest that simply because a particular activity is prevented on one ground it may not be permitted on another.

20.3.13 Let us however for the moment assume that the user has infringed for the purposes of section 32. Under this scenario, section 38 of the Act, but more likely section 39, could impose secondary infringement liability on ABC.

20.4 Secondary Infringement

20.4.1 Whilst it is possible, it seems unlikely that section 38 would be relevant. Unlike section 87, it is reasonably clear that section 38 is referring to a physical place. Whilst the heading of the section is supposedly no guide as to interpretation it will consciously or unconsciously influence an interpretation of what is meant by the references to a place of public entertainment in the section. More importantly, the definition of a place of public entertainment in section 38(2), whilst inclusive only, refers to premises ... made available for hire .... That reference is almost incapable of applying to other than a physical place.

20.4.2 Section 39 is more relevant. It would seem that the possibility of a web page being a cable programme or its transmission being a broadcast or performance may have been considered when one looks at section 39(1)(c). Whether or not ABC will be liable as a secondary infringer will depend on whether it comes within the categories of persons set out in subsections (2), (3) and (4) respectively.
20.4.3 Clearly, subsection 39(3) will not apply and it is also unlikely that subsection (4) will apply since, as we have already seen, ABC does not supply a copy of the work in respect of which it is alleged copyright has been infringed. All ABC does is provide a link to the site where that work is held.

20.4.4 That leaves us with subsection 39(2) and the issue of whether the word apparatus could include the web page of ABC. In other words, is ABC’s web site part of the apparatus which has provided the means to infringe copyright? No definition is given of the word apparatus and there is nothing in the section or elsewhere in the Act to indicate whether this refers to physical technology or can be extended to include intangible apparatus such as a computer program or the coding on the ABC site which enables the user to link to the ZZZ or BAA site.

20.4.5 Even if it could be said that the ABC site was part of the apparatus for the purposes of subsection (2), it must be able to be argued that it is not a substantial part as is required by the section. The user could access the ZZZ or BAA sites without utilising the links from the ABC site and even having done so it is not the ABC site which provides the actual means of infringement; it is the user’s computer, the user’s browser software and (certainly more so than ABC’s site) the network over which the digital information is transferred.

20.4.6 If this conclusion is wrong however ABC may be liable for secondary infringement under section 39(2)(b). ABC may have difficulty showing that it had no reasonable grounds for believing that its link to the ZZZ or BAA sites would not provide a means for copyright infringement since it is well known that such links, combined with browser software, will give the opportunity for such infringement. It is important to note that
subsection (b) provides an objective standard and the onus of proving no reasonable grounds for [the belief] ... would be on ABC.\(^{204}\)
Chapter 21

INFRINGEMENT BY INCLUSION IN BROADCAST OR CABLE PROGRAMME

21.1 In relation to broadcasts and cable programmes (which are the only two works dealt with by section 33), section 33 appears far wider than section 32. Whereas section 32 qualifies the restriction by reference to playing, showing or performing the various works in public, there is no such limitation in section 33. It should also be noted that by virtue of the definition in section 4(5), the reference in section 33 to the inclusion of a cable programme in a cable programme service is ...to the transmission of the programme as part of the service.

21.2 The conclusion must be that section 33 raises exactly the same issues as are raised by section 32 except that it is more likely for there to be an infringement because there does not seem to be any requirement for performance, playing or showing of the work in question to the public to establish an infringement. Apart from that, the comments made in chapter 20 will be relevant to this category of infringement.

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205 33. Infringement by broadcasting or inclusion in cable programme service-
The broadcasting of a work or its inclusion in a cable programme service is a restricted act only in relation to-
(a) A literary, dramatic, musical, or artistic work:
21. Infringement by Inclusion in Broadcast or Cable Programme

(b) A sound recording or film:
(c) A broadcast or cable programme.

Supra note 196.

Section 4(5) (supra note 81) refers to the inclusion of a cable programme in a cable programme service ... and it is uncertain whether this clarification can be extended to include any of the works referred to in section 33 or whether it is limited solely to cable programmes. In any case, since a cable programme can include any of the other works, this may be a distinction without a difference.

It is difficult to understand exactly what is intended by the distinction between sections 32 and 33. The definitions of broadcasting and cable programme service both indicate that they include transmission to the public. Also, the list of works covered by section 33 is a little misleading since the only work which is missing (when compared to works covered by the Act as referred to in section 14) is typographical arrangement of published editions (Section 14(1)(f)).
Chapter 22

INFRINGEMENT BY ADAPTATION

22.1 It is unlikely that linking or framing would be classed as adaptations of the site linked to or framed. Whilst the definition of *adaptation* in section 2(1) is an inclusive one, it seems clear that making an adaptation is not the same as making a derivative work under US law.

22.2 In fact, section 98(1)(a) of the Act which deals with the moral right restraining derogatory treatment\(^{209}\) refers to:

\[*addition to, deletion from, alteration to, or adaptation of*\]

...[Emphasis added].

22.3 This indicates that an adaptation does not include the other processes set out in that section.

22.4 It is clear therefore that the user in simply accessing the ZZZ or the BAA site through the ABC site is not adapting either of those sites. Therefore, there is no primary infringement and it follows that there can be no secondary infringement.

22.5 Nor is ABC liable for any adaptation since it does not perform any of the actions which are included in the definition of adaptation on the ZZZ or BAA sites or
any information on those sites. The information on those sites never enters the
ABC site at all. As we have seen, all that ABC does is provide a link for the
user to follow which then enables the user to access the sites directly.210

209 See para 26.5.
210 It is important to note that there is a category of copyright infringement under US law for derivations. In discussions on that topic, reference is often made to the original work being adapted. That is entirely different from the concept of adaptation in the New Zealand Act. However, it is similar in terms of some of its consequences to concepts which are now included in the New Zealand Act under the heading of moral rights.
COPYRIGHT INFRINGEMENT SUMMARY

23.1 The common thread that can be seen in this analysis is that under New Zealand copyright law, whilst ABC will not be liable as a primary infringer, the blunt instrument which copyright represents vis a vis digital works may often make the user inadvertently liable. In turn there may be instances where that primary liability may engender secondary liability for ABC but that will not be common.

23.2 Since quite clearly, ABC does not copy or otherwise primarily infringe, the crucial question will always be: is the user caught because he or she has stepped outside the bounds of the implied licence inherent in provision of a web site or the statutory exceptions which may apply to the way in which the information is used?
Chapter 24

MORAL RIGHTS

24.1 Moral rights provisions were introduced into New Zealand law for first time in 1994 when the Act was passed. This was done to comply with the TRIPs obligation to include in national laws the moral rights aspects of the Berne Convention for the Protection of Literary and Artistic Works.\textsuperscript{211}

24.2 It is with the moral rights provisions of the Act that ABC may face its biggest hurdle. Before we see why this is in detail, it is useful to have an overview of Part IV. The moral rights which are relevant to our discussion\textsuperscript{212} are divided into three categories:

24.2.1 Right to be identified as author or director;

24.2.2 Right to object to derogatory treatment of work;

24.2.3 Right to object to false attribution.

24.3 As we shall see, the moral rights regime is an area where there is a marked difference between linking without frames on the one hand and framing and inlining on the other. As can be gathered from the general category headings listed above, the moral rights essentially regulate how an author’s work is presented. Since a direct hyperlink without framing or inlining is analogous to
putting down one book and picking up another, it is therefore possible, even at this initial stage of the analysis, to discount any possibility of such linking itself breaching an author’s moral rights.²¹³

24.4 The other important point to bear in mind in respect of moral rights is that they are rights held by the author and not by the owner. This will be expected given their genesis in civil law jurisdictions. In such jurisdictions, intellectual property protection derives from a recognition of certain rights inseparable from an individual rather than the promotion of innovation through restriction on copying as is the case under the Anglo-American tradition.²¹⁴

24.5 With digital works on the web, this adds a whole new level of complexity to an area where simply copying has created enough legal controversy. A web page is, as we have already seen, often an online multimedia work spanning many of the traditional copyright categories. If nothing else, just attempting to isolate the author of the page or any particular component will often prove extremely difficult.

²¹² The other category of moral right, which is not relevant for present purposes, is the limited right to privacy for certain photographs and films.
²¹³ Of course the link text or image may imply authorship which is incorrect. For example, the headlines used on the Shetland News site would probably have breached the moral right of the Shetland Times author to be identified as the owner of those headlines. These infringements are not however the result of linking per se but rather of the manner in which the link is made.
²¹⁴ This explains why moral rights are often contrasted with the exclusive economic rights we have looked at above.
Chapter 25

**RIGHT TO BE IDENTIFIED**

25.1 Introduction

25.1.1 Section 94\(^{215}\) of the Act establishes the right of an author or director to be identified as such on the particular terms set out in that section. Section 95 then specifies how exactly that identification is to be made.\(^{216}\)

25.1.2 However, before we look at these sections in detail, the first point to note is that the right to be identified must be asserted for it to apply.\(^{217}\)

25.2 Assertion of Right

25.2.1 The method of asserting that right is set out in section 96\(^{218}\) where, again, we see both the somewhat outdated foundation of copyright in physical media and also the possibilities for inconsistency depending on which category of work a web page falls to be placed in.

25.2.2 The general requirement for assertion of the right to be identified which would apply to a web page is contained in section 96(2)(b) which
requires the assertion to be by *instrument in writing signed by the author or director*. Here we see our first difficulty - how is any assertion in a web page to be *signed*? Will a graphic file comprising the signature be sufficient? Is a digital signature sufficient? Again, New Zealand has fallen behind other countries here.\(^{219}\)

25.2.3 However, if the author cannot get home on that provision, they would then be advised to argue that the web page is an artistic work thereby taking advantage of subsection (3)(b) which is significantly less onerous. The only question with subsection (3)(b) is whether the publication of a web page containing the licence referred to in that subsection is a *public exhibition of a copy made in pursuance of that licence*. There is no definition of the word *exhibition* and it might be argued that a web page is not exhibited in the normal sense of that word which would usually imply an item forming part of a collection of items gathered together.

25.2.4 Failing that, there may be real difficulties in establishing that the right to be identified as an author or director of the web page or its contents has been asserted in accordance with section 96.

25.2.5 Assuming that an assertion can be made, the persons bound by the assertion are listed in section 96(4). Again, some of the provisions (e.g., subsections (c) and (d) which speak of copies coming into the *hands* of a person) are designed for a physical world but they are sufficient to cover notification in cyberspace as well.

25.2.6 There is no particular form of assertion that must be used, however, for an example, see the assertion made at the beginning of this paper on page i.
25.3 Subsistence of the Right

25.3.1 Again, section 94 is a classic example of how the categorisation of a web page into one or other of the categories of work may lead to different results. The section provides a series of conditions which are necessary before the right arises and those conditions differ depending on which category of work is being referred to.

25.3.2 If we categorise the web page as a literary work but excluding any words intended to be sung or spoken with music then section 94(2) will apply.

25.3.3 It is unlikely that subsection (3) (relating to adaptations) or subsection (4) (which relates to solely musical works or literary works consisting of words intended to be sung or spoken with music) will apply to the web page as a whole although they may apply to components.

25.3.4 However, subsection (6), which applies to artistic works, may well apply to the whole web page. In particular, it might be useful to categorise the web page as an artistic work so that the material which would be excluded from the categorisation of a literary work compilation would be included.

25.3.5 Unfortunately, whether classifying the page as an artistic work is advantageous or not will also depend on other factors. The difference between the protections given by section 94(2) (literary works etc) and section 94(6) (artistic works) can be seen if we use the ZZZ site as an example and assume that the work is included in a cable programme. Subsection (6)(b) refers only to a visual image of the work [being] included in a cable programme. It could well be argued that it is not a
visual image of the work which is being included but the work itself and therefore that this subsection does not apply - the right does not arise.

25.3.6 Contrast this with subsection (2) which provides for a situation where the work itself is included in a cable programme. If we assume that a web page provided over a cable programme service is not a visual image of that web page then the only way in which the author can be protected if the web page is classified as an artistic work is to argue that the work is published commercially or exhibited in public under subsection (6)(a).

25.3.7 Commercial publication is defined in section 11 which, despite the reference to commercial, does not require any money to change hands. The definition refers simply to the issue of copies to the public prior to receiving orders for them or to making the work available to the public by means of an electronic retrieval system. The internet would clearly fall within the definition of such a system.

25.3.8 Therefore, it is likely that there will be little problem in establishing the right of identification in respect of a web page.

25.4 Content of the Right

25.4.1 The content of that right is specified in section 95, and, in relation to a web page, essentially requires reasonably prominent identification of the author or director on the web page itself.

25.4.2 If we take this brief summary of the right and apply it to the framing by ABC of the ZZZ and BAA sites, there would not seem to be any difficulty created for ABC in framing the sites. Although any asserted right of identification may be obscured by the frame on the ABC site,
provided the ABC site allows scrolling within the frame, then the user will eventually see the assertion.

25.4.3 This is analogous to an assertion contained in a book (or indeed in this paper) which is, of course, out of sight until the page on which the assertion is printed is turned up. ABC needs to take care that an assertion which is not on the particular framed page is somehow included however, whether with the framed material or on the button which triggers the link.

25.4.4 Similarly with inlining. It is here that ABC would more likely be in breach of the moral rights of the author of the BAA site assuming that the inlined image of the logo which is taken from the BAA site does not carry with it any assertion which appeared on the BAA site. This would be a common occurrence since the assertion may not even be on the same web site page as the image.

25.4.5 The conclusion therefore must be that if an image is to be inlined or a page framed, quite apart from any traditional copyright considerations, any assertion in relation to the authorship of that image or page must also be recognised when the material is viewed through the linker’s web site. Otherwise, there will be an infringement of the author’s moral right to be identified.

25.5 Exceptions re Right to be Identified

25.5.1 The next stage in determining whether there has been an infringement of the right is to check the exceptions in section 97. There are various exceptions linked to or similar to those which apply in relation to copyright set out in Part III of the Act (e.g., fair dealing etc). However,
the more interesting exception, which might be argued to apply to a web page, is that given to computer programs in section 97(2)(a).220

25.5.2 The phrase computer program is not defined in the Act.221 The critical issue is whether a web page is a computer program222 since, if it is, it will not be subject to the moral rights regime.

25.5.3 It is to be hoped that the courts in New Zealand will take a sensible approach and determine that a web page as a total work is not a computer program, otherwise, the benefit of the moral right will be severely eroded in a world where, increasingly, information will be provided by this or similar means.

25.5.4 Finally, section 110223 of the Act must be considered since it seems to indicate that if only part of a web page is copied the moral right may not apply. Section 110 has a hierarchy in terms of the substantiality of the part which is being dealt with and the right to be identified is at the lower end of the hierarchy. Therefore, in order for the moral right in section 94 to apply, it is necessary to show that the \textit{whole or any substantial part of the [web page]} [Emphasis added] is being dealt with.

25.5.5 Again there is potential here for argument however. We have concluded that inlining may constitute an infringement since it will be likely that any assertion of the right to be identified will not be comprised in the link along with the image. The image however is likely to be only a small part of the web page from which it is obtained. And is it arguable that a page itself is merely part of the entire work (the web site) by analogy to a book? They are called web \textit{pages} after all.
25.5.6 In these circumstances it will therefore be to the advantage of the author of the image or page to argue that the image or page itself is an artistic work and therefore that the whole work has been dealt with, bringing the infringement within the parameters of section 110.

215 94. Right to be identified as author or director-
(1) Subject to section 97 of this Act,-
   (a) The author of a literary, dramatic, musical, or artistic work that is a copyright work has the right to be identified as the author of the work; and
   (b) The director of a film that is a copyright work has the right to be identified as the director of the work-
   in the circumstances described in this section, but the right is not infringed unless it has been asserted in accordance with section 96 of this Act.

(2) The author of a literary work (other than words intended to be sung or spoken with music) or a dramatic work has the right to be identified as the author of the work whenever-
   (a) The work is published commercially, performed in public, broadcast, or included in a cable programme; or
   (b) Copies of a film or sound recording including the work are issued to the public.

(3) The author of-
   (a) A literary work (other than words intended to be sung or spoken with music); or
   (b) A dramatic work-
   from which an adaptation is made has the right to be identified as the author of the work from which the adaptation is made whenever any of the events described in subsection (2) of this section occurs in relation to the adaptation of the work.

(4) The author of a musical work, or a literary work consisting of words intended to be sung or spoken with music, has the right to be identified as the author of the work whenever-
   (a) The work is published commercially; or
   (b) Copies of a sound recording of the work are issued to the public; or
   (c) A film whose sound-track includes the work is shown in public; or
   (d) Copies of such a film are issued to the public.

(5) The author of-
   (a) A musical work; or
   (b) A literary work consisting of words intended to be sung or spoken with music-
   from which an adaptation is made has the right to be identified as the author of the work from which the adaptation is made whenever any of the events described in subsection (4) of this section occurs in relation to the adaptation of the work.

(6) The author of an artistic work has the right to be identified as the author of the work whenever-
   (a) The work is published commercially or exhibited in public; or
   (b) A visual image of the work is broadcast or included in a cable programme; or
   (c) A film including a visual image of the work is shown in public; or
   (d) Copies of such a film are issued to the public; or
   (e) In the case of a sculpture, a work of architecture in the form of a building or a model for a building, or a work of artistic craftsmanship, copies of a graphic work representing the work, or of a photograph of the work, are issued to the public.

(7) The author of a work of architecture in the form of a building has the right to be identified as such on the building as constructed or, where more than one building is constructed to the design, on the first to be constructed.

(8) The director of a film has the right to be identified as the director of the film whenever-
   (a) The film is shown in public, broadcast, or included in a cable programme; or
   (b) Copies of the film are issued to the public.
216 95. Content of right to be identified-

(1) The right conferred by section 94 of this Act on an author or director is as follows:

(a) In the case of commercial publication, or the issue to the public of copies of a film
or sound recording, to be identified clearly and reasonably prominently-

(i) In or on each copy published commercially or issued, as the case may be; or

(ii) If identification in or on each copy is not appropriate, in some other
manner likely to bring his or her identity to the attention of a person
acquiring a copy:

(b) In the case of identification on a building, to be identified by appropriate means
visible to persons entering or approaching the building:

(c) In any other case, to be identified clearly and reasonably prominently in a manner
likely to bring his or her identity to the attention of a person seeing or hearing the
performance, exhibition, showing, broadcast, cable programme, graphic work, or
photograph.

(2) For the purposes of subsection (1) of this section, if the author or director, in asserting his
or her right to be identified, specifies a pseudonym, initials, or some other particular form of
identification, that form shall be used, but, in any other case, any reasonable form of
identification may be used.

217 Section 94(1).

96. Right must be asserted-

(1) A person does not infringe the right conferred by section 94 of this Act by failing, in the
circumstances described in that section, to identify the author as the author of the work or to
identify the director as the director of the work, as the case may be, unless the right has been
asserted under this section in such a way as to require that person to so identify the author or
director.

(2) The right may be asserted generally, or in relation to any specified circumstances,-

(a) On an assignment of copyright in the work, by including in the instrument effecting
the assignment a statement that the author or director asserts in relation to that work
his or her right to be identified as the author or director, as the case may be; or

(b) At any time, by instrument in writing signed by the author or director.

(3) The right may be asserted in relation to the public exhibition of an artistic work-

(a) By ensuring that when the author or other first owner of copyright parts with
possession of the original, or of a copy made by him or her or under his or her
direction or control, the author is identified as the author on the original or copy, or
on a frame, mount, or other thing to which it is attached; or

(b) By including in any licence by which the author or other first owner of copyright
authorises the making of copies of the work a statement signed by or on behalf of the
author or other first owner of the copyright that the author asserts his or her right to
be identified as the author in the event of the public exhibition of a copy made in
pursuance of the licence.

(4) The persons bound by an assertion of the right under subsection (2) or subsection (3) of this
section are,-

(a) In the case of an assertion under subsection (2) (a) of this section, the assignee and
anyone claiming through the assignee, whether or not the person claiming through the
assignee has notice of the assertion; and

(b) In the case of an assertion under subsection (2) (b) of this section, anyone to whose
notice the assertion is brought; and

(c) In the case of an assertion under subsection (3) (a) of this section, anyone into
whose hands that original or copy comes, whether or not the identification is still
present or visible; and
(d) In the case of an assertion under subsection (3) (b) of this section, the person to whom the licence is granted and any person into whose hands a copy made in pursuance of the licence comes, whether or not the person has notice of the assertion.

(5) In an action for infringement of the right, the court shall, in considering remedies, take into account any delay in asserting the right.

For example, Germany recently enacted a law regulating public and private key digital signature security.

97. Exceptions to right to be identified-
(1) The right conferred by section 94 of this Act is subject to the exceptions set out in this section.
(2) The right does not apply in relation to-
(a) A computer program…

The rationale for this was apparently that with the rapid development of technology, defining a computer program was thought to be an invitation to having the Act become quickly obsolescent.

If the web page is written entirely in Java, then it may be argued to be a computer program in its entirety with the data comprising images, text etc being inextricably interwoven with the program itself. Therefore, no moral rights for a javacized web page. However, if the web page is written in standard html code, whilst it may still be argued that it is a computer program, since the page itself is coded as a program to work with the browser software on the user’s computer, the stronger position is that that it is the browser software which is the program. The page itself will not run without that browser software (and indeed a javacized page will not do so either) and therefore whilst a web page does bear some similarity to a computer program it is not a program of itself.

110. Application of provisions to parts of works-
(1) The rights conferred by section 94 or section 105 of this Act apply in relation to the whole or any substantial part of a work.
(2) The rights conferred by the following provisions of this Act apply in relation to the whole or any part of a work:
(a) Section 98 (which relates to the right to object to derogatory treatment of a work);
(b) Section 102 (which relates to false attribution of the identity of an author or director);
(c) Section 103 (which relates to a false representation as to literary, dramatic, or musical works);
(d) Section 104 (which relates to false representations as to artistic works).
Chapter 26

DEROGATORY TREATMENT

26.1 If there is one category which might give web site providers real cause for concern then this would be it.

26.2 The derogatory right provisions are similar in structure to the provisions relating to the right to be identified. Although, importantly (and as might be expected), an author or director does not need to assert an objection to their work being treated in a derogatory fashion.

26.3 Again, as with the right to be identified, the right is subject to conditions that are work category dependent, however, there is little doubt that section 99(1)(a)\textsuperscript{224} will cover web pages.

26.4 Therefore, the most difficult question is whether, by framing or inlining, a work has received derogatory treatment.

26.5 The term treatment is defined in section 98(1)(a) as meaning:

\[\text{... any addition to, deletion from, alteration to or adaptation}\textsuperscript{225} \text{ of the work ...} [\text{Emphasis added}]\]
26.6 Without going further, this would appear to be an impossible standard, however, one must also refer to section 98(1)(b) which provides that:

The treatment of a work is derogatory if, whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director...

26.7 This raises a simple question which will no doubt be difficult to answer in relation to the ABC web site. By framing the ZZZ or the BAA site has ABC added, deleted or altered any material from those sites in a manner which is prejudicial to the honour or reputation of either ZZZ or BAA respectively?²²⁶

26.8 This is an issue which has been debated furiously in the US in relation to their category of derivative works. On the one hand there is the argument that in framing a site, no alteration or deletion whatsoever is made and technically this is quite correct. However, on the other hand, many argue that a user will seldom scroll down to the bottom of the framed site where any copyright, licensing, terms and conditions, disclaimers etc would appear and that the frame, in effect, alters the view of the framed site.

26.9 Without that material which is obscured (whether temporarily or permanently) by the frame, it may well be that the information framed could bring the author of the framed site into dishonour or disrepute. For example, in relation to the ZZZ site, if we recall that the price catalogue was viewed in the frame but the terms and conditions were obscured, if those terms and conditions stated that certain items were currently out of stock, then ABC as the author of that site could be brought into disrepute where users acting on that incomplete information arrive at its store and cannot obtain the products in question. Of course, it is possible that the ABC site may not even provide a scrolling device in the frame since all it is intending to do is frame the price list on the ZZZ site.
However, if it is linking to other sites then the lack of a scroll bar would seem counterproductive.

26.10 And what of the advertiser on the ZZZ site whose advertisement is obscured by that of ABC’s advertiser or worse still completely avoided because of the deep linking which ABC undertakes? All of these are potentially derogatory treatments.

26.11 Also, as is well known, browser software comes in many different flavours. Most software will allow web pages to be viewed with or without images. Similarly, screen resolution may be high or low and the size of a screen may vary.

26.12 Therefore, any given web page which is viewed may appear very differently depending on the various alternatives preferred by a particular user. To hold that the framing of a web page is derogatory treatment would tend therefore to suggest that any viewing of a web page which alters it on the user’s screen (as compared to the original) would be derogatory treatment. On a strict interpretation of the derogatory treatment right, this is in fact the case. Obviously, it is unlikely that a user who merely browses a web page would be attacked by the author of that page for doing what the author intended and it is therefore possible that the implied licence we have seen in relation to copying might be extended to the moral rights regime.

26.13 However, there is an argument against the extension of such an implied licence which is that the moral rights regime specifically provides for a waiver of the right to be provided in writing. It is therefore strongly arguable that if there is no such waiver (or licence) in writing then the right applies in full.
26.14 Clearly there are major difficulties if this is the case and the Courts are persuaded to allow full enforcement. One way around this of course is simply for the Courts to set a relatively high threshold of mutilation or distortion that must be present before the right is infringed.

26.15 It is to be hoped that the courts will indeed focus on the nature of the treatment rather than focusing on the alteration aspect since to do so would have extremely detrimental consequences for the use of the web.

26.16 With inlining the position is far clearer. Section 110 indicates that for derogatory treatment to occur the whole or any part of a work may be involved. Because inlining does not enable the remainder of the page where the image is located to be viewed, it must be possible to argue that inlining is an alteration or deletion of material on that web page.

26.17 An analogy would be placing a mat around a painting obscuring the name of the painter and a portion of the painting itself.

26.18 A different aspect of the same issue is where the material contained in frames themselves by virtue of its association with the material framed, has a spill over effect on that material. In other words does it prejudice the author’s reputation because the original material is added to. If that spill over effect is prejudicial to the author of the framed material then it is arguable that that author’s moral right to not have their work treated in a derogatory fashion, has been infringed.

26.19 For example, imagine that the BAA site (at the instigation of its woman president who created the site) champions the cause of women in the building industry. If the ABC site frame contains materials of a sexist nature then a user accessing the BAA site through the ABC site may conclude that there is some
association between them and that the BAA shares the views of ABC. Obviously, this would bring the BAA’s president into disrepute.

26.20 Because of the reality that framing does not technically alter a web page, it seems likely that the argument that the framing site adds to the framed site will prove a marginally simpler alternative in a claim of derogatory treatment.

224 99. Content of right to object to derogatory treatment-
   (1) In the case of a literary, dramatic, or musical work, the right conferred by section 98 (2) of this Act is infringed by a person who-
       (a) Publishes commercially, performs in public, broadcasts, or includes in a cable programme a derogatory treatment of the work;…

225 We have already concluded that ABC does not adapt the ZZZ or BAA web pages. See para 22.4 above.

226 It would seem that the words distortion or mutilation in subsection 98(1)(b) do little more than colour the meaning of the concept of prejudicing the [author’s or director’s] honour or reputation.

227 Section 107 of the Act.
Chapter 27

FALSE ATTRIBUTION

27.1 The right to prevent false attribution is less likely to be at issue with respect to the linking to or framing of a web page.

27.2 That right, which is provided for in sections 102-104 of the Act, stipulates that a person has the right not to have a literary, dramatic, musical or artistic work attributed to him or her as author or a film attributed to him or her as director.

27.3 If we look at our example of the ABC site, in fact, it is ABC’s intention to do just the opposite. If anything, ABC is seeking to have the information on the ZZZ and BAA sites attributed to ABC. Since the advertising, logos and other material in its frame will be likely to emphasise its corporate image, it is unlikely that any of the information framed or linked to will override this. In other words, we would not expect there to be any implication that the material comprising the ABC frame has been authored by either the person who prepared the ZZZ or the BAA sites respectively.

27.4 It is not however inconceivable that the right to object to false attribution could be breached in a framing situation where the frame itself was not delineated and was less aggressive in terms of its presentation. For example, if the colours in the framed material were the same as the frame and if there were no dividing
line between the frame and the framed material, it is possible that it might appear that the material in the frame did emanate from the person the material is shown within the frame. Set out below as Figure Four is a screen shot of The Copyright Website\(^{228}\) as an example of this. There is nothing to suggest that the material framing the article does not emanate from the provider of the article itself.

![Figure Four](image)

**Figure Four:** The typewritten material under the heading *What is a copyright?* is actually being viewed at another site <ftp://ftp.aimnet.com/pub/users/carroll/law/copyright/faq/part2> and is framed by The Copyright Website header and navigation bar. As noted with the screenshots of the TotalNews site at Figures One – Three above, the URL remains that of the framing site.

27.4 Note that the right to object to false attribution does not rely on any concept of derogatory treatment, the simple fact of false attribution is enough.

27.5 The right to object to false attribution does however include a right to prevent false representation. Here again the distinction between the various categories
of work mean that a choice must be made as to whether a web page falls within
section 103\textsuperscript{229} relating to literary, dramatic or musical works or section 104\textsuperscript{230}
relating to artistic works. Of course it is quite conceivable that the web page
may fall into both or that parts of the web page may fall into one or other of
these categories.

27.6 The sections however are very different in what they seek to achieve.

27.7 Section 103 is more closely related to the general false attribution right and
attacks any false representations as to a literary, dramatic or musical work being
adaptations of the author’s work. However, section 104 goes further and is
more akin to the derogatory treatment right.

27.8 Section 104(2) allows the author to prevent any express or implied statement
that an artistic work is the author’s unaltered work if in fact it has been altered
after they parted with possession of that work.

27.9 There are a few difficulties with this:

27.9.1 First, there is the argument as to whether the web page is an artistic work
at all.\textsuperscript{231}

27.9.2 Next, we have the question as to whether the web page (e.g. the ZZZ
web page) has been \emph{altered} by virtue of it being framed by the ABC site.
There is no definition of the word \emph{altered} and it is important to note that
there is no need for the prejudicial treatment which is encompassed in
the derogatory treatment right in section 98 of the Act. It is therefore
likely that the reference to \emph{altered} in this section will be interpreted more
widely than that in section 98. On those grounds, it is more likely that
the framing of the ZZZ site might be said to be an alteration for the purposes of section 104.

27.9.3 The next question is whether in fact there is an express or implied statement that the framed site is unaltered. This could be expected to be a difficult hurdle for the complainant to overcome. In effect, the moral right holder would need to establish that by framing a web page, the framer implicitly (obviously there is no express statement) represents that the framed material is being presented in an unaltered state. If it is held that in fact an alteration has been made then that is simply a function of the framing technology employed on purpose by the framer. It is therefore difficult to see how the framer could be said to have implicitly stated that no such alteration will be or has been made.

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228 Supra note 30.
229 103. False representation as to literary, dramatic, or musical work-
(1) In this section, the term "representation", in relation to a literary, dramatic, or musical work, means an express or implied statement as to the work being an adaptation of a work by a particular author.
(2) A person has the right not to have a literary, dramatic, or musical work falsely represented as being an adaptation of a work of which the person is the author.
(3) The right conferred by subsection (2) of this section is infringed by a person who issues to the public copies of a literary, dramatic, or musical work in or on which there is a false representation, knowing or having reason to believe that the representation is false.
(4) The right conferred by subsection (2) of this section is infringed by a person who performs in public, broadcasts, or includes in a cable programme a literary, dramatic, or musical work, accompanied by a false representation, knowing or having reason to believe that the representation is false.
(5) The right conferred by subsection (2) of this section is infringed by-
   (a) The issue to the public; or
   (b) The public display-
of material containing a false representation in connection with any of the acts mentioned in subsection (3) or subsection (4) of this section.
(6) The right conferred by subsection (2) of this section is infringed by a person who, in the course of a business,-
   (a) Possesses a copy of a literary, dramatic, or musical work in or on which there is a false representation; or
   (b) Sells or lets for hire, offers or exposes for sale or hire, distributes, or exhibits in public a copy of a literary, dramatic, or musical work in or on which there is a false representation,-
knowing, or having reason to believe, that there is such a representation and that the representation is false.
(7) The right conferred by subsection (2) of this section is infringed by a person who does an act described in this section or who authorises another person to do such an act.

104. False representations as to artistic work-

(1) In this section, the term "representation" means an express or implied statement as to a matter referred to in paragraph (a) or paragraph (b) or paragraph (c) of subsection (2) of this section.

(2) The author of an artistic work has the right-

(a) Not to have the work falsely represented as the unaltered work of the author if the work has been altered after the author parted with possession of the work; and

(b) Not to have a copy of a work that has been altered after the author parted with possession of the work falsely represented as a copy of an unaltered work of the author; and

(c) Not to have a copy of an artistic work falsely represented as being a copy made by the author of the artistic work.

(3) The right conferred by subsection (2) of this section is infringed by a person who exhibits in public an artistic work, or a copy of an artistic work, as the case may be, in or on which there is a false representation, knowing or having reason to believe that the representation is false.

(4) The right conferred by subsection (2) of this section is infringed by-

(a) The issue to the public; or

(b) The public display-

of material containing a false representation in connection with any act referred to in subsection (3) of this section.

(5) The right conferred by subsection (2) of this section is infringed by a person who, in the course of a business,-

(a) Possesses an artistic work or a copy of an artistic work, as the case may be, in or on which there is a false representation or when there is a false representation in or on the work or copy; or

(b) Sells or lets for hire, offers or exposes for sale or hire, distributes, or exhibits in public an artistic work or a copy of an artistic work, as the case may be, in or on which there is a false representation or when there is a false representation in or on the work or copy,

knowing or having reason to believe there is such a representation and that the representation is false.

(6) The right conferred by subsection (2) of this section is infringed by a person who does an act described in this section or who authorises another person to do such an act.

See above at para 12.6.
Chapter 28

SUMMARY RE MORAL RIGHTS

28.1 The moral rights regime will trap the unwary linker or framer. In our case, it is likely that ABC would be held to have infringed the moral rights of the authors of both the ZZZ and BAA sites, in particular on the derogatory treatment ground.
Chapter 29

BRIEF SUMMARY OF MAJOR PROBLEMS

29.1 Overview

29.1.1 In the course of the above analysis we have seen a number of areas where the advent of digitisation has stretched the seams of the copyright clothing.\textsuperscript{232}

29.1.2 There are however a couple of areas that do require at least urgent discussion, if not change to the Act. These are:

29.1.2(a) Categorisation of digital works and the flow on effects such categorisation has, particularly in the moral rights area.

29.1.2(b) The level of permanence needed for a copy to be made and allied to this the extent of the implied licence to copy or use information on the web and the incidental copying exception.

29.1.3 In chapter 30 initial thoughts on possible reforms are offered.
232 The tailoring analogy is one that has been prompted in various commentaries by the White Paper’s affinity for it. For example, see para 30.3 and note 240 below.
Chapter 30

SUGGESTIONS FOR REFORM

30.1 Before even considering reform, one does need to deal with the suggestions recognised (but not in the end agreed with) by Arthur Miller that reform is a waste of time because copyright is essentially outdated – …we really are dealing with a sufficiently new wine that it requires new conceptual bottles.\(^\text{233}\)

30.2 On the one hand, the copyright minimalists argue that the new uses of computer technology have given rise to problems in the intellectual property regime which indicate that it is headed for inevitable collapse.\(^\text{234}\)

30.3 Others are comfortable with the position that the current regime has coped with various changes in the past e.g. photography, motion pictures, sound recording, radio, television, photocopying and various other forms of telecommunication\(^\text{235}\) and therefore is able to cope with the changes wrought by cyberspace. This latter group includes those who prepared the CONTU report\(^\text{236}\) and more recently the Information Infrastructure Task force whose White Paper\(^\text{237}\) concluded that the US Copyright Act:\(^\text{238}\)

\[
\ldots \text{is fundamentally adequate and effective. In a few areas, however, it needs to be amended to take a proper account of the current technology. The coat is getting a little tight. There is no need for a new one, but the old one needs a few alterations.}\(^\text{239}\)
\]
30.4 Without such alterations, the White Paper suggests that cyberspace is and would continue to be a legal free-for-all [which] would transform the GII [global information infrastructure] into a veritable copyright Dodge City. As enticing as this concept may seem to some users,\textsuperscript{240} it would hardly encourage creators to enter its confines.\textsuperscript{241}

30.5 It has also been argued that the combination of advances in encryption combined with laws that would make it illegal to attempt to circumvent such encryption methods will eventually render copyright law obsolete.\textsuperscript{242}

30.6 The writer however has no doubt that as quickly as technological advances and encryption techniques are made and developed those who delight in hacking will avoid them notwithstanding any prohibition on doing so.

30.7 Like many aspects of prediction in information technology, science fiction writers also have predicted this. For example, in Greg Bear’s \textit{Eon} where incorporeal beings have been assigned to memory banks, rogue memories battle each other for access to better quality information and in doing so seek to avoid information restrictions.\textsuperscript{243} This may not seem as far-fetched as it sounds when we consider the advances and beginnings of convergence in the fields of electronic and genetic information analysis often referred to as bio-informatics.\textsuperscript{244}

30.8 It is therefore a point of commonality between the two opposing sides of this argument that the current position is unsatisfactory and there does need to be some change. Their reasons (and therefore their solutions) are however very different. For the maximalist/incrementalist, intellectual property laws just need some modification (although there is no doubt argument as to how much); for
the minimalist, the law cannot cope and other methods are necessary. As Barlow remarks:

> whenever there is such a profound divergence between law and social practice, it is not society that adapts. Against the swift tide of custom, ...hanging a few visible scapegoats is so obviously capricious as to only further diminish respect for the law.\textsuperscript{245}

30.9 And yet at times the minimalists also are forced to admit that the law does have value.\textsuperscript{246}

30.10 Therefore, there is merit in looking at reform of our existing copyright regime at least briefly in the problem areas isolated in the last section of this paper:

30.10.1 Categorisation;

30.10.2 Fixation and exceptions to copying.

30.11 **Categorisation**

30.11.1 There would appear to be two possible approaches:

30.11.1(a) A zero based review which says that there is no reason why we should necessarily continue with the now arbitrary distinctions between literary, artistic and musical works etc; or

30.11.1(b) A more conservative *taking up of the hem* to ensure that digital multimedia works such as web pages are adequately and logically covered throughout the Act.
30.11.2 The writer agrees with the conclusions reached in the UK and US that the time may be fast approaching when the centuries old categories of works should be collapsed into just two or three.

30.11.3 Detailed analysis is needed but it would be interesting to see whether some of the Act’s inconsistencies would be removed by a division between:

30.11.3(a) Works that are fixed with some degree of permanence and are able to be perceived (with any human sense) or experienced by human beings.

30.11.3(b) Works that are performed or transmitted live without fixation but which are nonetheless worthy of protection.

30.11.4 Obviously these categorisations are at a level of abstraction that would need fleshing out to make them capable of some certainty in their application. They do however offer the advantage that they depend not on linkages to techniques but instead to the manner in which we interact with information. Hopefully, this would better safeguard such a law against obsolescence in the face of technological advances.

30.11.5 Unfortunately, the writer does not hold out much hope that such a radical review would be likely to be started, let alone passed into law, in the near future and therefore, realistically, it may be better to aim for the achievable – a tune-up of the current Act.
30.11.6 That tune up its is suggested would involve the introduction of
compilations as a separate category of work taking them out from under
the literary work umbrella.

30.11.7 Whether a compilation is dealt with in the same way as a computer
program (particularly in relation to commissioned works and moral
rights) is a policy question but one would expect this to be the case
since the majority of compilations will be digital works.

30.12 Fixation and Exceptions to Copying

30.12.1 All that is needed here is clarification.

30.12.2 First it should be made clear that lodgment into RAM is not of sufficient
permanence to qualify as recording or storing for the purposes of section
2(1) of the Act and is therefore not copying for the purposes of the Act.

30.12.3 Secondly, it should be made clear that the implied licence (allowed by
section 29(1) of the Act and the incidental copying exception in
section 41 cover automatic caching consequent on browsing a web site.

30.12.4 Thirdly, it should be made clear that the time shifting exception in
section 84 of the Act does extend to both automatic caching and
conscious saving of a web page or site for later private, non-commercial
use.

30.12.5 It is tempting to suggest that the first recommendation above should also
be extended to include caching and time shifting. With some reluctance,
the writer has come to the conclusion that this should be resisted. The
fluidity of the distinction between the various forms of capture of web pages would mean, if this approach were to be adopted, that copyright infringement would be difficult if not impossible to police.

30.12.6 Also, since this is a rapidly changing area, to decide that one type of capture is excepted and another not may lead to arbitrary distinctions being drawn in the future.

234 See Barlow, supra note 54 and Boyle – Environmentalism, supra note 3.
235 See Miller, supra note 234 at 982 and Loundy, supra note 140 at 7 & 45-6.
236 Supra note 131.
237 Supra note 5.
238 17 U.S.C.
239 White Paper, supra note 5 at 204.
240 Presumably a reference to the likes of Barlow, Boyle, Samuelson, Litman, the Electronic Frontier Foundation, which can be located at http://www.eff.org/, the Digital Future Coalition at <http://www.dfc.org/> and the Union for the Public Domain at <http://www.public-domain.org/>.
241 White Paper, supra note 4 at 15.
242 For example, see Pamela Samuelson, Will the Copyright Office Be Obsolete in the 21st Century?, (1994) 13 Cardozo The Arts & Ent Law Journal 55 and Loundy (who disagrees with this conclusion) supra note 140 at 8.
244 See the brief discussion of this in the context of intellectual property in Boyle - Environmentalism, supra note 3.
245 Barlow, supra note 54 under the heading From Swords to Writs to Bits.
246 The quote from Boyle – Environmentalism, supra note 3, at the very start of this paper, is a good example of this.
247 Hard copy, electronic delivery etc
248 For example, a law drafted under these categories would more easily capture the developments which must surely follow from current virtual reality products. It is difficult to see how these types of products will be captured within current categories but such products are most certainly deserving of intellectual property protection.
249 Supra notes 106 and 186 and text associated.
250 Supra note 223 and text associated.
251 Supra note 110.
252 Supra note 167.
Chapter 31

CONCLUSION

31.1 Understanding the crucial technical details of, and differences between, linking, framing and inlining, leads to what might at first glance be considered to a surprising result. A linker (whether by href, framed or inlined link) will never be liable as a primary infringer of copyright under the New Zealand Copyright Act 1994 and will only rarely be liable for any secondary infringement.

31.2 However, the advent of moral rights in the Act means that framing and inlining may well breach the right to be identified as author and the right to object to derogatory treatment under the moral rights regime.

31.3 The issues however are far from clear and will certainly result in inconsistent and unfair results depending on how the Court is persuaded to categorise a web page and site. In the UK it has been held under similar legislation that a web page is a cable programme, however, that definition is fraught with difficulty and the holding was sparsely argued and reasoned to say the least.}\footnote{253}
31.4 In order to alleviate some of these difficulties, it would be useful for the Act to be amended:

31.4.1 To provide a separate class of work for compilations (tailored particularly to digital compilations);

31.4.2 To clarify the permanence required for there to be a copy under the Act and the extent of the licence and exceptions applicable to surfing the web.

31.5 All of this is of course predicated on the assumption that the Act is a useful place to impose such rules.

31.6 The writer must admit to having been tempted by the libertarian minimalist view that copyright legislation is no longer a valid tool for this purpose.

31.7 However, having looked at the matter in some detail, the writer is firmly of the view that intellectual property law is the most appropriate boundary fence behind which to defend against information misappropriation. The fence may need a little straightening, but at least it gives some guidance to those who must forage within its confines and safeguards them from the worst depravations of the cyber-anarchists who seem to desire the free range as the new home for all information.

Shetland Times, supra note 37.