


1999

Click Here: Web Links, Trademarks and the First Amendment

Christopher E. Gatewood

Follow this and additional works at: <http://scholarship.richmond.edu/jolt>

 Part of the [First Amendment Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Christopher E. Gatewood, *Click Here: Web Links, Trademarks and the First Amendment*, 5 Rich. J.L. & Tech 12 (1999).

Available at: <http://scholarship.richmond.edu/jolt/vol5/iss3/4>

This Notes & Comments is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Law and Technology by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.



Volume V, Issue 3, Spring 1999

Click Here: Web Links, Trademarks and the First Amendment

Christopher E. Gatewood[*]

Cite As: Christopher E. Gatewood, Note, Click Here: Web Links, Trademarks and the First Amendment, 5 RICH. J.L. & TECH. 12, (Spring 1999) <<http://www.richmond.edu/jolt/v5i3/gatewood.html>>. [**]

I. Introduction

II. First Amendment

III. Trademark

IV. Likely Intellectual Property Difficulties on the Web

V. Exemplary disputes

VI. Proposed Rules

VII. Safe Linking

VIII. Self Help

IX. Conclusion

{1} The World Wide Web has experienced rapid growth during the 1990s, with millions of publishers adding diverse opinions, objectives and page content. The main programming feature that has kept this network of networks from becoming a twisted thicket of web-sites is the hyperlink. These links guide users across the Web by creating connections from page to page and site to site, allowing a reader to follow tangential paths to whatever it is the Web has to offer her. Links provide connections within a site and are also used constantly to

travel from one publisher's site to another. Because the linking system does not require action or permission by the publisher of the link's destination site, that publisher often does not know that a link to his site has been created.

{2} The diversity of the Web's publications and the easy connections that links offer have created a forum for the free exchange of ideas unlike anything that has come before. This free exchange of information has created a robust marketplace of ideas, but businesses whose sites include trademarks or other valuable content can find their intellectual property interests threatened by unwanted links. For these publishers, the First Amendment interests of free discussion and open debate are quickly eclipsed by their concerns of trademark violations or misappropriation of their site's content. The ease and low cost of Web publishing has also led to the proliferation of noncommercial publishers, who are outside the scope of the federal trademark statutes and common law misappropriation claims, since the application of these laws are limited to the conduct of commercial entities.[1]

{3} Congress and some state legislatures have tried to write Net-specific laws to solve the legal challenges provided by the Internet, but these efforts have consistently met untimely ends in the courts. [2] Failed attempts to govern the Internet through these specific laws suggest that the answer to the precedential challenges posed by the Internet is not the creation of a new body of Internet statutes, but rather the careful application of existing law. In the context of Web links, the tension between the First Amendment interests served by linking and the intellectual property interests on the Web can be resolved by careful application of existing law. Beyond that protection, it must remain up to each publisher to either prevent or tolerate unwanted links.

I. Introduction

{4} The number of sites on the World Wide Web has increased very rapidly in recent years. Though a definitive count of the number of sites currently operated on the Web would probably be impossible, one survey estimates 43,230,000 Web hosts as of January 1999.[3] Businesses and private citizens have charged onto the Internet, hoping to take full advantage of the fledgling medium.[4] Pope, politician and pornographer alike are represented online by sites designed to get their messages to the Web-browsing public.[5]

{5} One of the central features of the Web that has contributed to this growth is the ease of navigation provided by hyperlinks, which consist of graphic images or highlighted words in the text of Web documents. [6] By simply selecting a link with his mouse, the Web user is transported to the corresponding place on the Web, whether that is within the site where the link appears or on another site altogether. This linking feature gives Web users the ability to follow their interests easily and quickly from one document to another, shopping the Web's immense marketplace of ideas.[7] This marketplace has turned the Web into a medium which fosters the free exchange of ideas like no other medium before it. In addition, the ease and low cost of global publishing on the Internet allow freedom of speech and of the press to an extent that far outstrips traditional broadcast and print media. In traditional media, content is controlled by a much more limited number of publishers, owners, and editors, all of whom are motivated by the mass market. On the other hand, the Web is comprised of publishers with every conceivable message and motivation, and it is primarily the linking function that allows ready navigation through all of the messages on the Web. As users follow links, they are able to compare the viewpoints of diverse publishers who are only tangentially connected to each other, each participating in this dynamic marketplace of ideas.

{6} When combined with the aggressive strategies of some Web publishers, however, linking has turned Web

presence into a mixed blessing for some 'netizens'. As a result of hyperlinks, many publishers have found protecting their intellectual property on the Web to be a challenge. Linking one Web page to another without permission can lead to legitimate claims of trademark dilution and tarnishment, as well as the common law commercial tort of misappropriation.^[8] American courts have not yet had a chance to shape the law in this area, as the two major disputes of this kind have settled before trial.^[9] The parties in a case from Great Britain settled a similar case while final judgment was pending.^[10]

{7} Some commentators have advocated the creation of a separate "law of the Internet" as a solution to the problems encountered in trying to apply existing law to legal disputes arising in this wildly different context.^[11] This new set of laws is neither necessary nor possible to create. Those that act on the Internet should not be allowed or required to opt out of existing law that governs communications and transactions in the rest of the world simply because they choose to take advantage of the opportunities offered by the medium. The answer, rather, is to devise principled approaches for the application of existing law to commerce and other conduct in cyberspace.

{8} Existing trademark law can be readily applied to relationships between commercial Internet publishers. However, the ease and low cost of publishing on the World Wide Web has brought to the medium many noncommercial publishers, and therefore many links, to which trademark law does not apply as well. For the sake of those publishers and the continued free exchange of information that the Web's linking function serves so well, new lines must be drawn between linking practices which violate intellectual property law and those which will have to be either prevented (without the help of the courts) or simply endured by the commercial publishers who have chosen to join the throngs in cyberspace.

II. First Amendment

{9} The whole of the Internet fosters freedom of speech and of the press by providing a worldwide network for instantaneous communication and publication, and the linking function itself serves the interest of the free exchange of information, enabling users of the World Wide Web to navigate its diverse and dynamic marketplace of ideas. The reasons for the First Amendment's protection of free expression are largely based on the ideas that free and open debate will generate truth, and that only an informed electorate can create an effective democracy. Thomas Jefferson wrote repeatedly on this topic:

{10} In every country where man is free to think and to speak, differences of opinion will arise from difference of perception, and the imperfection of reason; but these differences when permitted, as in this happy country, to purify themselves by free discussion, are but as passing clouds overspreading our land transiently and leaving our horizon more bright and serene.^[12]

{11} Jefferson also stated that: "Nothing but good can result from an exchange of information and opinions between those whose circumstances and morals admit no doubt of the integrity of their views."^[13] Other noted political philosophers have thrown their weight behind the "marketplace of ideas" concept as well, including John Stuart Mill. He conceived of the marketplace as a necessary means of testing the validity of ideas: "[N]o one's opinions deserve the name of knowledge, except so far as he has either had forced upon him by others, or gone through of himself, the same mental process which would have been required of him in carrying on an active controversy with opponents."^[14]

{12} The broad range of topics addressed by the far-flung and unfiltered publishers on the World Wide Web doubtless include many topics Jefferson and Mill never imagined, and the value of which being highly questionable in the context of public policy decision-making. Nevertheless, as government has reached out to regulate more types of conduct, the types of discussion that are relevant to inform the electorate as to the activities and makeup of their government have also expanded greatly. For example, by criminalizing the

importation and interstate transportation of "obscene" and "indecent" materials, [15] Congress creates a valid argument for the value of the discussion of the definitions of "obscene" and "indecent."

{13} In his article, *Free Speech is an Absolute*, Alexander Meiklejohn argues that, "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express." [16] He goes on to argue that many forms of expression lead to the type of "knowledge, intelligence, [and] sensitivity to human values" voters need to inform their decisions. [17] Among these forms of expression, Meiklejohn lists education, philosophy and the sciences, literature and the arts, and public discussion of public issues. [18] Casting the protective net this broadly, it is hard to imagine a subject of discourse, and specifically of Web publishing, the free exchange of which does not require First Amendment protection. [19] The enormous number of sites and publishers on the World Wide Web has created a robust marketplace of ideas that is best (and most often) navigated by the use of hyperlinks. This speaks loudly in favor of some degree of First Amendment protection for links themselves.

{14} A case from the Northern District of Georgia suggests that First Amendment protection should be extended to hyperlinks. [20] The *Miller* opinion came in a case challenging a Georgia law which sought to restrict, *inter alia*, the use of trademarks and trade names on computer networks. The law made it a crime to:

knowingly . . . transmit any data through a computer network . . . if such data uses any . . . trade name, registered trademark, logo, legal or official seal, or copyrighted symbol . . . which would falsely state or imply that such person . . . has permission or is legally authorized to use [it] for such purpose when such permission or authorization has not been obtained. [21]

{15} Such restrictions would severely limit links to commercial sites, since Web publishers would be loathe to explain to judges, who may or may not be familiar with the ways of the Web, exactly what a link does or does not imply about the relationship between the two publishers.

{16} Recognizing the law's chilling effect, the *Miller* court enjoined its enforcement, [22] noting that Congress and the Georgia legislature had "acknowledged the First Amendment problems with banning noncommercial use of trademarks" [23] by restricting the Federal Trademark Dilution Act [24] and the Georgia trademark infringement law [25] to commercial use. [26] The court held that the statute was "particularly harmful because it chills protected expression" [27] and therefore "operates unconstitutionally for a substantial category of the speakers it covers." [28]

{17} The *Miller* court implicitly recognized the right of noncommercial Web publishers to link to the Web sites of others, in the interest of the robust exchange of information which takes place on the Web. [29] The court also noted that a segment of publishers apparently covered by the law - those engaged in educational speech, news or commentary - must be able to freely use trade names and logos in the online world. [30]

{18} Commercial providers of news and commentary occupy a middle ground in the field of trademark and copyright. As favored First Amendment entities, they enjoy a large measure of freedom in their use of names and marks to refer to the subjects of their reporting. [31] but as commercial actors, they are subject to the law of misappropriation and trademark infringement when the plaintiff is a competitor in the news and commentary business. [32] The Georgia statute at issue in *Miller* is illustrative of clumsy legislative attempts to alter existing legal doctrine for use in the online world. The *Miller* court made its skepticism of such law-making explicit: "If [this] act prevents some ill-defined category of fraud or deception not covered by existing laws, defendants do not articulate why they have a compelling interest in preventing that conduct on the [I]nternet but have done nothing to prevent the same practices in the print media." [33] Other examples of failed cyber-legislation include a New York law and Congress' first attempt to restrict indecent materials in cyberspace.

{19} A federal district court in New York enjoined enforcement of section 235.21(3) of New York Penal Law, which sought to punish, by one to four years imprisonment, anyone using a computer to convey harmful sexual materials to minors.^[34] In defining what would be considered harmful to minors, the New York Law followed the holding of *Miller v. California*, where the Supreme Court adopted a three-part definition of obscenity not deserving of First Amendment protection.^[35] The district court held that the state law necessarily reached beyond its borders in a way that violated the Commerce Clause.^[36] The court rested its opinion on the Commerce Clause violation, leaving aside the First Amendment issues in deference to the Supreme Court's pending decision in *Reno v. ACLU*.^[37]

{20} The federal statute at issue in *Reno* is another example of ham-fisted legislation born out of the notion that the Internet's youth and rapid expansion requires the drafting of laws dedicated to its content.^[38] The Communications Decency Act met the same fate as the New York law when the Supreme Court enjoined its enforcement due to Constitutional violations.^[39] The Supreme Court agreed with the plaintiffs' First Amendment challenge, holding that "the CDA ... threatens to torch a large segment of the Internet community"^[40] with its overbroad restrictions on what the Court calls "[t]he dramatic expansion of this new marketplace of ideas."^[41]

III. Trademark

{21} Legislatures need not try to reinvent the wheel in the trademark/hyperlink context, because the existing law of trademarks and unfair competition is fit for application to the new medium as long as the conduct in question involves the commercial use of trademarks. Trademark law protects a business mark only to the extent that it identifies a source of goods or services, and therefore operates to prevent consumer confusion about the source of goods or services as well as to preserve the mark owner's investment in customer goodwill and business reputation. Commercial use of trademarks is defined in the federal Trademark Act, "Lanham Act," as use in commerce to reference goods or services for sale.^[42] Because enforcement of the Lanham Act is limited by the bounds of the Commerce Clause, the Act's reference to use "in commerce" brings with it the luggage of that separate jurisprudence. Under the commerce clause cases, "commerce" is defined broadly, and an action will be found to be noncommercial where it is altogether non-economic and where it will have no substantial impact on interstate commerce if the action is repeated elsewhere.^[43]

{22} In its second attempt to regulate the content of the Internet, Congress takes another tack at defining "commercial" in the Child Online Protection Act ("COPA" or "CDAII") as it seeks to divide users of the Internet into those that are "commercial" and those that are not.^[44] The distinguishing part of Congress' definition characterizes commercial actors on the Web as those "with the objective of earning a profit as a result of such [electronic communication] activities."^[45] This "profit" distinction would seem to distinguish the Web publications of non-profit charitable, advocacy, educational and religious organizations from those entities subject to the law's content regulation.^[46] This is true even though many such organizations seek to generate funds through their Web sites.^[47]

{23} Congress' definition of "commercial" in COPA is at odds with the meaning of "commerce" as it is used in the trademark statutes, where the word is used as a reference to the activity Congress can regulate under its commerce power. Where the COPA definition of what constitutes commerce is determined by profit motive, the Lanham Act instead focuses on the enforcement limits set by the commerce clause on Congress' trademark legislation. Between these two treatments, the Lanham Act's concept of "commerce" will be adopted for the purposes of this discussion. The issue here is, after all, the extent to which Web publishers can rely on traditional trademark claims to protect their intellectual property from unwanted links. Therefore, even though the COPA division of Web publications into commercial and noncommercial communications is conveniently context-specific to this discussion, COPA is Congress' attempt to deal with the prohibition of certain content where it may be accessed by children, and is therefore irrelevant to the intellectual property

law implications of Web links.

IV. Likely Intellectual Property Difficulties on the Web

{24} Several types of trademark and unfair competition claims are likely to recur in link litigation. These include misappropriation, trademark infringement, trademark dilution, and tarnishment.

{25} The common law tort of misappropriation occurs where one commercial actor free rides on the labors of another, adopting a product for its own use without permission. The historic case on misappropriation is *International News Service v. Associated Press*, where the defendant intercepted plaintiff's news and rebroadcast it over its own wire service.^[48] The hyperlink litigation that best fits a misappropriation fact pattern is the case of *Washington Post Co. v. Total News*, where the defendant linked to plaintiffs' news content in such a way that defendant's content remained on the computer screen, "framing" the plaintiffs' content.^[49] The misappropriation claim applies only to commercial actions, just as do the statutory trademark causes of action for infringement and dilution. This is true because common law or state law causes of action that seek to extend intellectual property liability beyond the territory covered by applicable federal statutes are preempted by those statutes.^[50]

{26} Trademark infringement occurs when another entity uses the owner's mark or one that is similar in a way that is likely to cause consumer confusion as to the actual source of goods or services.^[51] A recent example of such infringement on the Web is *Playboy Enterprises, Inc. v. Calvin Designer Label*, where a judge enjoined use of the domain names "www.playboyxxx.com" and "www.playmatealive.com" on defendant's Web sites, finding such use to be an infringement of the plaintiff's marks.^[52]

{27} Dilution of a trademark is the unauthorized use of the mark in any way that diminishes the mark's capacity to denote a single source, whether or not the user is a competitor.^[53] Consumer confusion about the source of goods or services is not an aspect of this violation.^[54] In *Deere & Co. v. MTD Products, Inc.*, for example, the court held that an advertisement making fun of the plaintiff's famous mark reached beyond the permissible realm of comparative advertising and diluted the selling power of the mark.^[55]

{28} One type of dilution is tarnishment, where the defendant's use of the plaintiff's mark attaches a negative association to the mark.^[56] Common defendants in tarnishment suits are those in the pornography business. For example, the court in *Pillsbury Co. v. Milky Way Productions, Inc.* granted injunctive relief to the plaintiff where the defendant included plaintiff's trademarks and advertising jingle with pictures of plaintiff's trade characters engaged in sexual intercourse.^[57]

V. Exemplary Disputes

{29} Recent linking disputes illustrate the tensions between the First Amendment and the free-wheeling, link-loaded nature of the Web on one hand, and the struggle to secure trademark rights on this new medium on the other. Each case involves linking practices beyond the ordinary, plain-text links which are common practice on the Web. Plain-text links are the most prevalent way to link to another part of the Web. These links are generally designated on the Web page by being underlined and in a different color text than the words around them. Links can consist of the name of the other site's publisher, the site's Uniform Resource Locator (URL; for example, "www.yahoo.com"), or any description of where the link leads.

{30} Any graphic image may also be used as a link. The sufficiency and prevalence of plain text linking escaped the court in *Miller*, which implicitly recognized a First Amendment right to link in spite of its erroneous assertion that the use of trademarks, seals, logos, or symbols are themselves necessary "just for the

purpose of enabling the linking system." [58] This factual misstep is significant because a relationship is more likely to be assumed where the link uses the destination site's recognized logo (which is usually protected at trademark law) rather than a plain-text link.

A. Deep Linking

{31} Perhaps the most celebrated linking controversy is that of *Ticketmaster v. Microsoft*, involving Microsoft's "Seattle Sidewalk" site. [59] Seattle Sidewalk is a service of Microsoft that includes local telephone listings, a shopping guide, plenty of revenue-generating advertising, and an entertainment guide. [60] To help its viewers buy tickets for events listed in the entertainment guide, the programmers of Sidewalk linked directly to the corresponding events within Ticketmaster's Website, where tickets can be purchased online. Sidewalk's links bypassed Ticketmaster's home page, entering the site behind Ticketmaster's own event calendars, advertising, and statements about preferred payment methods. [61]

{32} Ticketmaster objected to these "deep links," and sued, alleging misappropriation, trademark dilution, and unfair competition. [62] Ticketmaster claimed that Microsoft's unauthorized links diminished the value of its advertising and linking agreements with other companies, and complained that Microsoft's deep linking practice bypassed advertising on the Ticketmaster site. [63]

{33} This dispute settled before trial, and Microsoft removed the deep links to Ticketmaster's events listings, replacing them with a page of information about buying tickets through Ticketmaster, which includes Ticketmaster's phone number and a plain-text link to "Ticketmaster's external Web site at www.ticketmaster.com." [64] From its end, for several months Ticketmaster disabled even this plain-text, clearly unaffiliated link to its homepage, routing it to a page that read, "This is an unauthorized link and a dead end for Sidewalk." [65] This dead-end page then directs the reader to the same (www.ticketmaster.com) homepage.

{34} Another deep linking case arose in Great Britain, between competing newspapers in the Shetland islands of Scotland. [66] The Shetland News and the Shetland Times each maintained a Web version as well as a print version of their newspapers. [67] In addition to its own stories on the Web, the Shetland News linked to its competitors' stories by use of deep links using verbatim headlines from the Times. [68] The Times successfully obtained an injunction against this type of linking, but no final opinion was issued because the parties settled before final judgment. [69] The settlement allows continued linking by the News, but limits the links to the Times' headline page, and requires thorough notation on the News links that the links lead to Shetland Times stories. [70]

B. Framing

{35} Another linking practice that has led to litigation is called "framing," and happens when a destination site's (or 'linkee's') content is opened within a border maintained by the site doing the linking (or 'linkor'). The URL displayed by the browser does not change, and the linkee's content is diminished in size, which can cause the linkee's advertising to be obscured or miniaturized. Often the linkor will maintain its own paid advertising and site menu on one or several sides of the linkee's content. This practice is problematic for trademark reasons because of the suggestion of a relationship between the two publishers when one appears as a subset of the other. Framers are also susceptible to misappropriation and unfair competition claims, as the practice uses the content generated by the efforts and at the expense of the linkee publisher to the advantage of the framer, without license, payment, or permission.

{36} The most significant framing battle to date, *Washington Post Co. v. Total News*, was settled before trial. [71] Total News operates a Web site that serves as a directory of Web news services including the plaintiffs Washington Post, Entertainment Weekly, Cable News Network, Los Angeles Times, Dow Jones and Reuters.

[72] Total News does not create any news content of its own, but instead maintains links to news providers from its homepage and through a subject matter index.[73] The linking itself did not set the litigation in motion, rather it was the way in which Total News linked to the plaintiffs' content to which they objected.[74] When the Web user selected a news source from the Total News menu, that content would be displayed within a Total News frame, on a smaller scale and with the Total News menu and advertising still visible around the linkee's news copy.[75] The Web user's browser still indicated the URL, or current "Web address", as that of Total News.[76]

{37} The Total News plaintiffs complained that this practice implied a non-existent affiliation, endorsement, or sponsorship agreement with Total News, created consumer confusion, and diluted plaintiffs' trademarks.[77] The settlement agreement allows Total News to continue linking to the plaintiffs' sites, but only by the use of plain text links with no frames.[78] The order also makes the use of any link by Total News revocable by any plaintiff.[79] The settlement terms in this case demonstrate that linking itself is not necessarily a concern among commercial publishers. Instead, linking seems to be an accepted part of life on the Web, and may even be appreciated by the linkee as a means of directing more traffic to its site. Instead, it is the "linking plus" behavior of framing or the misleading use of logos which frustrates the linkee's intellectual property and competitive interests.

{38} Of the six plaintiffs, only one, CNN, remains on Total News' homepage main menu bar.[80] USA Today, Fox News, ABC News, and Yahoo! news, who were not plaintiffs in the suit, have apparently engaged in self-help to combat the framing practice. Currently their sites are programmed to defeat the Total News frame by "kicking out" of it, with some taking the extra step of beginning a separate browser window when readers arrive from a Total News link.[81] One notable exception to this is MSNBC, which appears on the main menu of Total News, and is still framed when linked to from Total News.[82]

{39} Litigation is ongoing in another framing case, that of *Futuredontics, Inc. v. Applied Anagramics, Inc.* [83] Futuredontics is an online dental referral service, which licensed one of its service marks from Applied Anagramics.[84] Anagramics linked its Web site to that of Futuredontics, placing its frame around Futuredontics pages.[85] Futuredontics sued, claiming copyright infringement and unfair competition.[86] So far, Futuredontics has withstood a motion to dismiss, but has failed to get a preliminary injunction against Anagramics' linking practices.[87] Anagramics has both stopped framing and stopped linking to Futuredontics' Web pages.[88]

VI. Proposed Rules

{40} The above cases involve relationships between commercial Web publishers, but the low cost and the ease of Web publication has led to many sites which are operated for personal or non-profit reasons.[89]

{41} It is simple enough to apply the existing intellectual property law of trademark disputes or unfair competition to interactions between commercial entities on the Web. These principles, however, become less clear when they are applied to interactions involving noncommercial entities. Trademark statutes and common law unfair competition doctrine apply to commercial use of a mark.[90] Providers of news and commentary, now prevalent on the World Wide Web, are given special leeway when it comes to trademark dilution claims, even though they are commercial publishers.[91]

{42} Because links are so important to the navigation of the Web, link limitations that ignore the commercial/noncommercial distinction for the sake of protecting intellectual property interests on the Web tread on First Amendment interests in the free exchange of information. In *Reno v. ACLU* and *ACLU v.*

Miller, such proscriptions were rejected as unconstitutional.^[92] In *Reno*, the Court distinguished the Communications Decency Act from earlier laws it had upheld against First Amendment challenges, in part because the Act failed to make the distinction between commercial and noncommercial.^[93] Previously, the Court upheld a New York statute that prohibited selling obscene materials to minors, and it defended this decision in *Reno* on the ground that the law applied only to commercial transactions.^[94] The district court in *Miller* made essentially the same observation, stating that one of its reasons for enjoining enforcement of the Georgia statute was that it prohibited "the use of trade names or logos in non-commercial educational speech, news, and commentary - a prohibition with well-recognized first amendment problems."^[95]

{43} In order to steer clear of such First Amendment problems, careful application of existing rules is necessary in the world of Web linking, because not all Web links operate in the same ways or for the same reasons. Web links can be divided into two categories: 1) those involved in "commerce," and subject to the laws of trademark and unfair competition; and, 2) those not involved in commerce, including the links of noncommercial entities and links from commercial providers of news and commentary to non-competitors.

{44} The appropriate analogies for noncommercial links are footnotes or cross-references, because of the absence of competitive or commercial motivations and the intent to simply provide more information and access to more speakers on a given topic. The permissibility of footnotes and their inability to infringe on intellectual property interests is well established in the copyright context, and the same logic applies to any misappropriation or trademark claims that might arise in the noncommercial links context. West Group, the legal publishing giant, has unsuccessfully challenged citation of its materials, including citation by other commercial entities.^[96] In a 1997 case, West Group was denied copyright protection from citations and from wholesale reproduction of the cases in its reporters by a CD-ROM publisher.^[97] West Group's results suggest that courts are hesitant to offer the protection of intellectual property law to publishers whose work is cited, and in some cases even reproduced, if such citation may be considered "fair use" of the material and does not otherwise violate copyright law.

{45} In *Sony v. Universal City Studios*, the Court found that noncommercial and educational uses of copyrighted works are favored in findings of fair use as a defense to infringement actions.^[98] The Court elaborated somewhat on this finding and the commercial/noncommercial distinction in fair use of copyrighted materials in *Harper & Row v. Nation Enterprises*.^[99] In *Harper & Row*, the Court explained that the force behind this distinction is the fear of free riding, or as the Court put it, "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."^[100] This is the same motivation that drives the federal trademark statutes as well as the common law of misappropriation. Although *Sony* and *Harper & Row* exist in the separate context of copyright, the Court's holdings there lend peripheral support to the permissibility of links by noncommercial or educational Web publishers.

{46} A presumption of a First Amendment right to link is appropriate for noncommercial links. The rules of trademark and unfair competition cannot be applied to these links, and absent such trademark restrictions, noncommercial entities' right to link can not be categorically limited in any principled way.^[101] In order for a misappropriation claim to lie, the challenged link needs to be both commercial and more than a plain-text link.^[102] For example, the pre-litigation deep links to Ticketmaster by Microsoft would rise to the level of link activity actionable in a misappropriation claim; whereas, the link from Microsoft that Ticketmaster is currently blocking would not rise to this level.^[103]

{47} The question then becomes which publishers should be considered noncommercial in the context of Web publishing, therefore enjoying this presumptive right to link. In order to draw a line here, it is necessary to consider the purpose and function of the site where the link appears. Basic considerations are whether the site is one that offers goods or services for sale, advertises goods or services for sale elsewhere, or profits by advertising on its site. Inclusion of one or more of these three factors leads to the conclusion that the site is a commercial one. The absence of these three factors leads to the presumption that the link is a noncommercial

one.^[104] To add clarity to this dichotomy, it is necessary to examine the various intellectual property causes of action in order to determine how existing intellectual property laws ought to be applied to Web links in the contexts of misappropriation, dilution, and infringement.

A. Misappropriation

{48} As discussed above, the tort of misappropriation occurs where one commercial actor adopts a product for its own use without authorization, thereby free riding on the labors of the creator. As we have seen in the *Total News* and *Ticketmaster* cases, this tort is of real concern in the linking context, particularly where the practices of deep linking and framing are used.

{49} However, not all links are equal in this regard, and the misappropriation claim must remain sensitive to context. The parties to the *Total News* and *Ticketmaster* cases were all commercial actors, either publishing information for advertising profits or selling services on the Web. The Web's many noncommercial publishers are distinct from these. Because actions under the federal trademark statutes are limited to acts in a commercial context, common law actions for misappropriation must also be so limited.^[105]

{50} Applying this commercial/noncommercial distinction, noncommercial publishers should be entitled to link in any way they choose without liability for misappropriation (obviously, linking that is defamatory, fraudulent, or otherwise independently actionable would still be liable conduct). Commercial linkers on the other hand, in order to avoid liability for misappropriation, should limit their links to plain-text links to other publishers' home pages.

B. Dilution

{51} The dilution cause of action, including its tarnishment subset, is rooted in the Lanham Act. The statute limits claims to cases where unauthorized use has caused "dilution of the distinctive quality of the mark."

^[106] Any unauthorized use that puts the mark into the public eye may reduce the distinctiveness of the mark, eroding the close link to a particular product that is the mark's value and its purpose for the owner and to the consuming public. Dilution is distinct from trademark infringement, because consumer confusion as to the source of goods or services is not an element of the violation.^[107]

{52} As applied to Web links, an example of dilution would be links consisting of car names leading to the sale of different modems. The car names would be set up to represent the relative speeds of the modems. For example, "the Volvo of the Internet," refers to a modem that is not the fastest but is very reliable, or "the Ferrari Testarossa of Cyberspace," provides a link to the speediest modem the seller offers. Using the goodwill built up by the cars' reputations as a shorthand method for selling modems is dilution. On the other hand, if the car links are used in connection with consumer information, educational materials about cars, or opinions about the cars or about the modems, this activity is excepted from the dilution statute by § 1125 (c) (4)(B) and (C). The statute states that "noncommercial use of a mark" and "all forms of news reporting and news commentary" are not actionable as dilution.^[108]

{53} The same commercial/noncommercial distinction necessary in the misappropriation context is also necessary here. Moreover, the resulting link rule is similar: the noncommercial use of a mark is justified when constructing Web links, but commercial use is still dilution. The dilution statute applies only to the extent that it would in other, more traditional, contexts.

C. Infringement

{54} The federal trademark infringement statute makes clear that a Web link infringes trademarks if it misrepresents the source of any goods or services by using another entity's mark.^[109] For example, if a page's text link refers to "Microsoft products," but the link is to a list of the site publisher's own software for

sale, infringement has taken place and the customer is likely to buy the infringer's software thinking it is buying a Microsoft product. It is clear from this example that the federal infringement statute applies just as well online as off. This activity directed toward buying and selling is commerce by any definition.

{55} The conduct proscribed by the infringement statute is limited to commercial acts, making its application in the realm of Web linking non-problematic in terms of potential application to noncommercial conduct or First Amendment tensions. The statute controls only the use of a mark "in connection with any goods or services . . . in commerce."[\[110\]](#) Any link using a mark simply to refer to another publisher's offerings of ideas, a link that only furthers the free exchange of information without seeking to participate in "E-commerce," simply does not trigger the infringement statute. If the "goods or services" for which the source is misrepresented by a link are less concrete than in the above software example - if it is information offered for free on the Web by a for-profit company - linking to that information does not in itself implicate the "in commerce" requirement of the infringement statute.[\[111\]](#) If such a link is actionable at all, it is on a misappropriation claim where the link is installed by another commercial publisher and the context of the link suggests that the information is produced by the publisher creating the link.

VII. Safe Linking

{56} For commercial linkors wanting to keep their sites well-connected, but avoiding suits by linkees, permission to install a link is the best practice. Where this is not practical or desirable, use of plain-text links instead of logos and symbols of the linkee will be less objectionable to the mark's owner. Also, the designation of these links as "external links," or "unaffiliated sites" will prevent confusion as to affiliation or endorsement of other sites.

{57} A good example of this is Cable News Network's Web news publication, which makes a common practice of this type of contextual insulation. The publication notes in a separate box below its news stories that its links are to "Related sites," and that "External sites are not endorsed by CNN Interactive."[\[112\]](#) Disclaimers or site design practices that prevent confusion as to the source of the material at the end of the link will go a long way toward preventing claims of infringement or misappropriation. However, as trademark dilution does not depend on confusion of sources, care must still be taken by publishers as to how they use marks they do not own.[\[113\]](#) Further, as demonstrated by the *Ticketmaster* and *Shetland Times* link litigation, where the link begins and ends with commercial entities, links to homepages are not as troublesome as those to internal pages.[\[114\]](#)

VIII. Self Help

{58} The very nature of the Internet is such that a publisher's presence exposes it to links from other publishers, even where links are not desired or invited. It is simply the nature of the beast; it is what makes the Web the Web. Therefore, Web publishers will have to endure linking by news media, commentators, and commercial entities; the courts will not step in absent something more than linking by itself.

{59} A lack of remedies in the courtroom is not the same as a lack of remedies for Web publishers, however, and several options are available as means of protecting Web sites from the unwanted links of others. One example is the link-blocking activity Ticketmaster uses to simply route the unwanted link to a dead end page and instruct the would-be site visitor from there.

{60} Web publishers can defeat unwanted frames by including simple programming code that opens a site in a new browser window when the site is accessed by any external link. Deep links can be defeated by rerouting all external links to a publisher's homepage or by using a program that changes the URLs of a site's internal

pages at certain intervals so that external links are unable to find the internal pages.

{61} If a self-help suggestion seems like a suggestion that the legal system abdicate its responsibility to govern on the online frontier, note that intellectual property remedies as a whole operate on a self-help basis. [115] In the area of trademark rights, for example, failure to defend one's own rights results in an abandonment of one's mark to the public domain. [116]

{62} The words "aspirin," "cellophane," and "thermos," for example, began as trademarks but were absorbed into the English language with proprietary rights for none when the owners did not protect their interests in these marks. [117]

{63} The trademark statute forbidding infringement and dilution uses injunctions as its enforcement mechanism against use or liability in a "civil action by any person who believes that he or she is or is likely to be damaged by such act." [118] Enforcement of trademark and misappropriation claims on the World Wide Web presents no compelling reason to introduce government enforcement where self-help and private litigation has always been the enforcement mechanism. [119]

IX. Conclusion

{64} It must remain up to the mark owner to protect its trademark and other intellectual property interests on the Internet, just as it would in any other business activity. The courts should not hear commercial entities' complaints about the free-linking Web climate in the absence of some other activity that violates established intellectual property law. These publishers must have known when they stepped into cyberspace that hyperlinks are an integral part of the medium. The failed attempts of state and federal legislators to restrict the free flow of ideas (from even unsympathetic Web publishers [120] and the hostility of some courts regarding the creation of apparently redundant laws for the sake of the Internet [121] suggest that commercial Web publishers are left with existing law and their own enforcement efforts to protect their intellectual property on the Web.

{65} This is as it should be. The redundant networks of the Internet, originally engineered so that the network might withstand a nuclear war, have made its rapid growth possible. The Web's structure allows for host computers to participate from almost every nation on the globe, [122] and this flexibility contributes to its content diversity and to access for all kinds of publishers. While useful to the structure of the medium, this redundancy is unnecessary and unhelpful within the statutes of the United States.

{66} The Internet and the World Wide Web are certainly different from any other communications media. Some have even suggested that cyberspace should operate as its own jurisdiction with its own laws. [123] While the novelty and the expansive nature of the Internet provide a challenge to the application of many existing laws, it is merely another communications medium. All of its users exist in real time and space, and even though their actions play out on this disembodied global network, their actions are no less subject to the laws of their physical jurisdictions (nation and state) because they are communicating through a medium on which traditional notions of geography do not apply.

{67} As this discussion suggests, new law is not the solution to the difficulties the Internet causes in the application of existing law. The solution is the principled application of existing law by the parties, the attorneys, and the courts. In the context of hyperlinks on the World Wide Web, the solution to application of trademark and misappropriation doctrine is the principled division of the actors into categories relative to

existing law. Once this is done, it is up to Web publishers themselves to engage in creative self-help to protect their intellectual property where the courts cannot.

[*] J.D. candidate 2000, The University of Virginia School of Law. The author would like to thank Professor Lillian BeVier for her helpful comments on an earlier draft.

[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Christopher E. Gatewood, Note, Click Here: Web Links, Trademarks and the First Amendment, 5 RICH. J.L. & TECH. 12, (Spring 1999), at <http://www.richmond.edu/jolt/v5i3/gatewood.html>.

[1] See *infra* note 50 and accompanying text.

[2] See *ACLU v. Reno*, 521 U.S. 844 (1997); *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

[3] See *Internet Domain Survey, January 1999* (visited Mar. 1, 1999) <<http://www.nw.com/zone/WWW/report.html>>. The surveyors, Network Wizards, define "host" loosely, as a computer that is part of the Internet. In terms of the worldwide Web, this definition means that sites with the same major domain names are on the same host. For example, the University of Virginia's home page, <<http://www.virginia.edu>>, and <<http://www.virginia.edu/topnews/IUVA.html>> are on the same host, but <<http://virgo.lib.virginia.edu/cgi-local/vg.pl>> and <<http://www.law.virginia.edu>> are on different hosts than the university's home page.

[4] A detailed history of the Internet is available at *Reno*, 521 U.S. at 849-54.

[5] See *The Pope & the Papacy* (visited Mar. 1, 1999) <<http://www.catholic-pages.com/pope/index.htm>>, a state legislator's Web offerings at <<http://www.jimmcgee.com>>, and Larry Flynt and company's presence at <<http://www.hustler.com>>.

[6] The prevalence of link-browsing as a means of navigating the Web was noted by the Supreme Court, themselves apparent Web neophytes, in *Reno*: "Users generally explore a given Web page, or move to another, by clicking a computer 'mouse' on one of the page's icons or links." *Reno*, 521 U.S. at 852.

[7] Another means of navigating the Web is through the use of search engines, which generate a list of plain-text links to sites dealing with a requested topic.

[8] See *Ticketmaster v. Microsoft*, No. 97-3055 (C.D. Cal. 1997; *Washington Post Co. v. Total News Inc.*, 97 Civ. 1190 (S.D.N.Y. 1997).

[9] See *Ticketmaster*, No. 97-3055; *Washington Post*, 97 Civ. 1190.

[10] See *Shetland Times Ltd. v. Wills*, [1997] FSR 604, 1997 SLT 669 (1996).

[11] See David R. Johnson and David Post, Symposium, *Surveying Law and Borders: The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367 (1996).

[12] Thomas Jefferson, *Letter to Benjamin Waring, 1801*, in 10 *The Writings of Thomas Jefferson*, Memorial

Edition 235 (1904).

[13] Thomas Jefferson, *Letter to Elbridge Gerry, 1797*, in 9 *The Writings of Thomas Jefferson* 385.

[14] John Stuart Mill, *On Liberty* 82 (Legal Classics Library ed., Legal Classics 1992) (1859).

[15] *See* 18 U.S.C. § 1462 (1998).

[16] Alexander Meiklejohn, *Free Speech Is an Absolute*, 1961 *Sup. Ct. Rev.* 245, 255.

[17] *Id.* at 256.

[18] *See id.* at 257.

[19] The possible exception here is Web-based obscenity, but as legislators continue to reach out with attempts to regulate content on the Internet, a case can be made that content that may or may not be covered by such regulation serves a purpose in the continuing public discussion of this issue.

[20] *See* *ACLU v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997).

[21] *Id.* at 1230 (quoting Ga. Code Ann. § 16-9-93.1).

[22] *See id.* at 1233.

[23] *Id.* at n.6.

[24] Federal trademark law is applicable to "use in commerce," and makes "noncommercial use of a mark" unactionable for claims of infringement or dilution. Lanham Act § 43(a) and (c)(4)(B), 15 U.S.C. § 1125(a), (c)(4)(B) (1998).

[25] The Georgia statute defines the forbidden use of registered marks as use in connection with sale, advertising, or distribution of goods or services. *See* Ga. Code Ann. § 10-1-450 (1998).

[26] *See* *Miller*, 977 F. Supp. at 1234; *ACLU v. Miller*, 1997 U.S. Dist. LEXIS 14972 (N.D. Ga. Aug. 7, 1997) (later opinion making injunction permanent).

[27] *Miller*, 977 F. Supp. at 1234.

[28] *Id.* at 1233.

[29] *See id.* at 1234.

[30] *See id.* Similarly, the federal trademark dilution statute precludes liability of news and commentary providers for their use of other entities' trademarks in their reporting. Lanham Act § 43(c)(4)(C), 15 U.S.C. § 1125(c)(4)(C) (1998).

[31] *See* Lanham Act § 43(c)(4)(C), 15 U.S.C. § 1125(c)(4)(C) (1998).

[32] *See* *Associated Press v. International News Serv.*, 248 U.S. 215 (1918); *see also* *Washington Post Co. v. Total News*, 97 Civ. 1190 (PKL) (S.D.N.Y. 1997).

[33] *Miller*, 977 F. Supp. at 1235.

[34] See *American Library Ass'n v. Pataki*, 969 F. Supp.160 (S.D.N.Y. 1997).

[35] See *Miller v. California*, 413 U.S. 15 (1973). The New York version of the three factors defined "harmful to minors" as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (a) Considered as a whole, appeals to the prurient interest in sex of minors; and (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors." *American Library Ass'n*, 969 F. Supp. at 163 (quoting New York Penal Law § 235.20(6)).

[36] U.S. Const. art. I, § 8, cl. 3; see *American Library Ass'n*, 969 F. Supp.at 183.

[37] See *American Library Ass'n*, 969 F. Supp. at 183.

[38] See *Reno v. ACLU*, 521 U.S. 844, 858 n.24 (1997).

[39] *Id.* at 885.

[40] *Id.* at 882.

[41] *Id.* at 885.

[42] See Lanham Act §§ 41, 43, 15 U.S.C. §§ 1125, 1127 (1998).

[43] See *United States v. Lopez*, 514 U.S. 549 (1995) (defining the limits of Congress' commerce power).

[44] 47 U.S.C. § 231 (1998). Congress defines those communicating for "commercial purposes," and "engaged in the business" of making communications via the Internet at 47 U.S.C. § 231 (e)(2). Section 231 (e)(2)(A) defines "commercial purposes" as "engaged in the business of making such communications." Section 231(e)(2)(B) defines those "engaged in the business" as:

... the person who makes a communication, or offers to make a communication, by means of the World Wide Web ... [who] devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." 47 U.S.C. § 231(e)(2)(B).

[45] *Id.* § 231(e)(2)(B).

[46] A U.S. district court in Philadelphia granted a temporary restraining order against the restrictions on expression included in COPA, finding a likelihood of success on the merits in the plaintiffs' claims that the Act "violates the First Amendment rights of adults." *ACLU v. Reno*, No. CIV.A.98-5591, 1998 WL 813423, at *2 (E.D. Pa. Nov. 23, 1998).

[47] See, e.g., *American Red Cross - Donate Now* (visited Apr. 6, 1999) <<http://www.redcross.org/donate/donate-now.html>>; *Presbyterian Church (U.S.A.): Mission Funding* (last modified July 31, 1998) <<http://www.pcusa.org/missionfunding/sections/support/asmeco/projlist.htm>>.

[48] See *International News Serv. v. Associated Press*, 248 U.S. 215 (1918).

[49] See *infra* Part V.B.

[50] See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (holding that a Florida statute which prohibited the use of a certain method of duplicating unpatented boat hulls was pre-empted, under the supremacy clause, by the federal patent system).

[51] See Lanham Act § 32, 15 U.S.C. § 1114 (1998) (defining liable infringement as the use in commerce of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark ... [if] likely to cause confusion, or to cause mistake, or to deceive").

[52] *Playboy Enters., Inc. v. Calvin Designer Label*, 985 F. Supp. 1220 (N.D. Cal. 1997).

[53] See Lanham Act § 45, 15 U.S.C. § 1127 (1998) (defining dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services," regardless of business competition between the parties or likelihood of consumer confusion or deception).

[54] See Lanham Act § 43(c), 15 U.S.C. § 1125(c) (1998).

[55] 41 F.3d 39 (2d Cir. 1994).

[56] See generally *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497 (2d Cir. 1996) (holding that the name "Spa'am" for a wild boar puppet character did not tarnish the plaintiff's mark).

[57] 215 U.S.P.Q. 124 (N.D. Ga. 1981); *but cf.* *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987) (reversing injunction against the publication of an erotic parody of plaintiff's catalogue).

[58] *ACLU v. Miller*, 977 F. Supp. 1228, 1233 n.5 (N.D. Ga. 1997).

[59] *Ticketmaster v. Microsoft*, No. 97-3055 (C.D. Cal. 1997).

[60] See *Sidewalk Seattle* (visited Feb. 25, 1999) <<http://seattle.sidewalk.com>>.

[61] See Complaint, *Ticketmaster v. Microsoft*, No. 97-3055 (C.D. Cal. May 12, 1997) <<http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>>.

[62] See *id.*

[63] See *id.*

[64] *Sidewalk Seattle: Ticketmaster Northwest* (visited Feb. 25, 1999) <<http://seattle.sidewalk.com/detail/12170>>.

[65] *click here to visit Ticketmaster USA* (visited Feb. 25, 1999) <<http://ticketing.ticketmaster.com/restricted/index.html>>

[66] See *Shetland Times, Ltd. v. Wills*, [1997] FSR 604, 1997 SLT 669 (1996).

[67] See *id.*

[68] See *id.*

[69] See *Duncan Campbell, Computing and the Net: Shetland showdown Duncan Campbell on a good day in court for the Web*, *The Guardian*, Nov. 13, 1997, at 7.

[70] See *id.*

[71] See Stipulation and Order of Settlement and Dismissal, *Washington Post Co. v. Total News Inc.*, 97 Civ. 1190 (PKL) (S.D.N.Y. 1997), available at <<http://www.ljx.com/internet/totalse.html>> [hereinafter Washington Post Stipulation].

[72] See *id.*

[73] Total News still does business in this way. See *Total News: All the News, on the Net, All the Time* (visited Feb. 25, 1999) <<http://www.TotalNews.com>> [hereinafter Total News Homepage].

[74] See Complaint, *Washington Post v. Total News*, 97 Civ. 1190 (PKL) (S.D.N.Y. 1997) paras. 30-76, available at <<http://www.ljx.com/internet/complain.html>> [hereinafter Washington Post Complaint]; see also Washington Post Stipulation, *supra* note 71, paras. 3 and 4.

[75] See Total News Homepage, *supra* note 73.

[76] See *id.*

[77] See Washington Post Complaint, *supra* note 74.

[78] See Washington Post Stipulation, *supra* note 71.

[79] See *id.*

[80] See Total News Homepage, *supra* note 73.

[81] See *id.*

[82] See *id.*

[83] 45 U.S.P.Q.2d (BNA) 2005 (C.D. Cal. 1998).

[84] See *id.* at 2008.

[85] See *id.* at 2009.

[86] See *id.* at 2008.

[87] See *id.* at 2010-11.

[88] See *Welcome to Applied Anagramics' 1-800-DENTIST* (visited Feb. 25, 1999) <<http://www.appliedanagramics.com>>.

[89] E.g. *Christopher Gatewood's Homepage* (visited Mar. 1, 1999) <<http://www.people.virginia.edu/~ceg4y>>; *Habitat for Humanity International* (visited Mar. 1, 1999) <<http://www.habitat.org>> (exemplifying sites maintained by individual students or by non-profit groups).

[90] See 15 U.S.C. § 1125(a)(1), (c)(4)(A) (1998). See also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (suggesting misappropriation claims are limited by preemption concerns to the commercial context as well).

[91] See 15 U.S.C. § 1125(c)(4)(C) (1998).

[92] See *Reno v. ACLU*, 521 U.S. 844, 896-97 (1997); *ACLU v. Miller*, 977 F. Supp 1228, 1235 (N.D. Ga.

1997).

[93] *See Reno*, 521 U.S. at 877.

[94] *See id.* at 864-65 (citing *Ginsberg v. New York*, 390 U.S. 629, 636 (1968)).

[95] *Miller*, 977 F. Supp. at 1233.

[96] *See Matthew Bender & Co. v. West Publishing Co.*, 42 U.S.P.Q.2D (BNA) 1930 (S.D.N.Y. 1997).

[97] *See id.*

[98] *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[99] *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

[100] *Id.* at 562 (referring to *Roy Export Co. Establishment v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980)).

[101] *See* 15 U.S.C. § 1125(a)(1), (c)(4)(A) (1998). *See also* 15 U.S.C. § 1125(c)(4)(C) (1998); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

[102] *See Bonito Boats*, 489 U.S. 141.

[103] *See Sidewalk Seattle: Ticketmaster Northwest* (visited Feb. 25, 1999) <<http://seattle.sidewalk.com/detail/12170>>.

[104] *See United States v. Lopez*, 514 U.S. 549 (1995) (defining the limits of Congress' commerce power).

[105] *See supra* note 50 and accompanying text.

[106] 15 U.S.C. § 1125(c)(1) (1998).

[107] *See id.* § 1125 (c) (1998).

[108] *Id.* § 1125(c)(4)(B), (c)(4)(C) (1998).

[109] *See id.* § 1125(a)(1)(B) (1998).

[110] *Id.* § 1125(a)(1) (1998).

[111] *See id.*

[112] *CNN Interactive* (visited March 2, 1999) <<http://www.cnn.com>>.

[113] *See* 15 U.S.C. § 1125(c) (1998).

[114] *See supra* Part V.A.

[115] *See, e.g.*, 15 U.S.C. §§ 1051-1127 (1998).

[116] *See id.* § 1127. Section 1127 provides that:

A mark shall be deemed to be "abandoned" if . . . [A]ny course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services or in connection with which it is used or otherwise to lose its significance as a mark.

Id.

[117] *See* Bayer Co. v. United Drug Co., 272 F. 505 (S.D.N.Y. 1921) (holding that the word "aspirin" had passed into the public domain); DuPont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75 (2d Cir. 1936) (holding that the public use of "cellophane" created generic-ness, and former mark owner lost trademark rights); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963) (holding that although the word "thermos" was invented by plaintiff to describe vacuum bottle, wide-spread use deprived plaintiff of trademark rights).

[118] 15 U.S.C. § 1125(a)(1)(B) (1998).

[119] *Cf.* ACLU v. Miller, 977 F. Supp. 1228, 1235 (N.D. Ga. 1997) (noting that a substantial threat of irreparable injury would be a compelling reason to supplant traditional self-help).

[120] *See* Reno v. ACLU, 521 U.S. 844 (1997) (pornographers subject to the Communications Decency Act); Miller, 977 F. Supp. 1228 (anonymous 'spammers' in Georgia); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (those conveying sexual materials to children).

[121] *See* Miller, 977 F. Supp. at 1235 (1997).

[122] One study places the number of connected countries at 195, with only 42 unconnected countries worldwide. *See* Larry Landweber, *International Connectivity: Version 16* (June 15, 1997) <ftp://ftp.cs.wisc.edu/connectivity_table/Connectivity_Table.text>. A world map of the study's results is also available. *See* *Connectivity Map* (June 15, 1997) <ftp://ftp.cs.wisc.edu/connectivity_table/Connectivity_Map.color.bmp>.

[123] David R. Johnson and David Post, *Surveying Law and Borders*, 48 Stan. L. Rev. 1367 (1996).