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Note

“What a Tangled Web We Weave, When First We Practice to Deceive”*: Frames, Hyperlinks, Metatags, and Unfair Competition on the World Wide Web.

by
SHELBY CLARK**

Introduction

The Internet and the World Wide Web have become ubiquitous, particularly for those, such as lawyers, who perform large amounts of research. As they have grown and taken on new roles, these new media have begun to shape, and be shaped by, many aspects of the law. The usefulness of copyright and traditional trademark law in regulating Internet issues has generated much debate and scholarly literature.¹ While occasionally mentioned, however,² unfair competition doctrines have received relatively little attention, particularly with regard to some of the newer problems emerging on the World Wide Web (“the Web”). This Note explores the effectiveness of unfair competition in theory and in practice in

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1. See, e.g., Michael Melton, *International Cyberspace Licensing Perils*, 496 *PLI/PAT* 95 (1997); David W. Maher, *A Cyberspace Perspective on Governance, Standards, and Control: Trademark Law on the Internet—Will It Scale? The Challenge to Develop International Trademark Law*, 16 *J. MARSHALL J. COMPUTER & INFO. L.* 3 (1997); Neal J. Friedman & Kevin Siebert, *The Name Is Not Always the Same*, 20 *SEATTLE U. L. REV.* 631 (1997).

2. See, e.g., Mark B.V. Partridge, *A Review of Recent Trademark and Unfair Competition Cases in the U.S.*, 38 *IDEA* 5-7 (1997).

promoting the best interests of the Web, its users, and content providers, especially regarding the legal issues raised by three Web-page programming techniques: frames, hyperlinks, and metatags.

Part I of this Note discusses the general principles underlying the World Wide Web, and in particular, three programming techniques that take advantage of these principles: hyperlinks, metatags, and frames. Part II explores legal issues that have arisen, or are likely to arise, regarding the arguable misuse of these three techniques. Part III examines unfair competition law's potential for addressing these legal issues: to what extent does this body of law create a cause of action when these techniques are used, or misused? This section is divided into four major categories of unfair competition law: deceptive marketing, commercial disparagement, misappropriation, and trademark dilution. Within each of these categories, the Note considers its application to each of the programming techniques at issue. Part IV discusses the implications for the World Wide Web of applying unfair competition law as discussed here. Part V summarizes, draws conclusions, and makes recommendations.

I. Current Technology: An Overview

The Web, at its simplest, is a portion of the Internet characterized by hyperlinks.³ A hyperlink is text or some other screen element, such as an image, that when clicked on with a mouse pointer, opens another electronic document. The element to be clicked on is "linked" to the desired document with special programming and the electronic address of that document; this address can identify any document on any server computer that is connected to the Internet. Hyperlinked text (text that is to be clicked on, also known as *hypertext*) is usually colored differently than surrounding text, or underlined, or both. A mouse pointer moved over a hyperlinked element changes form, e.g. from an arrow to a hand with one finger extended, to indicate that clicking on this element will activate a hyperlink.

Physicist Tim Berners-Lee first created hypertext in 1992 in an effort to create an information structure corresponding better to the brain; since then, hypermedia has grown to include sounds and images,

3. See JERRY HONEYCUTT ET. AL., SPECIAL EDITION USING THE INTERNET 14 (4th ed. 1998); the Web has been called "a medium whose very existence and viability is defined by its hyperlinking capabilities." David Post, *The Link to Liability*, THE AMERICAN LAWYER, July-Aug. 1997, at 99, 100 (arguing that disparate strands of the law already deal with hyperlinking concepts but that courts will have trouble uniting them).

including videos.⁴ The Web has grown spectacularly,⁵ to the point that it dominates popular conceptions of the Internet.⁶

Crucial to the Web's development has been the emergence of "web pages," which in practice are the primary documents, both static and interactive, linked together to form the Web.⁷ Each has a unique electronic address, technically called a Universal Resource Locator code, or URL. Most web-accessible documents have a URL that starts with "http://www." Authors create web pages using hypertext mark-up language ("HTML").⁸

Traditional and new techniques alike seek to make these pages as interesting and useful as possible. The quintessential web programming technique is the hyperlink, or link,⁹ which essentially acts as an address or a pointer toward a particular electronic location. Clicking on a link sends a message to that address. The computer where the target document resides responds by sending the document in question to the user's computer terminal. This has been analogized to finding a book listed in a card catalog and having the librarian retrieve it, or to calling a telephone number and listening to the answering machine's message.¹⁰ Ordinarily, any page can be linked to without its operator's consent, just as anyone can call any telephone number or request any book appearing in a catalog. However, some web-page operators have complained – and occasionally filed suit – because of links from other pages with which they do not want to be associated, or because the links jump past the operator's "home page" and go directly to the desired page within the web site.¹¹ These "deep links" can bypass legal or commercial information on the home page, often negating the operator's purpose in hosting pages. Simple

4. See HONEYCUTT, *supra* note 3, at 14-15.

5. One study reported a growth rate in 1993 of 340,000 percent. *See id.* at 15.

6. *See id.*

7. *See id.* at 21.

8. *See id.* at 142 (describing web pages as hypermedia documents), 144 (giving "HTML document" as an alternative, and possibly more precise, name for "web page").

9. "The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location." *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

10. *See* Matt Jackson, *Linking Copyright to Homepages*, 49 FED. COMM. L.J. 731, 749 (1997).

11. Commercial web sites typically have multiple "pages." The initial page that the web site owner intends most users to encounter is called the "home page," and may contain important disclaimers or other legal information. More important to most site owners, these pages often contain much of the advertising that the site user is supposed to encounter, and thus generate the bulk of the site's revenues. *See, e.g.*, HONEYCUTT, *supra* note 3, p. 145; Robert C. Scheinfeld and Parker H. Bagley, *Emerging Issues for the Internet*, N.Y.L.J., Nov. 26, 1997, at 3.

hyperlink lawsuits have been filed in England¹² and New Zealand,¹³ and several "deep" hyperlink cases have been brought in the United States¹⁴ and overseas.¹⁵

Another essential web programming technique is the use of HTML tags, which specify how to format text (e.g., boldface), or cause the web browser¹⁶ to display an image, as well as creating links to other documents.¹⁷ "Metatags" are HTML tags used in the header of a web page to provide information to web browsers and other programs; they do not ordinarily appear to the person using a browser to view the page.¹⁸ Often those searching for particular information on the Web use public or commercial search engines, which automatically browse through the Internet compiling tables of which information may be found where.¹⁹ Search engine programs determine web pages' relevance to a particular search according to the text appearing on each page, and use proprietary algorithms to rank pages according to how often the search word or phrase appears and where on the page it appears.²⁰ Many of the most-used search engines also examine text in the metatags. Therefore, web-page authors often use metatags to describe the page's true purpose and intent, which may not be obvious from ordinary search criteria.²¹ Search engine algorithms may also assign greater weight to metatag text because they do not distinguish it from the ordinary text of the page, and because it appears at the beginning.²² Thus, text in the metatags, which most users never see, can alter the results returned by search engines.

Some web-page authors take advantage of this situation to make their pages seem more relevant to a search, so it ranks higher in the list of pages given to the searching person. One way to do this is to

12. See <<http://www.users.globalnet.co.uk/~dlheb/legal1.htm>> (visited Feb. 27, 1998).

13. See Aardvark #36, 25 Nov. 1996, <<http://www.aardvark.co.nz/av1125.htm>> (visited Feb. 27, 1998).

14. See *Ticketmaster Corp. v. Microsoft Corp.*, No. 97 Civ. 3055 (C.D. Cal. filed April 28, 1997).

15. See, e.g., *Shetland Times, Ltd. v. Wills*, [1997] F.S.R. 604 (Scot. Oct. 24, 1996) (order granting interim interdict).

16. Web browsers, programs capable of displaying web pages, are the usual means of using the Web; well-known examples include Netscape Navigator and Microsoft Internet Explorer.

17. See HONEYCUTT, *supra* note 3, at 143.

18. See Marcelo Halpern, *Meta-Tags: Effective Marketing or Unfair Competition?*, CYBERSPACE LAWYER, Oct. 1997, at 2, 3. Most web browsers enable users to switch to a display showing HTML tags as well as the normally visible text.

19. See *id.*

20. See *id.*

21. See Martin J. Elgison and James M. Jordan III, *Trademark Cases Arise from Meta-Tags, Frames*, THE NAT'L L. J., Oct. 20, 1997, at C6, C7.

22. See Halpern, *supra* note 18, at 3.

simply insert likely search-words repeatedly in the metatag. To eliminate or reduce that tactic's effectiveness, some search engines ignore word repetitions past a certain number, or drop the page from consideration altogether.²³ Nevertheless, use or abuse of metatags underlies several recent cases²⁴ involving such claims as trademark infringement, trademark dilution, and unfair competition.²⁵

Finally, a newer technology called "frames" enables web page authors to build in a link that points to another page, often a third party's, and display it in a portion of the first page. The framed page appears in a window, smaller than (and inside) the one that displays the browser. Usually the frame is scrollable, and it operates independently of other displays within the browser.

Often the framed web pages are meant to be viewed that way,²⁶ but sometimes they were meant to be occupy the browser's full display. Frames can be useful to, e.g., view subordinate documents while keeping a table of contents available,²⁷ but they can also have presentation effects that the operator of the framed page considers deleterious. For example, the frame may cut off content or advertising of the framed page, surrounding it instead with the first page's advertising.²⁸ The user may not be aware that the framed page belongs to a third party, or even that it is another page being framed by the first.²⁹ Other potential problems include displaying the entire framed page, but therefore reducing it in size and (if it features advertisements) subjecting viewers to a double-dose of ads that reduces the impact of any given one. Several disputes and lawsuits have centered on frames, the most widely reported being *Washington Post Co. v. Total News Inc.*³⁰

II. Legal Issues Posed by Programming Techniques

A. Hyperlinks

Hyperlinks are a defining characteristic of the Web, one that any web page author necessarily knows about and takes into account in creating the page. Furthermore, a link essentially acts as an address,

23. See *id.* at 5 n.3.

24. See *Oppedahl & Larson v. Advanced Concepts*, No. 97-Z-1592 (D. Colo., July 23, 1997); see also *Playboy Enterprises, Inc. v. Calvin Designer Label*, 1997 WL 605377 (N.D. Cal. 1997).

25. See *Playboy v. Calvin*, 1997 WL 605377; see also Halpern, *supra* note 18, at 3.

26. See HONEYCUTT, *supra* note 3, at 154-55.

27. See *id.*

28. See Mary Luria, *Controlling Web Advertising: Spamming, Linking, Framing, and Privacy*, COMPUTER LAW, November 1997, at 10, 13.

29. See HONEYCUTT, *supra* note 3, at 155.

30. No. 97 Civ. 1190 (PKL) (S.D.N.Y. filed Feb. 20, 1997).

indicating where to find information that someone has deliberately placed on the Web. So why would any web-page operator complain about links to their page? Arguably, the link's creator has benefited the page operator by directing more viewers to the page. The explanation hinges on the commercial structure and realities of the Web.

Typically, one Web site contracts with another Web site to display an advertisement. Much like a billboard, the cost of renting this space directly relates to the "landlord's" Internet location. Web sites that are often viewed, or "hit," are considered prime real estate, and are relatively costly sites at which to advertise. Most Web sites offer a number of pages of data. The "home page" is where most viewers enter a site, and it is on this page that the majority of advertising occurs. [¶] The complaints about linking are not about linking per se, but rather about links that circumvent another's home page or the advertising portion, thereof.³¹

On April 28, 1997, Ticketmaster Corp. sued Microsoft Corp. for placing links from Microsoft's "Seattle Sidewalk" Web page to pages inside Ticketmaster's site, thus bypassing Ticketmaster's home page and advertising pages.³² Microsoft's site furnished information about events and activities in the Seattle area and, for those events requiring tickets, provided information about Ticketmaster and a link to the latter's web site.³³ Ticketmaster claimed that Microsoft had thus committed "electronic piracy" and "gained revenue from advertising made a part of Microsoft's web site, depriving Ticketmaster of favorable advertising business and opportunities."³⁴

Apparently an effort to negotiate a mutually agreed-upon link had failed, and Microsoft decided to establish the link unilaterally.³⁵ Ticketmaster's suit alleged dilution of its trademarks and diversion of its advertising revenues and implied that within the trade "absent an agreement with the owner for use of a Web site, Web sites are for personal non-commercial use."³⁶ Microsoft answered that "any business . . . participating in the Internet and the . . . Web invites other participants to use the business's Internet addresses and URL's to contact it."³⁷ In addition to its formal response, Microsoft labeled Ticketmaster's position "against the very nature of the Web" and

31. Scheinfeld and Bagley, *supra* note 11, at 3

32. See *Ticketmaster*, No. 97 Civ. 3055; see also Luria, *supra* note 28, at 12-13. See article, Amended Complaint, and Reply (visited on February 25, 1998), <<http://www.ljx.com/LJXfiles/ticketmaster.html>>.

33. See Post, *supra* note 3, at 99.

34. See *Ticketmaster*, No. 97 Civ. 3055.

35. See Luria, *supra* note 28, at 13.

36. See *Ticketmaster*, No. 97 Civ. 3055.

37. Elgison & Jordan, *supra* note 21, at C6.

threatening "the future of the Internet."³⁸ Hyperbole notwithstanding, Microsoft's position has some force. As one observer commented, "[i]t is . . . the general view of the industry that no permission is required for linking of any kind While linking agreements are also common, they are usually intended to deal with other aspects of the relationship."³⁹ Thus, parties may allocate advertising revenue and site-maintenance costs beforehand, or decide upon a uniform appearance across multiple sites.

One author suggests that while "[t]ext-only links can be defended as a fair use," a link that "involves prominent use of the trademark and/or logos of the owner of the linked site" could arguably constitute unfair competition as well as trademark infringement and/or dilution.⁴⁰ Another author, dealing with hyperlinks in the context of copyright, argues that because they are essentially addresses, such links are uncopyrightable facts, and thus that the copyright fair-use defense is inapplicable.⁴¹ Likewise, the trademark "fair use" defense,⁴² even if it can be applied to related unfair-competition claims, will generally be inappropriate with regard to links. "The purpose of the defense is to prevent the trademark rights of one party from being extended to preclude another party from the description of his product to the public."⁴³ As simple addresses, links have little if any descriptive function. Of course, the visible aspect of the link could benefit from this defense if it is descriptive or necessary to identification of a product or service provider. However, regardless of whether the fair use defense is relevant, unfair competition claims seem at least plausible regarding links.

One unresolved issue regarding hyperlinks is whether linking to a site's home page should be treated the same as "deep linking" that bypasses the home page. One observer has noted, in the context of *Ticketmaster v. Microsoft*, that "after the initial complaint was filed, Ticketmaster filed an amended complaint to reference deep linking, creating an inference that Ticketmaster suspects that merely linking

38. Luria, *supra* note 28, at 13.

39. *Id.*

40. *Id.*

41. See Jackson, *supra* note 10, at 754. The comment goes on to argue that collections of links are effectively databases, and thus protectible under the United States Supreme Court's reasoning in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), unless the collection is completely comprehensive and organized alphabetically. See *id.* at 755.

42. Codified at Lanham Act § 33(b)(4), 15 U.S.C. § 1115(b)(4) (1998).

43. *United States Shoe Corp. v. Brown Group Inc.*, 740 F. Supp. 196, 198 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 844 (2d Cir. 1990).

to a homepage may not be actionable in the abstract."⁴⁴

B. Metatags

Metatags have also taken center stage in several recent legal controversies. In *Playboy Enterprises Inc. v. Calvin Designer Label*, the court enjoined Calvin from using in any fashion (including as Calvin's web site address) not only the trademarked terms "playmate" and "playboy," but also "any other term or terms likely to cause confusion therewith."⁴⁵ Playboy was found likely to succeed on the merits in proving, *inter alia*, false designation of origin and false representation, due to Calvin's use of such terms and trademarks in metatags.⁴⁶

Another widely watched case, *Oppedahl & Larson v. Advanced Concepts*,⁴⁷ pitted a law firm against a web-page designer.⁴⁸ While the two are not direct competitors, Carl Oppedahl is a well-known critic of the Internet's domain name registration and dispute resolution policies. Those topics are of interest to many people considering creating a web site, so people searching for his web page might also be interested in web hosting services.⁴⁹ The defendants apparently used the names "oppedahl" and "larson" repeatedly in the metatags on eleven web pages, with the likely effect of confusing search engines into putting those pages high on the list that a search engine would return in response to a query seeking the law firm's home page.⁵⁰ Significantly, people using the search engines might not themselves be confused; as a demonstration of this, someone anonymously created the "This has nothing to do with Carl Oppedahl or Oppedahl and Larson Page," which would naturally appear highly relevant to a search engine looking for the firm's page.⁵¹

The *Oppedahl* complaint alleged common-law unfair competition and trademark violation, and violation of Lanham Act Sections 43(a) (unfair competition) and 43(c) (trademark dilution).⁵² At least one observer has noted that the strongest arguments for the

44. Jeffrey R. Kuester & Peter A. Nieves, *What's All the Hype about Hyperlinking?* (visited Oct. 13, 1999) <<http://www.tkhr.com/articles/hyper.html>>.

45. *Playboy*, 1997 WL 605377 at 1-2.

46. *See id.* at 1.

47. No. 97-Z-1592 (D. Colo. 1997) (hereinafter "Oppedahl"); The filing can also be found at a Web paged maintained by Oppedahl & Larson. *See* <<http://www.patents.com/ac/>> (visited on October 17, 1999).

48. *See* David Loundy, *Hidden Code Sparks High-Profile Lawsuit*, CHICAGO DAILY L. BULL., Sept. 11, 1997, at 6.

49. *See id.*

50. *See id.*

51. *Id.*; *see also* <<http://www.geocities.com/CapitolHill/Lobby/6620/index.htm>>.

52. *See Oppedahl*, No. 97-Z-1592.

plaintiffs were that "people will be confused as to the relation between the plaintiff's and the defendants' sites" and that defendants were using another's "famous mark" for a "commercial purpose in commerce," in violation of Section 43(c).⁵³ The case resulted in permanent injunctions against all three defendants,⁵⁴ demonstrating that at least in a commercial context, the unauthorized and deceptive use of another's trademarks can be prevented even if the use is never visible to most viewers of the web page.

C. Frames

Frames are akin to links in that they directly offer a connection to another web site. The framing site is sometimes called a meta-site because it aggregates other sites on one screen for the user.⁵⁵ While this arguably benefits both users (who could instead, if they chose, go directly to the framed site rather than viewing it from the meta-site) and the framed sites (which potentially gain more viewers), several complaints have arisen due principally to the effect framing has on the visibility of the framed site's advertisements, and to "passing off" concerns.⁵⁶

Framing first appeared in 1996 as a feature unique to the Netscape Navigator Web browser, but was widely available by mid-1997.⁵⁷ Even before then, the *Total News* case had been brought.⁵⁸ The case, based on framing that "causes Plaintiffs' websites to appear not in the form that Plaintiffs intended, but in an altered form designed by Defendants for their own economic advantage," alleged, *inter alia*, counts of misappropriation, trademark dilution, trademark infringement, false advertising, and tortious interference with advertising contracts.⁵⁹ The case soon settled, leaving the legal issues sketched out but unresolved.⁶⁰ The settlement agreement allows Total News to create plain hypertext links to the plaintiffs' web sites, but prohibits unauthorized or indirect links, and all framing.⁶¹

53. Loundy, *supra* note 48, at 6.

54. See *Oppedahl*, No. 97-Z-1592; see also <<http://www.patents.com/ac/>>.

55. See Ellen Poler, *Frames and License Agreements* (visited February 22, 1998) <<http://www.collegehill.com/ilp-news/poler1.html>>.

56. See note 65, *infra*, and accompanying text.

57. See Richard Raysman and Peter Brown, *Dangerous Liaisons: The Legal Risks of Linking Web Sites*, N.Y.L.J., Apr. 8, 1997, at 3.

58. The complaint was filed Feb. 20, 1997. See *Washington Post Co. v. Total News Inc.*, No. 97 Civ. 1190 (S.D.N.Y. filed Feb. 20, 1997).

59. *Id.*

60. Settlement was announced June 5, 1997. See *id.*

61. See *id.*

III. Unfair Competition Law and the World Wide Web

The principle branches of unfair competition likely to be relevant to this discussion, aside from traditional trademark law, are (1) Deceptive Marketing, or "Passing Off," (2) Commercial Disparagement, (3) Appropriation of Trade Values, or Misappropriation, and (4) Trademark Dilution. The first two of these are forbidden by federal law under Section 43(a) of the Lanham Act,⁶² and the fourth is covered by the Federal Trademark Dilution Act, a 1996 amendment to the Lanham Act;⁶³ state law protects against all of these under common law or state statutes. One important related cause of action is the tort of interference with a competitor's business relations.⁶⁴

A. Deceptive Marketing

The essential test for passing off is whether defendant created a likelihood of consumer confusion regarding defendant's identity or affiliation, or the source, sponsorship, or approval of its goods or services.⁶⁵

(1) *Links*

A, the operator of a web page, could state a deceptive marketing claim of passing off against B if "in connection with the marketing of goods or services" B made "a representation likely to deceive or mislead prospective purchasers" by giving them a false impression that B's business (or web site) is really A's, or that B is affiliated with A, or that A makes or approves of B's goods or services.⁶⁶ Thus, if B falsely indicated that the link pointed to his "partner" A, and that claim was likely to "deceive or mislead prospective" customers, B could be liable to A for passing off. Note that B need not state the relationship in clear terms; any "representation" can suffice, and the existence of the link could, in some situations, raise an otherwise ambiguous implication to the level of "representing." To the novice Web user, the mere existence of the link could imply that A permitted its creation. Likewise, suppose A and B are both web-page

62. 15 U.S.C. § 1125(a)(1) (1996) ("Any person who . . . uses in commerce any word, term, name, symbol, or device [or] false or misleading description [or] representation of fact, which is likely to cause confusion, or . . . mistake, or to deceive . . ." regarding one's own "goods or services" or those of another, is civilly liable.).

63. 15 U.S.C. § 1125(c) (1996).

64. See 2 RUDOLF CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* §§ 9.01 - 9.21 (Louis Altman, 4th ed. 1996 & Supp.).

65. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 (1995) (hereinafter "RESTATEMENT").

66. *Id.*

authors and B creates C's web page. B falsely implies via a link that C's site is a product of A's effort. B is liable to A.⁶⁷

Links can also take the form of graphics or images, rather than text, and sophisticated Web authors often engage users with artistic embellishment or suggestive designs and colors. In some cases, this could likewise amount to passing off. An advertisement's "form [or] color . . . may be designed to mislead the casual reader. Ornamental additions may also be used to deceive the unwary."⁶⁸

In the *Ticketmaster* case, a representative example of link disputes, Microsoft evidently tried to reduce its exposure to liability for passing off. In addition to offering a link to Ticketmaster's ticket-purchase page, "Seattle.sidewalk [Microsoft's site] informs you that you may be able to purchase tickets through Ticketmaster [and] provides some information about Ticketmaster's operations."⁶⁹ These measures would probably make most ticket-buyers aware that they were buying from Ticketmaster, not Microsoft or a subsidiary. A clear disclaimer of affiliation, placed near the link in the Seattle.sidewalk page, would further protect Microsoft.

Reverse passing-off, another deceptive marketing claim, occurs when an actor's misrepresentation leads consumers to think another's goods are those of the actor (rather than thinking the actor's goods are those of another).⁷⁰ This poses a lower threat of harm to the injured competitor than does direct passing off, though it may divert future business from that competitor to the actor.⁷¹ It is also closer to the facts of the *Ticketmaster* case, though no such claim was actually made. However, had Ticketmaster failed to indicate its ownership on the linked-to page, that page might have appeared to casual users to be part of Microsoft's site. Thus, Microsoft would have potentially misled viewers into thinking another's goods or services were provided by Microsoft, the actor.

This danger underscores the importance to the linker of clear disclosure, as it has no control over the linked-to page, which could, by later changes, lose elements that clearly indicate its true ownership. Linkers not making such disclosure could be liable for a later likelihood of confusion, even if the likelihood was not present at the time when the link was created. The linker's subjective intent is relatively unimportant for this cause of action.⁷² This possibility also demonstrates the importance of clearly indicating, on every page of a

67. See *id.*, § 4 cmt d, illus. 3.

68. IA CALLMANN, *supra* note 64, at § 5.11.

69. Post, *supra* note 3, at 99.

70. See RESTATEMENT § 5, cmt. a, *supra* note 65.

71. See *id.*

72. See *id.* cmt. b.

web site, who owns or controls the page.

In addition to the liability of web page operators for deceptive marketing, freelance web-page designers or others involved in creating an infringing link can be held contributorily liable. Those who “by supplying materials or rendering services to a third person” aid the latter “directly and substantially in making a representation” that makes the third person liable for deceptive marketing, are themselves liable for contributory deceptive marketing.⁷³

(2) *Metatags*

Abuse of metatags can also create a strong deceptive-marketing claim. In the context of Internet domain names, one court, in *Green Products Co. v. Independence Corn By-Products Co.*,⁷⁴ has stated that

ICBP’s argument [that it can use <greenproducts.com> as its Internet address] is analogous to saying that ICBP has the right to hang a sign in front of its store that reads, “Green Products.” When customers enter the store expecting to be able to see (and possibly, to buy) products made by Green Products, ICBP then announces, “Actually, this store isn’t owned by Green Products; it’s owned by ICBP. We don’t sell anything made by Green Products, but as long as you’re here, we’ll tell you how our products are better than Green Products.” In essence, ICBP is capitalizing on the strong similarity between Green Products’ trademark and ICBP’s domain name to lure customers onto its web page.⁷⁵

The same principle applies in the context of metatag use of a competitor’s name. The search engine acts as an intermediary, but duping it, like doctoring a map, leads users to visit site B when they were seeking out site A. If ICBP put “Green Products” in its site’s metatags, it might be actively tricking potential customers into visiting its web site – the essence of deceptive marketing. Likewise, in the *Oppedahl* case (where no claim for deceptive marketing was made), this approach could have produced a finding of liability. Note that, although Advanced Concepts and the other defendants in that case were not in competition with Oppedahl & Larson, that is not a necessary element of this cause of action.

(3) *Frames*

In the context of frames, as opposed to links, passing off and reverse passing off are considerable dangers. If the framing site does not clearly indicate (either in connection with the clickable link or in the frame) that the framed page is another’s, users could believe the framing page’s operator also operates the framed one. This could

73. *See id.* § 7(1).

74. 992 F. Supp. 1070 (N.D. Iowa 1997).

75. *Id.* at 1076.

create reverse passing off by giving the impression that the work of another (the framed page) is the work of the actor (the framing page's operator). Likewise, users may expect to see a whole new page after clicking on a link, rather than a framed one. They may then believe that the frame (part of the framing site) is part of the framed site. This could create direct passing off by giving the giving the impression that the work of the framing page's operator (the frame and any material appearing on it) is really the work of another (the framed page's operator). Thus, those whose web pages include frames that can link to outside sites should ensure that users will be aware of who is responsible for any given material.

In the *Total News* case,⁷⁶ one cause of action alleged false designation of origin, false representation and false advertising.

B. Commercial Disparagement

Section 43(a) of the Lanham Act "creates a cause of action for any false description or representation of a product," including statements that are misleading, partially incorrect, or untrue due to incomplete disclosure.⁷⁷ This federal cause of action extends to misrepresentations of the nature of an actor's "or another person's goods, services or commercial activities."⁷⁸ Courts apply a test examining whether (1) the defendant has made false or misleading statements as to his own product or another's; (2) there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) the deception is material (likely to influence purchasing decisions); (4) the advertised goods traveled in interstate commerce; and (5) there is a likelihood of injury to the plaintiff (declining sales, loss of good will, or the like).⁷⁹

(1) Links

At least one author has suggested that hyperlinks can be used to compete unfairly by creating a link from a company's name to a disparaging image.⁸⁰ A similar possibility would be linking from a competitor's name to a website that likely customers would find

76. *Washington Post Co.*, No. 97 Civ. 1190 (PKL); see *supra* notes 58 - 61 and accompanying text.

77. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 921 (3d Cir., 1990).

78. 15 U.S.C. § 1125(a)(1)(A-B) (1999). A common-law cause of action for commercial disparagement is also available, though different jurisdictions require varying elements; injunctive-relief requirements in particular differ. See CALLMANN, *supra* note 64, at § 11.33.

79. *Max Daetwyler Corp. v. Input Graphics, Inc.*, 545 F. Supp. 165, 171 (E.D. Pa. 1982) (citing *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165-66 (2d Cir. 1978)).

80. See Elgison, *supra* note 21, at C6.

objectionable. Technically, “[t]o be actionable [as common-law unfair competition], the representation must relate to the goods, services, or commercial activities of the actor.”⁸¹ However, under the 1988 revision of § 43(a) of the Lanham Act,⁸² and under § 2(a)(8) of the Uniform Deceptive Trade Practices Act,⁸³ an actor who falsely “disparages the goods, services, or business of another” is subject to liability without proof of special damages or of an intent to deceive.⁸⁴ Additionally, the state-law tort of trade libel⁸⁵ will often apply in such circumstances.

By the test described above, few “disparagement” claims are likely to succeed regarding links per se. The crucial element here is number two: actual deception or a tendency to deceive. A link is essentially a fact, and is therefore not inherently deceptive. However, it is important here to remember that a link consists of two elements: the text or symbol visible to a user that indicates a link is present, and the underlying address to which it points. Web browsers indicate in an address bar at the top of the screen the address of the page presently open,⁸⁶ and usually display at the bottom of the page the address to which a link points whenever the cursor is placed over a link. However, users can alter many aspects of the display so that the link-address might not show; in addition, some users will not think to look at the address, or will not recognize its significance. Thus, a link whose visible portion describes A, but which contains the address for B, could be deceptive to someone who does not already know A from B and cannot tell from the URL that they have arrived at B’s site, not A’s.⁸⁷

(2) *Metatags*

Metatags are unlikely to give rise to a commercial disparagement claim. To do so, a metatag would have to deceptively attract viewers to a web page that misleadingly describes a company or product. However, ordinarily the web page, not the metatag, would create liability. The metatag’s contribution is simply to ensure the page is

81. See RESTATEMENT § 2 cmt. c, *supra* note 65.

82. 15 U.S.C. § 1125(a) (1999).

83. Unif. Deceptive Trade Practices Act § 2(a) (Revised) (1999).

84. *Id.*

85. See JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 7.02, footnote 110.25 (trade libel has occurred “where the integrity or credit of a business has been maligned,” whereas trade disparagement concerns “the disparagement of goods or services.”).

86. When one page is framing another, the framing page’s address is shown, not the framed one’s. See Raysman, *supra* note 57, at 3.

87. A link could also be misleading in the traditional way that an advertisement could be, but that form of disparagement may likewise be addressed traditionally.

listed as responsive to a particular request or search.⁸⁸ Potentially, a metatag could make a derogatory page seem responsive to a search for a particular product or company. Alternatively, it could be associated with a page that automatically forwards the viewer to a third party's page. This could be disparaging if the metatag were itself a disparaging word or phrase, so that (to the viewer) a search using the word or phrase would appear to respond with the third party's web page.

In the first situation, the metatag would serve to create the connection between the third party's product or business, and the disparaging web page. This role is relatively incidental, unless the web page itself makes no reference to the product or business in question. In that case, the metatag would be the sole source of liability for the owner of the disparaging web page. Absent the metatag, viewers would be unlikely to associate the disparaging page with the product or business being attacked. However, in such a case the metatag would almost certainly have to consist of a trademark belonging to the attacked entity. It is unlikely that a search-engine user would use a non-trademark term in a search for a particular business or product. Thus, such a metatag would probably make its creator liable for trademark violations, including dilution – causes of action that will usually be easier to prove than commercial disparagement in such circumstances.

In the second situation – a metatag that indirectly sends the viewer to a third party's web page – the search engine user would necessarily be searching for uses of that disparaging word or phrase. If the search term is disparaging only in context, for example, "shark" associated by a metatag with a lawyer's home page, then the metatag could lead to actual deception, creating liability. If the search term is disparaging in all contexts, it is less likely that such a metatag could actually deceive the search-engine user, so liability would rarely attach.

(3) *Frames*

Frames could in principle give rise to commercial disparagement by juxtaposing the framed site with critical or disparaging material. Another possibility would be framing a site with advertisements for a competitor, or simply for an inappropriate service or third-party site. For example, a meta-site could be set up to note what topics users are interested in, and automatically frame the third-party sites they view with ads related to that subject. This could lead to framing, e.g., the Ford site with an ad for General Motors vehicles. Alternatively, a

88. See *supra* notes 20-25 and accompanying text.

meta-site that did *not* distinguish among viewers' interests might end up framing Disney's site with ads for sex-related web sites. In at least some circumstances, this might be viewed as "disparagement" of the framed site, though often a "trademark tarnishment" action under the dilution doctrine would be more appropriate.

C. Misappropriation

The next major branch of unfair competition law is appropriation of trade values, or misappropriation. This encompasses causing harm by "appropriating [an]other's intangible trade values" and is limited to circumstances in which the actor is liable (1) for appropriation of trade secrets, or (2) for "appropriation of the commercial value of the other's identity", or (3) under state or federal statute or international agreement, or for breach of contract or infringement of common law copyright.⁸⁹

Conceivably one could use a link to enable others to gain access to trade secrets, possibly making the creator contributorily liable, but once a "secret" appears on the Web it has probably lost the necessary confidential status. Therefore, the first of these circumstances seems irrelevant to the issues here addressed. Likewise, the third invokes principles of law largely beyond the scope of this Note. However, appropriation of the commercial value of another's identity could arise from the use of links, frames, or metatags. Liability for this cause of action arises from "using without consent [another's] name, likeness, or other indicia of identity for purposes of trade."⁹⁰ These "indicia of identity" are used "for purposes of trade" if used, *inter alia*, in advertising the appropriator's goods or services, or in connection with services rendered.⁹¹

(1) Links

A link could conceivably constitute appropriation of identity for advertising purposes, merely by appearing in a web page in connection with advertising material or a solicitation. The link would have to amount to a name, likeness, or other "indicia of identity." In addition to a text name acting as the visible part of the link, liability might accrue for use of an image or logo. Of course, the presence of these elements could also incur liability if they are not links, just as if they were images on a printed page. More significantly, the web page operator might be liable for a link that goes, or even appears to go, to the site of another, even without "proof that prospective purchasers

89. RESTATEMENT § 43, *supra* note 65.

90. *Id.* § 46.

91. *Id.* § 47.

are likely to believe that the identified person endorses or sponsors the user's goods or services."⁹² As noted above, the link's address is often visible even if the viewer does not activate it, so that a link to, e.g., "http://www.JohnWayne.org/" could be actionable even if the site actually had nothing to do with John Wayne, and even if the symbol activating the link did not evoke John Wayne in any way.⁹³ Therefore, site designers should use caution in creating promotional links or references to service providers, and ensure that both the visible and address portions of any commercial links do not invoke a protected identity.

(2) *Metatags*

Metatags could give rise to a claim for appropriation of identity in the same way that they can be used for deceptive marketing, as seen in the *Green Products* case.⁹⁴ If A uses B's names in the metatags on A's commercial web site, A is using an indicium of B's identity for purposes of trade (to affect where A's site is listed in search-engine results). Absent B's consent, A would be liable to B for misappropriating the commercial value of B's identity.

The use of a metatag is analogous in some ways to the placement of an advertisement: both are intended to promote awareness of a product, service, or entity (here, a web site). The metatag does so by getting a page near the top of a search list that the page designer considers relevant, so that people searching for the word or phrase in the metatag are likely to click through to that web page. The higher the page is on the list, the more likely a searcher is to see it, and thus select it. In the same way, a person seeing an advertisement made more memorable or persuasive by virtue of an (unauthorized) use of some valuable identity, is more likely to seek out or use the advertised service or product, or to remember favorably the advertised entity.

The principles the *Green Products* court relied on in prohibiting ICBP from using "greenproducts.com" as its web-site name apply equally well to the use of a competitor's name, trademark, or other identifying word or phrase in a metatag. Such a use would likewise be akin to "hang[ing] a sign in front of [defendant's] store" containing such a mark or misleading identifier, and would "capitalize on the strong similarity" to "lure customers onto [defendant's] web page." It is less evident whether use of such a mark or identifier is actionable if

92. *Id.*, cmt. a.

93. This issue raises tangentially the question of issuing and protecting domain names, which is beyond the scope of this Note.

94. *Green Products Co. v. Independence Corn By-Products Co.*, 992 F. Supp. 1070 (N.D. Iowa 1997), discussed *supra* at text accompanying notes 74-75.

the mark or identifier is not a competitor's. Here, however, the *Oppedahl* outcome⁹⁵ indicates that in at least some circumstances, use of a non-competitor's trademark may be enjoined. Use of other "identity-indicating" terms has not yet been challenged in a reported state-court case, and is not otherwise covered by federal law. Depending on particular state law, a court might be willing to extend the *Green Products* and *Oppedahl* principles to cover such a situation.

(3) *Frames*

Framing raises the possibility not only of "appropriating the identity" of a framed commercial site, but also of applying the rarely invoked principles of *International News Service v. Associated Press* ("INS").⁹⁶ First, a framed site could claim an "identity" that the framing site has usurped: If simple imitation of someone's famous characteristics is actionable,⁹⁷ then surely using that entity's actual, public face is. Such a claim would have to overcome the challenge that the very purpose of web sites is to be viewed, and that no web site is of much value if not linked to. Why should not the one providing the link derive some benefit therefrom?

In *INS*, the Supreme Court upheld the issuance of an injunction prohibiting INS from taking down the essential facts of stories reported by the Associated Press ("AP") in East Coast newspapers, using those facts to write competitive stories, and sending them on to the West Coast for publication in time to match or even "scoop" AP newspapers there. "Associated Press thus faced a direct threat to its primary market by a competitor who had incurred none of the development costs associated with collecting the news. Such circumstances present the most compelling case for protection against appropriation."⁹⁸

Circumstances similar to those of *INS* are arguably present in at least some framing cases.⁹⁹ The key elements would likely be: (1) competing commercial use of (2) factual (non-copyrightable) material created or gathered at some effort or expense, (3) so that the originator of the material was deprived of the benefit of its efforts. As one court has put it, in the context of facts about professional sports games, the "elements . . . that allow a 'hot news' claim to

95. *Oppedahl*, No. 97-Z-1592, discussed *supra* at text accompanying notes 47-54.

96. 248 U.S. 215 (1918).

97. See, e.g., *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992) (overturning summary judgment against "Wheel of Fortune" hostess Vanna White, who sued over an advertisement that clad a robot in an evening gown and blonde wig and posed it by a "Wheel of Fortune"-type game board).

98. See RESTATEMENT § 38 cmt. c, *supra* note 65.

99. See Alan J. Hartnick, 'Framing': *Internet Equivalent of Pirating?*, N.Y.L.J., Apr. 4 & 11 1997, at 5, 5.

survive . . . are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."¹⁰⁰

The Web eliminates many of the advantages traditional news media have long enjoyed. In *INS*, even a sophisticated competing operation was unable to challenge AP on the east coast — it needed lead time to reduce the stories to facts and rewrite them (thus avoiding copyright violations), transmit them, and print and distribute them. On the pre-Web Internet, time would be needed only to rewrite the stories; the medium itself would perform "printing" and "distribution" with a few keystrokes. On the Web, competitors need not even re-write the stories; they can simply frame the desired web pages to attract readers, insert their own advertising in the frames, and enjoy the benefit of selling without the expenses of generating their own editorial content. This is part of the basis for the *Total News* complaint: "Although Defendants, too, derive revenue by selling advertisements placed within the totalnews.com website, Defendants provide little or no content of their own. Instead Defendants have designed a parasitic website that republishes the news and editorial content of others' websites in order to attract both advertisers and users."¹⁰¹ The crucial technical element may be whether framing sites effectively substitute their own advertising for that of the framed site. If they do so, the framed site's operator loses the benefit of its news-gathering or creative effort — attracting viewers to its ads.

Even in *Total News*, however, the defendant's position had merit. If the framing page is adding nothing of value to the original, "pirated" sites, why does it have viewers? Clearly, some Web users must prefer, at least some of the time, to use a meta-site that aggregates content from several "source" websites. The benefits are actually fairly evident once any time is spent traversing the Web: speed, convenience, and the ability to readily compare the stories carried on various "source" sites. Because the *Total News* case settled, the tension between these positions has not yet received a full hearing.

Framing sites that present an entire framed site, with its advertisements, inside their own advertising frame, may pose a special issue. This view may reduce the effect the framed site's ads would have if users viewed the site directly, unframed. However, these users might not visit the framed site at all if it were not conveniently available at the framing meta-site, in which case they would not see the ads at all. On balance, and given courts' apparent

100. *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997).

101. *See Washington Post Co.*, 97 Civ. 1190.

reluctance to extend the INS rationale,¹⁰² this practice at least seems protected.

D. Trademark Dilution

The last major branch of unfair competition is defined by the doctrine of trademark dilution. Founded on the principle that trademark owners are entitled to the favorable association they have created between their name and their product, the doctrine examines first whether the mark in question is "distinctive," and second whether there is a likelihood of dilution due to the challenged use.¹⁰³ Distinctiveness may be interpreted differently in this context than in the trademark identification-of-origin regime.¹⁰⁴ One test courts have used is whether "the mark has come to signify plaintiff's product in the minds of a significant portion of consumers and . . . the mark evokes favorable images of plaintiff or its product."¹⁰⁵ Ultimately it is "the degree of advertising value the mark has gained which determines" whether it is protected from dilution.¹⁰⁶ Dilution, in turn, may consist of (1) actual or potential consumer confusion, (2) use detracting from the mark's previous reputation ("tarnishment"), or (3) diminished uniqueness and individuality of the mark.¹⁰⁷ One court, interpreting the Federal Trademark Dilution Act, found that "the Act's legislative history . . . indicates that Congress understood that 'dilution' might result either from 'uses that blur the distinctiveness of [a famous] mark or [that] tarnish or disparage it.'"¹⁰⁸

(1) Links

In a sense the entire "dilution" branch of unfair competition deals with mental "hyperlinks" — the associations people form between things they see, hear, or otherwise sense, and the memories they have. To the extent that mental processes function by cross-referencing ideas and memories, the Web attempts to mirror the brain. As "dilution" addresses the blurring of mental links and the creation of new ones adverse to the initial creator, so it might address electronic links.

102. See RESTATEMENT § 38, cmt. c.

103. See, e.g., *Wedgwood Homes v. Lund*, 659 P.2d 377, 378 (Or. 1983).

104. See *id.* at 379.

105. *Id.* at 380.

106. *Id.* at 381. Under Lanham Act § 43(c), enacted in 1996, the test is whether the mark is "famous." 15 U.S.C.A. § 1125(c)(1) (1997).

107. See *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 494-95 (1st Cir. 1981).

108. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Development*, 170 F.3d 449, 452 (4th Cir. 1999) (quoting H.R. Rep. No. 104-374, at 2 (1995)).

Whether a link could dilute a trademark depends initially on the mark's fame and reputation. To dilute the mark, it would have to at least threaten consumer confusion, tarnish the mark's reputation, or reduce its distinctiveness. If a page clearly indicates its true owner's identity, a link to that page is, without more, unlikely to confuse consumers. Possibly other material on the linking site, together with the link, could confuse consumers as to the identities and relationships between the two page operators. If the linked-to page does not clearly indicate its owner's identity, "dilution" seems unlikely, and a deceptive marketing claim is likelier to succeed than a dilution claim, because the true owner's identity and reputation are never invoked. Thus, the viewer's mental cross-references regarding that owner are not affected.

A link to a site with an address similar to a famous one could also conceivably be a basis for an action. For example, if A created a search engine at the site "look-it-up.com" and acquired the necessary distinctiveness, and B later created a competing one at the site "look-up.com," A might be able to state a claim not only against B but against others who link their sites to B's site, because the links might confuse potential customers regarding the original mark ("look-it-up.com"). However, because links are basically addresses, essential to the function of the Web, more than a bare link would probably be needed to win such a case, such as other material associated with the link heightening the confusion. If A's site is well-known and B's is not, text near the link calling B's site "the famous Internet search tool" might suffice for a claim.

A link could tarnish the existing goodwill or reputation of a mark in the same manner that it could constitute disparagement.¹⁰⁹ Courts have found such tarnishment when a mark "would clearly have a tendency to impugn [a] product and injure plaintiff's business reputation,"¹¹⁰ and also when it is used in a context that is merely incompatible with a plaintiff's popular image of quality.¹¹¹ Thus, a link could be actionable if it referenced (but did not directly use) a famous mark in linking to an "unwholesome" site, or to one that cheapens the image of the legitimate mark.

Finally, a link could be actionable for directly attacking the "distinctiveness" of the owner's mark; this is, practically, similar to the passing-off cause of action.

109. See *supra* text accompanying note 80.

110. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972) ("Enjoy Cocaine" poster using Coca-Cola design).

111. The best-known example is *Steinway & Sons v. Robert Demars & Friends*, in which "Stein-Way" clip-on plastic handles for beer cans were found to tarnish the Steinway mark for pianos. 210 U.S.P.Q. 954 (C.D. Cal. 1981).

The dilution cause of action is limited to commercial use of the plaintiff's trade name or mark, including advertising.¹¹² Satire and journalism in which the intent is to sell the diluting good are protected by First Amendment principles. Lanham Act § 43(c)(4) codifies this protection in regard to the federal cause of action.¹¹³ Thus, many non-advertising activities on the Web are likely to be protected, though electronic commerce and services such as brokerages are not.

(2) *Metatags*

Metatags are unlikely to create the sort of viewer confusion that links can generate, though as discussed above, they can potentially do so. Such confusion can result from a mistaken belief that a site listed by a search engine is actually responsive to the search request. Thus, a metatag consisting of a competitor's name could draw the user to the site with that metatag, rather than to the desired site (the competitor's). In addition to more direct trademark violations, this could confuse consumers regarding who operates the site visited, or regarding proper ownership of the trademark. If the mark is sufficiently famous to merit protection under federal dilution law, and most states', however, the viewer is unlikely to be confused over actual ownership of the mark.

A "tarnishing" effect might result from a metatag in the same way commercial disparagement could.¹¹⁴ It is also possible that successful use of a tarnishing metatag could be used to help prove a broader dilution case. If search-engine users are entering the challenged term, e.g. "Stein-Way,"¹¹⁵ that tends to show consumer awareness of the term, indicating that the plaintiff's mark is already injured.

By the same token, metatags are not likely to directly give rise to a claim for diminished uniqueness and individuality of a mark. They are only useful if users enter the chosen word or phrase in a search engine. Thus, they are "reactive" and depend on the chosen term already being in the users' consciousness. They do not in themselves alter peoples' identification of a particular mark with a particular product or business. They can, however, be used to demonstrate the extent to which search-engine users' awareness has already been changed, that is, to show the extent of injury caused by other activity such as advertising. Here, as with "tarnishment," metatags are more

112. See *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 30 (1st Cir. 1987) (finding that a non-commercial parody will not give rise to a dilution claim).

113. 15 U.S.C.A. § 1125(c)(4) (1997).

114. See *supra* sec. III(B)(2).

115. See *supra* note 111.

useful for proof than as the basis of a claim.

(3) *Frames*

Frames may be even more likely than ordinary links to cause confusion among users, the first of the three facets of trademark dilution. They further blur the conceptual boundary between sites, and thus their operators. If a framing site does not clearly indicate what site a link will open, the user might not realize that the framed site is operated by someone else: the holder of the trade name or mark. The URL of the framed site, if visible at all, is less prominent than that of the framing site, so the user may associate the framed site with the framing one's URL, which typically is named for the operator.¹¹⁶

Framing a site could also "tarnish" it by incorporating in the frame elements that could be considered unwholesome or whose image among likely viewers is of lower quality than the framed site's or its operator's reputation. This is equivalent in some ways to commercial disparagement, though tarnishment seems more likely to apply where the framing site does not make an effort to impugn the framed site.

Frames are unlikely to lead to "diminished uniqueness" of the framed site because they do not represent something "akin" to the framed site; they show the real thing. Arguably a framed site could be "less unique" because users would have access it without viewing it in isolation. Rather, it would appear in conjunction with other elements selected and arranged by the framing site's operator. To be successful, the plaintiff would probably have to argue that the frame forces viewers to see only less distinctive elements of a page that, viewed *in toto*, is more distinctive. A counterargument can be made that the same problem arises when a web page is displayed on too small a monitor, for which the page operator could state no claim.

IV. Policy Issues: The "Best Interests" of the Web

The World Wide Web is now in a state of flux, and will be for the foreseeable future. Because unfair competition law is relatively flexible, it can be a useful tool for handling disputes in such a nebulous medium, but that flexibility can make legal results unpredictable. From a policy standpoint favoring development of the Web's power and diversity, what is the best use of unfair competition law?

The truest challenge here, as in all law, lies in balancing competing, legitimate interests. Computer programs are now

116. E.g., Yahoo!'s site is at <<http://www.yahoo.com/>>.

available that will rifle through the inventories of online stores or auction sites, and report what is available at what price.¹¹⁷ This enables the consumer to get the lowest price with the greatest speed and convenience, but it threatens the livelihood of businesses that survive by the advertising on their sites, which is ignored by the program and goes unseen by the program's user. Which interest deserves greater deference? In theory, at least, the more flexible a legal doctrine is, the better it can accommodate the varieties of situation that will arise.

The Web's very name describes its most defining feature: it facilitates the creation of new links between data, and often between ideas, thus making possible new understanding. Its speed and universal accessibility are also crucial, but they simply make the links more useful. Because of the fundamental importance of these links, the hyperlinks that embody them should rarely create liability. It is technically feasible to permit access to particular web pages only from designated other ones, so that a home page's "front door" status can be enforced. It is also fairly easy for a web page's owner to put identifying information on every page in its website. Perhaps the onus to prevent undesirable "deep links" should be on the website owner. Also, because the Web's value derives from the proliferation of linkages, and because web addresses are purely objective information, it seems unwise ever to allow liability to attach to any simple use of hyperlinks.

This argument applies only to the "pointer" aspect of links, not to their visible aspect. The latter can, as discussed above, injure the operator of the site linked to, and thus should be actionable in at least some circumstances. Such liability should not, however, extend to the use of another's trademark (whether word or image, or conceivably sound) to link to that other's web page. This use is wholly consistent with the identification function trademarks have always served. Instead, liability should only arise when a misleading or derogatory link is created to another's web page.

Metatags serve a more ambiguous role in the scheme of the Web. Originally intended merely to control the design and appearance of web pages, they now play additional roles, including describing the true purpose and nature of the page for search-engine purposes. The owners of search engines have responded in various technical ways to the abuse of metatags, and to an extent, this mitigates the problem. However, because of the scale and rate of growth of the Web, automated search engines are here to stay. Artificial intelligence is unlikely to soon approach human judgment, so supplemental means

117. See Dan Gillmor, *Subversive Software Points to Bargains*, CHI. TRIB., Oct. 25, 1999, at Business 12.

are needed to help search engines identify web pages relevant to particular requests. Metatags have served this role usefully, and it would be unfortunate to lose that capability. Furthermore, there is no reason in principle why other methods of determining web-page relevancy could not similarly be "spoofed" by rogue web-page operators. Therefore, this aspect of metatags deserves some legal protection.

One way to provide this protection would be with the same sort of regulation that attends, for example, advertising. However, that regulation grew on the back of a body of long-standing, well evolved law. Now is the time for a similar body of law to develop to protect metatags. It is not yet clear whether traditional trademark law will prevent all misuses of metatags, although *Oppedahl*¹¹⁸ is encouraging. Other aspects of unfair competition law do have a role to play, as discussed above.

Frames suggest the unexpected but useful ways in which the Web will develop in the coming decade or two. They take advantage of hyperlinks to present existing information in new, potentially useful ways. As is so often true, that which can be useful can also be harmful. There is no reason why frames cannot be used for the same harmful purposes as a 1999 web-piracy scheme: forcing viewers into a pornographic web site chosen by the pirates, and holding them there until the users re-boot their computers.¹¹⁹ Although that incident attracted government attention leading to a prompt shutdown, this was probably as much because of the objectionable content of the web pages in question as it was due to the wrongfulness of the action. Future, non-pornographic incidents may meet only with private responses from the individuals affected, and the owners of the web sites they cannot reach.

Unfair competition law provides several avenues to deal with these and other innovative uses of Web technology. Furthermore, it offers ways to reconcile the conflicting but legitimate interests of competitors, and of web-site hosts versus viewers. It may be necessary ultimately to hold framing sites liable for failure to indicate the ownership of whatever web pages they frame. Hopefully, web-browser makers will incorporate a facility that automatically displays the URL of framed pages. Market forces may encourage this; legal ones can do so as well, if less directly. The potential liabilities discussed above suggest that such a course is both desirable and likely.

118. See *supra* notes 47-54 and accompanying text.

119. See Stephen Labaton, *Net Sites Co-opted by Pornographers*, N.Y. TIMES, Sept. 23, 1999, at A1.

V. Conclusion

Unfair competition doctrines can afford considerable protection to web site operators who suffer from the misuse of metatags, links, and frames. For that reason, this body of law should receive some attention from web site designers and their counsel. The parameters of this protection remain unsettled because few cases have gone to trial, so courts must work by analogy and by reference to underlying legal principles and goals. As they do so, unfair competition law offers more flexibility than most other doctrines to let courts reach just and equitable conclusions. This same flexibility, combined with the relative dearth of case law and statute on this topic makes it difficult for practitioners to foresee which activities create liability, and the extent of that liability.