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Browsing, Caching, Downloading & Linking Websites: Copyright & Multi-jurisdictional Dimensions

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INTRODUCTION


The Internet is generating a multitude of vexing legal questions for the intellectual property professional and poses a significant challenge to the existing international framework of intellectual property protection. This paper focuses on the copyright and private international law implications of this relatively new medium of communication, and looks in particular at the issues relating to the

fundamental building blocks of the World Wide Web, namely browsing, caching, downloading and linking of Web sites¹.

Creating a Web page, browsing, caching, downloading or linking to certain material on another Web site, is regrettably capable of giving rise to copyright subsistence in some jurisdictions as well as giving rise to infringement in others, which by its nature is multi-jurisdictional.

Legal uncertainty as to what online digital subject matter is entitled to copyright protection, what acts amount to infringement, what jurisdiction or jurisdictions' law governs, and the scope of any implied licences, will continue until there is a specific international convention dealing with the Internet and intellectual property².

Even after such a convention, it is likely that proving copyright

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infringement in respect to online digital subject matter will remain difficult and complex. In this regard consortia of copyright collecting societies, publishing, telecommunications and other industries are well advanced in the search for technologies and strategies to track the use of copyright material on the Internet so as to be able to charge for the use of such material³.

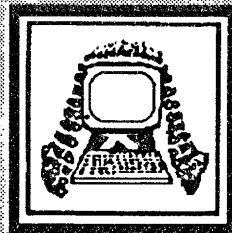
In the meantime this uncertainty creates a bonanza for lawyers and may well prove to emasculate one of the most powerful tools for disseminating knowledge since the printing press. It is possible for lawyers to identify areas of Internet usage in which one's client should be advised to be prudent, a type of checklist as it were. However, it is simplistic to think that such a list will be very helpful due to the uncertainty surrounding the

application of traditional copyright doctrine to particular incidents of Internet usage and the multiplicity of jurisdictions that may bring their law to bear on any particular dispute. Even more simplistic is legal advice not to copy, as compilation and synthesis of information is of the essence of Internet usage, and the word 'copy' begs the question.

Practically speaking, most Internet litigation to date indicates that parties are most likely to sue or be sued where information is taken from a Web site without also taking the advertising material accompanying it⁴ or where the information is regarded as sensitive⁵. Further, the targets for litigation are often likely to be Internet Service Providers (ISPs), rather than individual copyright infringers, as ISPs are often relatively large concerns and therefore worth suing⁶.

It is unlikely that there will ever be a huge volume of litigation concerning copyright on the Internet. Such litigation will inevitably be even more expensive than patent or software copyright infringement proceedings. With Internet copyright, alleged infringement of copyright subsisting in any software component of a copyright work may constitute only one small part of the entire dispute between the parties.

A fundamental problem with copyright and digital communications networks is that copyright requires the defendant to make or authorise the making of reproductions or adaptations. With computer networks such as the Internet, it is not necessary for a user to purposefully make reproductions or adaptations of online material. It is generally the browser software on an



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end user's computer, and server computers spread across the network, that is responsible for creating reproductions of copyright material online. What is the position of a person who makes an unauthorised link to a Web site or creates a site wholly composed of a multiplicity of unauthorised links?

The area abounds with complexity and issues of authorisation of infringement and implied licences. Once you have analysed the relevant issues under Australian law, you can then turn to all those other countries where your client may wish to sue or might be sued.

THE INTERNET

It is useful to briefly look at the current state of play in relation to the technical aspects of the Internet, in order to give a context to the issues under discussion in this paper.

The Internet, as an international computer network, commenced in the early 1990s. The Internet evolved out of ARPANET, a network created by the Advanced Research Project Agency of the US Defense Department.

The Internet is a collection of individual proprietary networks that are interlinked through the use of the TCP/IP protocol suite. One of the most important facets of the Internet, at least from the perspective of everyday users, is the World Wide Web (WWW), which is predominantly based on the Hypertext Transfer Protocol (HTTP).

The growth of the Internet has been phenomenal. Australia ranks fourth-behind Canada, Sweden and the US - in Internet access per capita. A report from the Federal government's National Office for the Information Economy says 43% of Australians accessed the Internet to February 2000, compared with 43% for Canada and Sweden and 41% for the US in 1999. By the end of last year 28% of Australian homes (1.9 million households) were online⁷ and by the end of this year it will be well over a

third⁸. The April 1999 CommerceNet/Nielsen survey revealed that the number of Internet users over the age of 16 in the US and Canada had reached 92 million, up from a figure of 72 million nine months earlier⁹. At present, the commercial importance of the Internet is predominately advertising and to a lesser extent e-commerce.

The Internet now delivers voice over IP (Internet Protocol), IP telephony and facsimile capabilities as well as facilitating e-commerce. The growth in popularity of the Wireless Application Protocol (WAP) is bringing about an increase in Internet content delivery to mobile telephones and similar equipment. Internet content thus consists of all the traditional forms of copyright such as literary, artistic and musical copyright plus cable, broadcast, audiovisual and multimedia works.

THE WORLD WIDE WEB (WWW)

At the root of the Web are several established protocols¹⁰ and four new standards¹¹:

- (1) the Hypertext Markup Language (HTML), which is a standard file formatting language that defines how WWW documents are to be displayed and allows for the embedding of scripting languages, images, sound and video files;
- (2) the Hypertext Transfer Protocol (HTTP), a communications protocol which, essentially, is the 'language' that client and server machines use to ask for and transmit Web resources (though it provides a sort of application transport over which other types of Internet applications can be executed). HTTP can carry telnet, FTP and other application session information as well as Web data;
- (3) the Uniform Resource Locator (URL) scheme for identifying the location of any Internet resource, whether it is a Web

document, an FTP file archive, a telnet server or any other type of service through TCP/IP¹²; and

- (4) the Common Gateway Interface (CGI), which provides a standard interface from Web documents to other computer resources like databases.

A workable understanding of the technical operation of the Internet, and in particular the WWW is invaluable to a meaningful analysis of copyright issues presented by the medium.

1. Copyright Subsistence in Digital Subject Matter

The information contained on a Web site will in all probability constitute a number of different copyright works under the *Copyright Act 1968* (Cth) ("Act"). The design and selection of literal, graphic and audiovisual components appearing on a given Web site may also be entitled to copyright protection as a 'compilation'. Indeed, there may even be a compilation in the selection of sites linked to from the Web site.

Therefore, a typical Web site will give rise to copyright works in the form of original literary (including computer programs), dramatic, musical, artistic works, sound recordings, films, dramatic, broadcasts, cable programs and adaptations. 'Adaptation' includes compilations, and this category of work is of crucial importance to much Internet usage, compilation being of the essence of what occurs on the Internet.

In Australia, originality as a precondition for copyright subsistence is a *de minimis* requirement. Provided a work originated with the author and is not copied it will be original in the copyright law sense¹³. The most difficult problems in respect of the concept of 'originality' in the past have been raised by compilations, where the decisions have been far from easily reconcilable. This trend will, in the short term, at least only be exacerbated by Internet copyright cases.

The exclusive rights granted to a copyright holder under the Act depend upon the type of work in question. A copyright holder's exclusive rights include copying, publishing, licensing, broadcasting, transmission, public performance and adaptation. The extent and availability of these rights varies with the nature of the work concerned. In addition to the civil rights of the copyright owners, criminal sanctions exist for the manufacture, possession for purposes of sale and distribution of infringing works. Criminal sanctions are also proposed in relation to the manufacture and dealing in circumvention devices, that is devices which have as their main function the circumvention of technological measures employed by copyright owners to protect their material¹⁴.

The different types of copyright works contain separate and almost infinitely divisible rights. For example, in a musical work, the separate rights include the right to prohibit reproduction of musical notation, public performance of the composition, synchronisation to a soundtrack accompanying any moving sequences of images such as a video and any transmission except for home copying¹⁵. A right in copyright may be made technology specific, eg. DVD only, and geographically limited, eg. USA or Australia only.

The right to stop adaptation, an infringing act, which is also an act capable of giving rise to copyright subsistence, is a key concept¹⁶. So too is the concept of substantial part, as in order to infringe any copyright work, a substantial part must be taken¹⁷. Substantial part is by long hallowed usage defined as a qualitative, not quantitative taking¹⁸. Anything 'qualitative' is necessarily subjective, therefore individual judges' concepts of fair play are necessarily brought to bear here.

In addition to the issues surrounding the broadcasting and diffusion rights, it is worth noting the application of computer software copyright in relation to Web sites. As computer programs are literary works under the

Act, there is also the issue of whether or not HTML code (including URLs) that generates a Web page, might be a copyright work¹⁹. In *Powerflex v Data Access*²⁰, a decision of the Federal Court, the first instance ruling, subsequently overruled by the High Court, observed that copyright might subsist in a few words of programming language. Such a decision, if allowed, may have afforded copyright protection to URLs, causing significant complications in the use of hypertext links. Further, the 'look and feel' of a computer program in the absence of direct copying of the source or object code may also be available to protect Web sites. Indeed, in *Digital Communications Associates Inc. v Softklone Distributing Corp*²¹, copyright infringement was held despite the fact that there was no literal copying of the program code.

Therefore one may conclude much of the material disseminated through the Internet will give rise to subsistence of copyright, but the determination of the issue on a particular set of facts may entail laborious and expensive legal analysis.

1.1 Current Legislative Limitations in Respect of Online Digital Subject Matter

It is useful to briefly discuss the exclusive rights of broadcasting and diffusion in the context of the Internet.

Internet communications are generally transmitted through both the analogue telephone network and through proprietary computer sub-networks either by wire or by wireless technology. This means that under present Australian copyright legislation, an Internet communication may come within the definition of a cable program or broadcast or both. The relevant definitions of these rights in the Act are technology specific.

Under section 10(1) of the Act, the term 'broadcast' means to "transmit by wireless telegraphy to the public"²². Interestingly, the present definition of "to the public" does not provide

copyright owners with the exclusive right to control transmissions that originate from Australia but are intended only for reception by the public outside Australia (as they are not broadcasts to the public as required by the Act)²³.

The exclusive right of transmission to subscribers to a diffusion service is defined to mean: "the transmission of the work or other subject-matter ... over wires, or over other paths provided by a material substance, to the premises of subscribers to the service"²⁴.

The problem with such technology-specific statutory language is illustrated in the decision of the High Court in *Telstra v APRA*²⁵. In that case, members of the court could not agree on whether music played 'on hold' to Telstra telephone subscribers was a broadcast or cable diffusion. The need for a broad-based technology neutral exclusive right was one of the driving forces behind the 1996 WIPO Copyright Treaty ("WCT").

The original draft of the WCT defined two such rights, namely: (1) a technology neutral 'transmission' right, and (2) a right of 'making available to the public', however the treaty as adopted amalgamates these two rights into a single right of 'communication to the public'²⁶.

The Federal Government cites the WCT as one of the factors precipitating the sweeping copyright reforms contained in the *Copyright Amendment (Digital Agenda) Bill 1999* ("Bill")²⁷. The centrepiece of the Bill is a 'new' right of "communication to the public". The communication right is implemented by replacing the existing technology-specific exclusive rights of broadcasting and diffusion, contained in section 31 of the Act, with the new right. The Bill also inserts a definition of 'communicate', which reads as follows:

"... [to] make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter"

It is important to note therefore that the right only covers 'communication' in the electronic domain, that is, it does not create an exclusive right of communication in the print environment.

The Bill was introduced into the House of Representatives on 2 September 1999 and almost immediately referred to the Standing Committee on Legal and Constitutional Affairs ("Standing Committee"), which tabled its report in December 1999. Whilst generally agreeing with the provisions of the Bill, the Standing Committee's report suggested a number of amendments. The Bill was passed by the House of Representatives, subject to a number of amendments, on 28 June 2000.

1.2 Downloading, Browsing & Caching Web Sites – Implied & Statutory Licenses

Downloading copyright material from Web sites would almost definitely constitute infringement of one or more of the exclusive rights of the relevant copyright owner, be it reproduction, adaptation or the proposed communication right.

In a similar vein to downloading, browsing material in which copyright subsists from Web sites will almost definitely be held to amount to one of the restricted acts in respect of copyright subject matter, be it reproduction or adaptation.

Unlike browsing the pages of a book, an Internet user's PC must make a Random Access Memory (RAM) or cache copy of the Web page in order to display the material.

In *Mai Systems Corp v Peak Computer Inc*²⁸ the US Ninth Circuit held the loading of software into a personal computer's random access memory (RAM) for the purpose of viewing a system error and diagnosing problems, was copying within the meaning of the *US Copyright Act 1976*. The Court considered that anything more than transitory was regarded as 'fixed', even though the reproduction would be lost when the computer was turned off²⁹.

The issue of whether or not the transfer of program information into RAM amounts to a reproduction in material form is still unresolved under Australian law. In *Autodesk Inc v Dyason* ("Autodesk")³⁰, Sheppard J of the Full Federal Court suggested that it would not amount to a reproduction. His Honour did think that the transfer of a program from a floppy disk to a hard disk is such a reproduction. In the recent case of *Microsoft Corp. v Business Boost Pty Ltd*³¹, Microsoft alleged that the defendant (a computer retailer) had infringed the *Copyright Act 1968* by first, loading and storing Microsoft software on a hard disk and secondly, causing them to be loaded into RAM each time the program was run. In order to grant the injunction sought by Microsoft, Tamberlin J was required to find that there was a serious question of law that either:

- (i) the running of a computer program from temporary storage and operation in RAM is a reproduction in material form; or
- (ii) the transfer of a program to the hard disk is a reproduction in a material form.

Referring to the comments of the court in *Autodesk*, Tamberlin J was satisfied that there was a serious question of law as to whether the defendant's conduct in installing the Microsoft programs infringed copyright and accordingly awarded the injunction.

However, there is little doubt that an implied licence exists in relation to the browsing of Web sites. After all, they cannot be viewed unless they are accessed by browser software. The real difficulties arise in relation to the exact terms of any such licence.

The other important issue in this context is whether or not caching, the practice involving the making of a local copy of frequently accessed Web documents, in order to improve network performance, should be excluded from the definition of 'reproduction'. On this point, the Bill proposes the insertion of two new sections, namely ss43A and 111A, that

would provide an exception to infringement for temporary reproductions of a work that occur "as part of the technical process of making or receiving a communication". The Bill does not distinguish between the various forms of caching, most notably between copies made by proxy servers as opposed to copies made by browser software and stored on a user's PC. The proposed exceptions would also appear to cover RAM reproductions of online copyright material that do not fall within the relevant exception for computer programs in s47B of the Act³². Notably, this 'technical processes' exception does not apply if the 'making of the communication is an infringement of copyright'³³.

There was a substantial amount of debate before the Standing Committee in relation to these sections that culminated in recommendation 35 of the Standing Committee's report, in which the Committee recommends that sections 43A and 111A be removed from the Bill.

In its April 2000 Interim Report³⁴, the Intellectual Property & Competition Review Committee recommended the retention of the caching provisions set out in the original Digital Agenda Bill. They did so on the grounds of the enhanced efficiency that caching brings to Internet usage, though the Committee argued for non technology specific language in the Bill. The Bill as passed by the House of Representatives retains the original sections 43A and 111A, which provide an exception to infringement in respect of temporary reproductions or adaptations made as part of the technical process of making or receiving a communication.

Arguably, the only potential economic significance of caching is in relation to its effect on advertising revenue³⁵. Generally, when a user accesses a cached document, the cached 'site' does not record a 'hit' as it would if the user accessed Web documents stored on the originating site. Given that the attractiveness of a particular Web site to advertisers is predicated to a significant extent on

the number of 'hits' the site receives, caching may have an adverse effect on the amount of advertising revenue generated by a Web site. However, a Web site can embed high-level programming instructions (e.g. in Javascript), that will send information on page accesses in respect of cached documents back to the originating server.

Given the importance of caching to the proper functioning of the Internet, and the negligible effects of caching on any legitimate markets of the copyright owner, it is difficult to support the Standing Committee's recommendation that the practice remain an infringement of copyright under the Act.

1.3 Hypertext Links, Inline Linking and Framing

Hypertext links are the essence of the World Wide Web. These links make the Web a "seamlessly" connected bulk of information³⁶. As recognised by the U.S. District Court for the Eastern District of Pennsylvania:

*"The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location."*³⁷

However, hypertext links present a number of vexing copyright issues for the IP professional. They allow any given Web site operator to incorporate third party images, text and other material into a Web site, without that person necessarily making a copy of anything. Generally, it is intermediate computers, as well as browser software running on users' machines that generate the reproductions.

There are two basic types of linking employed by Web sites. The most common, the 'hypertext link', is a word, phrase or image in a Web page that when clicked brings up another Web document. An example of a simple hypertext link is given in Figure 1.0. As discussed previously, each document on the Web has a unique Uniform Resource Locator (URL). Taking the example of "<http://www.law.murdoch.edu.au/apipli>", 'http' part of the URL is the protocol

and specifies how the data is to be transferred, "www.law.murdoch.edu.au" is the DNS³⁸ name of the computer where the resource is located, whereas the final part, ie. "apipli", specifies a particular document (or directory) on that server.

Figure 1.0

The other form of linking, which is generally referred to as 'inline linking', most commonly occurs in relation to the use of image HTML tags. A typical HTML tag incorporating an image contains a field specifying the location of the image file (see Figure 2.0). It is not necessary that the image be contained on the server containing the rest of the relevant Web page. A URL for an image on another site may be readily specified as the source of the image file to be incorporated into the Web page (see Figure 2.1). In most cases, a visitor to the relevant Web site will be unaware that the image is not stored on the same computer as the rest of the Web page.

Figure 2.0

Figure 2.1

Whilst not strictly an instance of linking per se, the practice known as 'framing' is often mistaken as such, or at least is generally discussed in the context of linking. Frames allow a Web designer to divide a Web page into distinct regions, permitting certain regions such as menu bars to remain constant on the page, whilst another frame contains the main page content and is reloaded as necessary as the user navigates through the site³⁹. In this example, as the menu bar does not have to be continually reloaded, the Web site can be accessed with greater speed. 'Framing' generally refers to the practice by which a Web site operator incorporates the content of a third party Web site into one frame, whilst surrounding that frame with advertisements, logos, menu bars or other content contained on the local server. In the following example (Figure 3.0), the HTML code sets up a Web page containing two frames, a left-hand-side frame containing the Web page "apipli_left.htm" and another frame containing the Web page "apipli_right.htm". A Web document contained on another Web site can

readily be specified in the 'src' field.

Figure 3.0

In the majority of cases of all types of linking, the permission of the owner of the "linked to" Web site is not sought prior to establishing the link.

A Web site may consist entirely of content drawn from third party Web sites, without any independent contribution by its 'owner' other than the selection of URLs included in the relevant HTML tags. A person accessing the site will not be aware of the origin of the information unless they examine the underlying HTML code. Such a site can perhaps best be referred to as a 'virtual Web site', in the sense that the Web site as viewed by the user is constructed, or drawn together, 'on the fly' from Web documents located on a number of different Web servers. This is to be contrasted with the practice known as 'mirroring', which refers to the situation where a copy of an existing remote Web site is stored on a local server. This is a common practice in relation to Web sites that provide freeware or shareware computer programs for download. Often a number of mirror sites around the world will replicate the 'parent' Web site so that local users within may have faster access to the resources offered by the parent Web site.

1.4 Linking Litigation

The most famous link-litigation case is *The Shetland Times Limited v. Dr Jonathan Wills and Zetnews Limited*⁴⁰. The Pursuer (plaintiff), *The Shetland Times*, was a local newspaper in the Shetland Islands of Scotland. It has a Web site, which includes online copies of articles and photographs that appear in the printed edition of its newspaper⁴¹. The Defender, *The Shetland News*, provided an Internet-based news and reporting service. In October 1996 the Defenders made hypertext links to the Pursuer's Web site. The text of the links appearing on the Defender's site were a number of headlines that appeared in the online edition of *The Shetland Times*.

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If a user clicked on one of these headlines, he or she would access the text of the relevant story on the Pursuer's Web site, bypassing its home page and the associated advertising. This practice of linking to a document on a Web site other than the site's home page is referred to as 'deep linking'.

The Shetland Times applied for an interim interdict (an injunction) preventing *The Shetland News* from maintaining the impugned links. The case came before Lord Hamilton, sitting in the Court of Session in Edinburgh (the Scottish equivalent of the High Court). On 24 October 1996 Lord Hamilton granted an interim interdict, preventing the Defenders from "storing in any medium by electronic means or otherwise copying", or "including in any service operated by the Defenders on the Internet" any headline, text or photograph from any edition of *The Shetland Times*' newspaper or Web site. Regrettably for we lawyers, the case has now been settled.

In *The Washington Post Company v. TotalNews Inc.*⁴² case, the plaintiffs were a group of news organizations, including CNN, Reuters, Time and the Wall Street Journal. Each of the plaintiffs owns famous trade marks under which they publish and create copyright news material in various forms. Each plaintiff also operates a Web site containing such copyright material and trade marks. The plaintiffs derive advertising revenue from the operation of their sites, generally proportionate to the number of visitors they attract. The defendants operated a site that used frames to incorporate selected content from the plaintiffs' Web sites. As a result a user could view articles and other content originating from the plaintiffs' sites, surrounded by advertisements placed on the site by the defendants (from which they profited).

It is important to note that the use of frames did not transport the user from the defendant's site to the Web sites of the plaintiffs. An understanding of the technical process by which the

TotalNews (and similar Web sites) are generated, is important here. Examining the processes at a meaningful level of abstraction, the process begins with a request from an end user (through browser software such as Internet Explorer, Netscape Navigator, Mozilla etc.), for a particular Web document located on the site specified in the relevant URL. The relevant Web server responds to the request by sending back a file containing various HTML instructions. The user's browser then begins the process of translating the HTML code into a form intelligible to the user. It is during this translation process that the browser notices the HTML tag specifying that one or more documents located on other servers are to be incorporated into the Web page to be displayed to the user. The browser then sends a request to the relevant server for any such Web documents and performs the process of HTML translation on the file received back from that server. Therefore, no copy of the plaintiffs' Web sites needed to be made on the defendant's server.

The plaintiffs sued the defendants for the acts of misappropriation, trademark dilution, copyright infringement and other related tortious acts in connection with the framing on the defendant's "parasitic" site⁴³. The case was settled soon after the complaint was filed, even before the response of the defendant was due, and an agreement submitted to the court for its approval⁴⁴. Under the settlement, the defendants agreed to stop incorporating content from the plaintiffs' sites into any frame located on the defendant's site, or to otherwise "directly or indirectly cause any plaintiffs' Web site to appear on a user's computer screen with any material (e.g. URL, text, graphics, pop-up window, audio or other) supplied by or associated with defendants or any third-party, such as an advertiser..."⁴⁵. This case goes to the heart of how the Web operates, that is, the compilation and synthesis of online material. However, since it was settled between the parties, it left unresolved the issue of whether a

linker has the right to create a hypertext link to a linkee's site, either by HREF or by IMG (image) tags, and if so, whether such content must be displayed as close as possible to its original form or whether it can be 'framed' on the linker's site.

*Ticketmaster Corporation v. Microsoft Corporation*⁴⁶, filed in the U.S. District Court for the Central District of California, was another case dealing with hypertext links and the practice of deep linking. Ticketmaster sells tickets to entertainment events at various arenas and other venues throughout the U.S., and operates a Web site offering listings and other information related to such events. One can purchase tickets online or via phone numbers provided on its Web site. Microsoft operates a Web site at "seattle.sidewalk.com", which features information about Seattle, including information concerning upcoming live entertainment events. Microsoft, without Ticketmaster's approval, made links to Web pages within Ticketmaster's site, for those interested in purchasing tickets or obtaining more detailed information concerning ticket availability. The deep links made by Microsoft were ordinary hypertext links. However, once linked, although the user saw the Ticketmaster's URL in his browser, indicating that the user was at the Ticketmaster's site, Ticketmaster's home page was bypassed (along with the advertising material that appeared thereon), and took the user directly to the entertainment listings.

In its complaint, Ticketmaster alleged Microsoft's linking constituted "electronic piracy", and it sued Microsoft for wrongful appropriation and misuse of Ticketmaster's name and trademarks and unfair competition, and diminution and dilution in value of Ticketmaster's name, trademarks, goodwill and business⁴⁷. The case was likewise settled between the parties. Whilst the terms of the settlement are confidential, Microsoft now only provides links to the Ticketmaster home page⁴⁸.

The most recent deep linking case is that of *Ticketmaster Corporation v Tickets.com Inc.*⁴⁹ in the United States District Court for the Central District of California. The facts of the case are very similar to those involved in the Ticketmaster's litigation against Microsoft. Ticketmaster claimed, *inter alia*, that Tickets.Com's practice of deep linking violated key sections of its Web site "terms and conditions" which specifically prohibited the practice⁵⁰. Ticketmaster also alleged that the practice constituted passing off and inverse passing off, interestingly copyright infringement has not been pleaded in the case. This notwithstanding, Judge Hupp made the following statement at the hearing of a preliminary motion to dismiss⁵¹ on March 27 this year, namely that "hyperlinking does not itself involve a violation of the [U.S.] Copyright Act ... since no copying is involved". However, the deep linking practices of Tickets.com may yet be held to constitute breach of contract, tortious interference with economic relations, passing off or inverse passing off⁵².

An example of an inline linking dispute was that involving the popular 'Dilbert' comic strip⁵³. In that case, a Mr Dan Wallach, a fan of the comic strip, felt that United Media (the owner of copyright in respect of the strip), did a poor job of laying out the official Web site. Wallach created his own site, incorporating images of Dilbert strips through the use of inline linking⁵⁴. United Media sent Wallach a cease-and-desist letter, claiming that he was infringing copyright in the images. The parties settled the dispute without litigation, Wallach instead using normal hypertext links to the United Media home pages containing the images.

Another copyright issue that has arisen in the context of hypertext links is whether or not a Web site operator may be held liable for authorising infringement where the operator provides a link to an infringing copy of a work located on a third party's server. Campbell J of the United States District Court in Salt Lake City considered this issue in an interlocutory hearing in the matter of

*Intellectual Reserve Inc v Utah Lighthouse Ministry Inc*⁵⁵. The defendant, a long-time critic of the Mormon Church, operates a Web site containing commentary on the teachings of the church.

The defendant posted on its Web site the tenth chapter of the "Church Handbook of Instructions" ("Handbook"), along with portions of two other chapters, a total of 17 pages of the 160-page book. A few months later, the church, acting through its Intellectual Reserve Inc. arm, filed a lawsuit against the defendant in the United States District Court for the Central Division of Utah, claiming that the posting of the sections of the Handbook constituted copyright infringement. Judge Campbell issued a temporary restraining order against the directors of the defendant prohibiting the posting of the book's contents. About a month later, the defendant posted on its Web site an e-mail from a reader stating that the "Church Handbook of Instructions is back online!". The e-mail went on to list three Internet addresses at which copies of the entire Handbook, or portions of it, could be found⁵⁶.

Claiming that the defendant was improperly directing Web site visitors to sites containing infringing copies of the Handbook, the Mormon Church succeeded in its application to expand the terms of the restraining order. Campbell J issued a formal preliminary injunction, prohibiting the defendant from directly posting the contents of the Handbook, or posting on its site "addresses to Web sites that defendants know, or have reason to know, contain the material alleged to infringe plaintiff's copyright ...".

In reaching her decision, Judge Campbell made two key findings. First, she reasoned that any visitor to a Web site that viewed an infringing copy of the Handbook was probably engaging in direct copyright infringement, because that viewer's browser automatically makes a RAM or cache copy of the text. Second, her Honour stated that by hosting the URLs to the infringing Web sites, after

the defendant was ordered to remove the Handbook from its site, and by otherwise assisting people who wished to locate infringing copies of the Handbook, the defendant was liable under a theory of contributory copyright infringement (authorising infringement)⁵⁷.

There appear to be a number of problems with Campbell J's reasoning. First, her Honour's decision fails to consider whether an implied licence to browse the plaintiff's Web site negatives a finding that RAM copies of the site constitute copyright infringement. Second, accepting that such a licence must necessarily be implied from the nature of placing material on the Internet, and in order to ground a claim for authorising infringement, direct infringement must also be established, Campbell J's preliminary finding of contributory infringement appears fatally flawed. It would also appear that the 'technical processes' exception mooted in the Digital Agenda Bill (s43A) would negative the argument on which the preliminary holding of direct, and therefore contributory, infringement was based on in this matter.

1.5 Links & Copyright's Preoccupation with the Making of Copies

The problem with all Internet communication is that copies (in the sense normally understood) of copyright works and other subject matters need not be made by an alleged infringer, and if they are, it is generally for network performance reasons (caching in one of its various forms).

The copyright problems in this regard are directly linked to the decision to protect digital subject matter through copyright. With traditional copyright works such as those on paper, browsing or reading a work does not require a licence from the copyright owner. In the case of digital works, the making of a transient copy is essential to the reading of the work. Copyright legislation here and elsewhere has characterised the making of these transient copies of

digital works as infringements of copyright⁵⁸. Specific exceptions have recently been introduced into Australian legislation in relation to the making of copies of computer software in the normal course of running the program, for the purposes of developing interoperable products, security testing and for error correction⁵⁹.

Copyright's preoccupation with copies creates particular problems in the context of deep and inline linking. Were a person to copy an image onto their Web server, for example by scanning a photograph and loading it onto a server connected to the Internet, the reproduction made in the process would in all likelihood constitute copyright infringement under the Act. However, where inline linking is used, the same person gains an identical benefit, ie. the inclusion of the relevant image on their site (without the payment of a royalty or other fee), but as no 'copy' is made, no claim for copyright infringement would appear to lie. The same result would appear to follow for text appropriated from third party sites through the use of deep links and inline framing.

Copyright is used to works residing in an identifiable and fairly permanent form, whether that be on paper, a CD ROM, floppy disc, or computer hard drive. However, Web documents can have no reasonably identifiable residence. This concept requires some clarification. One speaks of 'virtual documents' in this respect, that is, files comprising both text, images and computer programs which become intelligible to the user after being translated by a browser. The computer program component is the HTML⁶⁰ or embedded scripting code such as Javascript or PHP. As previously explained, the appearance of a Web page is determined by the relevant HTML tags and these scripting components.

A document on the World Wide Web might use HTML tags to instruct a user's browser to fetch text and graphics from other sites and display them in the subject Web document.

The user will be unaware of the origin of this content unless the underlying HTML code is examined. Therefore, the only component of the Web which is located on the computer specified by the relevant URL, may be a set of HTML and similar high-level programming instructions that identify the URLs of the components on the remote servers from which the 'virtual document' is assembled. The 'copy' is only made when the user's browser translates the HTML tags into a format intelligible to the user. The question then becomes: is this 'copy' a reproduction for the purposes of copyright.

1.6 Linking and Framing: Infringement of HTML Code & URLs

If infringement by unauthorised linking is to be proven the process becomes very complicated. Is a 'virtual document' a reproduction, adaptation, or will it constitute a breach of the communication right under the Digital Agenda Bill amendments?

This appears to require one to first consider of whether or not the reproduction of the URLs (specifying the location of Web documents hosted on other sites), given in the HTML commands on the originating site, may constitute an infringement of any relevant copyright. To prove infringement, copyright must subsist in a URL. This seems most unlikely, as a URL is simply a method of referencing or addressing a particular Web resource and is usually comprised of a trade name (or a related generic term that is descriptive of services contained on the relevant Web site), coded in accordance with the conventions of the Domain Name System (DNS) and the URL scheme. The decision in the landmark *Exxon case*⁶¹ would also appear to work against a finding of copyright subsistence in a URL.

A further issue arises in relation to the process by which a document specified in a particular URL is retrieved so that it can be displayed to the user. Normally this function is performed by the user's browser

software that translates and executes HTML instructions to fetch a particular Web document from a remote Web site. Is copyright infringed in the process of translating the HTML code of the particular Web document on the target site? Important in this regard is the copyright owner's exclusive adaptation right. Section 10 of the Act defines 'adaptation' in relation to computer programs as:

"... a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work ..."

Therefore it is likely that the translation performed by the browser would infringe the exclusive adaptation right (at least to the extent that the relevant Web page is comprised of computer program components). However, section 43A(1), the 'technical processes' exception proposed in the Digital Agenda Bill, would appear to provide a defence to infringement in this situation.

One of the most important achievements of the World Intellectual Property Organisation (WIPO) Intellectual Property Treaty 1996, was to create a technology neutral right of 'communication to the public' to cover use of copyright material on the Internet.

The Discussion Paper to the Digital Agenda Bill states that where a person, without the consent of the copyright owner, connects a file server with a copyright document on it to a publicly accessible computer network such as the Internet, the action may constitute infringement of the proposed communication right with or without exercising the 'reproduction right'⁶². An even more common situation is where a Web site operator links to copyright material located on another server on the Internet. Both sites, from the nature of the Internet, are publicly available⁶³. Does the link infringe the communication right? One would argue that providing a hypertext link to certain copyright material does not amount to an exercise of the exclusive

right of the copyright owner to communicate the work to the public. The situation is analogous to one where a librarian provides a Dewey decimal reference to a library book. The link merely directs the user to the server where the relevant copyright material is made available to the public.

A further issue and one with more implications for further reform, is the question of what is made available. As mentioned previously, with inline linking and framing all that is made available on the defendant's site is a set of HTML instructions to assemble a Web page from a set of third party copyright works, no copies need be made available on the defendant's server. Given copyright's traditional preoccupation with copies this poses problems and signifies that this area of technology is ushering in new types of right. Rights in information as such, which bring with them new questions as to how to balance protection with access.

Perhaps the law could draw a distinction here between the terms 'reproduce' and 'copy' – 'copying' denoting a more literal type of copying (ie. in the traditional sense), whereas 'reproduction' could be interpreted to encompass the assembly or re-assembly of a particular form of expression of an idea. However, given the proliferation of temporary reproductions that are reasonably required to be made as part of the technical process of communicating digital works, one has to wonder whether an action, that is primarily concerned with the question of whether or not copies or reproductions have been made, is satisfactory. In this sense, one could argue that the retention of the concept of 'reproduction' in the Digital Agenda Bill perpetuates the technologically-specific nature of the Act. One submits that an action based on whether or not there has been a *misappropriation* of the skill, labour and effort invested by the copyright owner in the creation of the copyright work may be more suitable in the digital environment.

Issues of implied licences also arise. Given that the prudent use of scripting and configuration of Web server software can prevent third parties linking to, or framing material contained on one's Web site⁶⁴, does the failure to institute such measures imply a licence to link to the material?

The inclusion of 'moral rights' in Australian legislation⁶⁵, specifically the right to insist on attribution of authorship and to object to derogatory treatment of a work, may also have significant implications for linking on the Internet. Inline links, deep linking and other practices such as 'framing' may segment a work and therefore be considered derogatory treatment, or they may remove the author's name thereby offending the attribution right.

2. MULTI-JURISDICTIONAL DIMENSIONS

Internet usage gives rise to unprecedented multi-jurisdictional/private international law/conflict of laws issues. Private international law is that part of domestic law which operates to regulate disputes which have a connection of some type with one or more foreign legal systems⁶⁶. Every modern legal system has developed its own particular rules of private international law, and these rules differ from country to country as much as any other branch of domestic law.

In Australia, as in many other common law jurisdictions, private international law is concerned with more than simply the determination of whether or not a particular court has 'jurisdiction' to hear a matter before it. Australian private international law also involves determination by the forum court as to what law should be applied to the facts of a given case, *forum non conveniens* issues and the rules relating to the recognition and enforcement of foreign judgments⁶⁷.

The question of whether or not a particular court has jurisdiction to hear a matter is quite distinct from the determination of which law applies to the facts of the case at hand. Further,

jurisdiction and *forum non conveniens* are distinct issues, the latter is derived from the common law, and refers to the process whereby the court considers in which court the matter at hand can most appropriately be litigated. This requires consideration to be given to issues such as the applicable law, cost, convenience, geographical location of the parties and the remedies available in the forum state⁶⁸.

The private international law methodology in Australia essentially involves characterising the relevant cause of action as a member of one of several possible categories, each of which has a choice of law rule indicating which laws ought to govern the matters in dispute. Australian choice of law rules are thus indicative: they aim only to identify the most appropriate law from a choice of laws. The law chosen by this process performs the dispositive function⁶⁹ and decides the substantive issues involved⁷⁰. Australian private international law exists both at common law and in the various rules of court in each of the Australian states.

The traditional rule in relation to intellectual property torts (such as infringement of copyright) is that the jurisdiction in which the infringing act has been committed is the natural forum for the determination of the resulting claim⁷¹. It is not necessary, however, that all elements of the tort have been committed within the jurisdiction, although it is not altogether settled which elements must occur within the jurisdiction⁷².

All the above represents Australian conflict of laws rules. Other countries not only have different rules but different modes of analysis of conflict of laws issues. Even where they are similar the results can be bizarre. For example one of the authors was recently approached to act as an expert witness on Hong Kong patent law in a case before a Houston court, instigated by a US company against a Malaysian defendant where the issue was infringement of a Hong Kong patent in Hong Kong. The Texas court

found it had jurisdiction and was preparing to apply Hong Kong law!

2.1 Willingness of US Courts to Take Jurisdiction Over Internet Disputes

The decisions that exist on conflict of law issues and the Internet are mainly interstate United States conflict of laws cases. This mirrors the position of early computer software and copyright cases which were predominately US cases.

The US decisions in this area raise the spectre of US courts taking jurisdiction over copyright infringement on the Internet alleged to take place in other countries and territories such as Australia. Alternatively viewed, the US decisions raise the opportunity for clients to take action in the US against some very pecunious defendants.

US Private International Law Rules

The US cases are complicated by the existence of state 'long arm' statutes giving state courts jurisdiction interstate and indeed overseas. The Due Process Clause of the 14th Amendment to the US Constitution allows a court to require a non-resident defendant to stand trial in the forum state only where the court properly exercises personal jurisdiction over the defendant⁷³. Assuming the requirements of the relevant long-arm statute are satisfied, a US court may assert personal jurisdiction over a non-resident by exercising either general or specific jurisdiction.

A court may exercise general jurisdiction only if the defendant is physically present in the forum state or maintains continuous and systematic contacts with that forum state. The court may exercise specific jurisdiction if the defendant has "minimum contacts" with the forum state in such a way that bringing litigation against the defendant does not offend the "traditional notions of fair play and substantial justice" and that the defendant would have reasonably have been able to foresee being brought before the court in the forum state⁷⁴.

The minimum contacts test is itself comprised of three prongs. First, the defendant must have 'personally availed' himself of the benefits of the law of the forum state. This test is satisfied where the defendant purposefully directs its actions towards the forum state and shows a substantial connection with the forum state. Second, the plaintiff's claim must arise from the defendant's activities in the forum state. Finally, the court's exercise of jurisdiction over the defendant must be reasonable. (largely *forum non conveniens* considerations).

The test of 'purposeful availment' was considered by the United States Supreme Court in *Superior Court of California v Asahi* ("*Asahi*")⁷⁵. The defendant Asahi, a Japanese manufacturer, sold its product to a U.S. distributor. The distributor then sold the product on a world-wide footing, which the court referred to as placing a 'product into the stream of commerce'. A product liability suit arose in California and the US Supreme Court held that the California court's exercise of personal jurisdiction over the Japanese company was a violation of due process. Justice O'Connor and Justice Brennan delivered differing opinions on what constitutes purposeful availment when dealing with the 'stream of commerce'.

Justice O'Connor's opinion adopted a narrow interpretation of putting a product into the stream of commerce. O'Connor J found that placing a "product into the stream of commerce, without more, did not meet the purposeful availment requirement for minimum contacts. O'Connor J explained that the awareness of a defendant that its product has entered a forum state by the stream of commerce does not equate to an act purposefully availing oneself of a forum state. O'Connor J further explained that the additional conduct referred to is conduct that 'may indicate an intent or purpose to serve the market in the forum state. Thus, in O'Connor J's opinion, beyond placing a product into the stream of

commerce, additional action by the defendant towards the forum state is required to satisfy minimum contacts.

Justice Brennan's opinion of the stream of commerce maintains a broader interpretation than that of Justice O'Connor. Brennan J's rejected the additional contact requirement espoused by O'Connor, reasoning that "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale". Brennan J stated that as long as a defendant is "aware that the final product is being marketed in the forum State" through the stream of commerce, the defendant cannot be surprised to defend a suit within the forum".

2.2 Internet-related Jurisdiction Cases

Recently, the US courts have applied the *Asahi* judgment to Internet contact. In *CompuServe v. Patterson*⁷⁶ the appellate court reversed the District Court's decision that the Plaintiff's Internet contacts were too tenuous to establish personal jurisdiction. The appellate court found Patterson had established minimum contacts with the forum and satisfied personal jurisdiction by applying O'Connor's opinion in *Asahi*.

CompuServe is an Internet service and content provider based in Ohio. Patterson was a subscriber to CompuServe's services and is a resident of Texas. Patterson entered into a shareware contract with CompuServe whereby Patterson used CompuServe's distribution facilities to sell his software over the Internet. Patterson wrote to CompuServe alleging, *inter alia*, trademark infringement precipitating CompuServe's action in seeking a declaratory judgment in Ohio. Patterson claimed this assumption of personal jurisdiction over him constituted a violation of due process. The court disagreed, holding Patterson purposefully availed himself of the privilege of doing business in Ohio. They also held the

facts satisfied the reasonableness requirement largely due to the contract made between the parties. Important in the court's decision was the fact that Patterson's common law trade marks were effectively established through activities in Ohio under a contract governed by Ohio law.

The tide of eagerness for forum states to assume jurisdiction appeared to turn in *Bensusan v King*⁷⁷. Bensusan was a New York Corporation which owns the trade mark "Blue Note" which is also the name of its jazz club in New York City. King is a resident of Missouri who operates a small jazz club under the same name. King created a link to Bensusan's Blue Note jazz club Web site. Bensusan sued for trademark infringement in the New York District Court. The court found that maintaining a Web site did not 'purposefully avail' King to the laws of New York. The court stated that "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting or selling, or otherwise making an effort to target its product in New York"⁷⁸.

Similarly, in *Cybersell v Cybersell*⁷⁹, the Court held that a Web site operated by the defendant, a Web site development firm in Florida, did not infringe the trade mark rights of the Arizona plaintiff. The Court rejected the argument that because the Internet does not recognise geographical boundaries and is globally accessible, a Web site is necessarily intended for universal use. The Court said that to hold otherwise would mean that every complaint arising out of actions on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located.

However, two decisions made around the same time are inconsistent with the above cases. In these particular cases, the courts appear to have set to with some enthusiasm to acquire jurisdiction. The first, *Inset Systems v Instruction Set*⁸⁰, the plaintiff Inset

Systems was based in Connecticut the defendant was based in Massachusetts. Both companies provide their services throughout the world. The plaintiffs sued for trademark infringement in respect of the domain name "inset.com". The Connecticut court held there was personal jurisdiction because the defendants Web site was available in Connecticut. The court made no reference to the then Bensusan case.

In *Maritz v Cybergold*⁸¹ the court followed the Inset decision. The plaintiff was a Missouri Corporation, the defendant a Californian corporation. The plaintiff sued in Missouri for infringement of its trademark 'Goldmail'. The court found personal jurisdiction simply by virtue of access to the defendants Web site in the forum state, Missouri.

Stott, an American practitioner, makes the following comment on the *Inset Systems* and *Maritz* decisions:

"Decisions like the *Inset* and *Maritz* could have negative implications on the Internet's technological progress. Courts that hold that Web site advertising and soliciting satisfy minimum contacts (*Asahi*), in effect, create national (or even world wide) jurisdiction because of the world wide nature of the Internet."⁸²

Perhaps the most useful case to date dealing with Internet jurisdiction issues is that of *Zippo Manufacturing v Zippo Dot Com*⁸³. In this case the defendant was a Californian Corporation that operated a Web site called Zippo Dot Com. Zippo, the famous cigarette lighter manufacturer, is a Pennsylvania Corporation, sued the defendant for use of the name Zippo (trademark & dilution) under Pennsylvania law. The defendant's only contact with Pennsylvania residents was through its Web site, yet still the court found personal jurisdiction. The court held the contractual agreements entered into on the Web by the defendant, with Pennsylvania residents and Internet access providers, was sufficient. The court stated that the likelihood that personal jurisdiction can be constitutionally exercised "is directly

proportionate to the nature and quality of commercial activity that an entity conducts over the Internet". The court's formulation the relevant test, based on an examination of the decisions referred to above and which has been applied in the majority of subsequent U.S. decisions⁸⁴, is as follows:

"At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper ... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction ... The middle ground is occupied by interactive Web site where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site ..."⁸⁵

The difficulties and complexities arise however in the fact based determination of the level of interactivity of the subject Web site. The opinions of various courts differ in their categorization of certain conduct as 'interactive'. For example, in the recent decision on *Mink v AAAA Development LLC*⁸⁶, the court declined personal jurisdiction even though the AAAA Web Site provided users with a printable mail order form, a toll-free telephone number, a mailing address and e-mail addresses (to which the company regularly responded). The decision seems to be based predominantly on the fact that the Web site did not facilitate the placing of orders online.

2.3 Enforcement of Internet-related Foreign Judgments & Court Orders

The case of *Nottinghamshire County Council v Anning & Ors*⁸⁷ is illustrative of the jurisdictional implications of

the Internet. On May 30, 1997, three U.K. journalists posted a controversial child abuse report on their Web site. Nottinghamshire County Council threatened the three journalists with legal action if they failed to remove the report from the Web site on the ground that any copying of the report was an infringement of Nottinghamshire County Council's copyright. On June 3, Nottinghamshire County Council obtained a High Court injunction against the journalists, requiring them not to reproduce, authorise the reproduction of, disseminate, disclose or in any way deal with the report or with information in the report⁸⁸, on the ground that any copying of the report would constitute an infringement of Nottinghamshire County Council's copyright.

As a result, the report was withdrawn from its place on the journalists' Web site, and replaced by hypertext links to the report on a number of "mirror sites" that had appeared in other countries. The Council's solicitor claimed that the injunction also covered these and so the links were removed⁸⁹. Although the journalist's site had been effectively closed down, and no other UK sites were mirroring the report due to the injunction, mirror sites sprung up in many other countries. The County Solicitor wrote to one of the mirror sites in Canada owned by Jeremy Freeman, claiming that the copy of the report on Mr Freeman's Canadian Web site amounted to copyright infringement, and therefore should be removed. Mr Freeman removed his copy, replacing it with a link to the report on a US Web site. The Council's solicitors wrote to him again requesting him to remove the link, and threatened to initiate legal proceedings. Mr Freeman, a 21-year-old student, complied again. But his story was widely publicised by several reporters, which resulted in more mirror sites in different countries⁹⁰.

The Council lawyer also wrote to the operators of other mirror sites in the U.S. and Australia, demanding them to remove all copies of the report or

suffer the consequences. Both Webmasters refused to comply, since they believed that the UK injunction order would be unenforceable in other countries⁹¹. The Council eventually abandoned its action against the three journalists, stating that they "faced ... a technology running at a pace which exceed[ed] the law's ability ... to deal with it ..."⁹². A number of Web sites around the world still carry copies of the report.

The New South Wales Supreme Court decision of Simpson J in *Macquarie Bank Limited & Another v Berg*⁹³ also illustrates the complications for the enforcement of court orders in Internet-related proceedings. In that case, the plaintiff and the defendant were involved in proceedings before the Industrial Relations Court of NSW and the Federal Court, and the defendant in the subject proceedings posted information about the proceedings on a Web site located at "maquarieonline.com". MBL sought an injunction restraining the publication of the allegedly defamatory online material in NSW.

As the defendant was not present in NSW, and any acts done by him in relation to the publication of the allegedly defamatory material on the Web site were done from outside the state, important questions of jurisdiction were therefore raised. The Court noted that authority exists to support the proposition that Australian courts are empowered to restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction⁹⁴. Whether that power should be exercised is a question of discretion. Notably, factors relevant to the exercise of the discretion include the potential enforceability of any orders made, and whether another court is a more appropriate forum⁹⁵. In refusing the plaintiff's application for the injunction, her Honour stated that:

"It is reasonably plain, I think, that once published on the Internet, material is transmitted anywhere in the world that has an Internet connection. It may be

received by anybody, anywhere, having the appropriate facilities. Senior counsel conceded that, to make the order as initially sought, would have the effect of restraining publication of all the material presently contained on the Web site to any place in the world. Recognising the difficulties associated with orders of such breadth, he sought to narrow the claim by limiting the order sought to publication or dissemination "within NSW". The limitation, however, is ineffective. Senior counsel acknowledged that he was aware of no means by which material, once published on the Internet, could be excluded from transmission to or receipt in any geographical area The consequence is that, if I were to make the order sought (and the defendant were to obey it) he would be restrained from publishing anywhere in the world via the medium of the Internet." (emphasis added)

Her Honour's concern as to the worldwide effect of any injunction was the sole reason for her decision against the granting of the injunction.

Both of these cases give a glimpse of the problems arising from the transnational and instantaneous nature of Internet communication and the law.

2.4 International Developments

The inconsistencies evident in the U.S. decisions above, and the growth in international commerce and the Internet, provide support for the argument that a multilateral treaty dealing with jurisdiction is necessary. One such draft treaty, known as the Hague Convention on *Jurisdiction and Foreign Judgments in Civil and Commercial Matters* ("Convention"), is currently in the process of formulation. The draft convention was proposed by the U.S. in 1992, with formal negotiations beginning in 1996. There have been a number of meetings of the Special Commission, and a preliminary draft treaty has been prepared⁹⁶. Australia has been represented at all meetings of the Special Commission⁹⁷.

The final text of the Convention is due to be resolved in October of this year, however, disagreements and complications, particularly in the

context of e-commerce, make it unlikely that the deadline of October will be met. Indeed submissions from a number of e-commerce industry representatives to the US House Courts and Intellectual Property Subcommittee on 29 June 2000 cautioned against the U.S. entering into the Convention in its present form⁹⁸.

There are a number of reasons why a multilateral approach to the problem makes sense. First, negotiating separate bilateral agreements would require a larger commitment of resources than a multilateral effort. Second, litigants would be disadvantaged if they were required to cope with the differences that result from negotiation of a number of separate treaties. Third, each treaty may require the enactment of separate domestic legislation, further slowing the implementation process.

The proposed treaty is a mixed convention. This means that, broadly speaking, it details a white list of approved grounds of jurisdiction, a black list detailing prohibited grounds of jurisdiction and a grey list, which is essential jurisdiction outside of the white and black lists predicated on national laws relating to jurisdiction. Member states would be required to recognise and enforce all foreign judgments based on white list grounds of jurisdiction, refuse recognition where the head of jurisdiction is on the black list, and would be free to develop their own national policies regarding the enforcement and recognition of grey list jurisdiction judgments. Notably, a number of the prohibited grounds of jurisdiction contained on the black list, are grounds on which a number of the U.S. Internet jurisdiction cases have been decided.

It should be noted that whilst the Convention lays down a number of choice of jurisdiction principles, it does not attempt to consolidate substantive rules of the domestic private international law. That is, it provides guidance on the preliminary issue of what court or courts have jurisdiction to hear a particular dispute, but leaves the question of

what law governs the matter to be determined by the private international law rules of the forum state. The failure of the Hague Conference to attempt to reconcile different domestic choice of law rules has been criticized in a number of the submissions to the US Courts and Intellectual Property Subcommittee in June of this year⁹⁹. However, given the disparity of national laws in relation to jurisdiction and choice of law rules, one would argue that the Hague Conference is correct in focusing its attention on obtaining a consensus on the preliminary issue of jurisdiction (ie. choice of court). Such a consensus would provide the necessary foundation for a more comprehensive reworking of the Convention at future meetings of the Hague Conference.

Notably, Article 12 (which sets out the heads of exclusive jurisdiction), states in subparagraph 4 that in proceedings which have as their object the registration, validity, nullity, revocation or infringement of patents, trade marks, designs and other similar rights required to be deposited or registered, the courts of the member state in which the deposit or registration has been applied for or has taken place, is deemed to have exclusive jurisdiction. The article expressly states that it does not apply to copyright or any neighbouring rights. The application of the article to patent and trade mark infringement proceedings, as distinct from proceedings dealing with proper registration and validity of the same, has not been supported by a majority of member states as yet.

The present draft of the convention also contains a number of articles that seek to redress the unequal bargaining power between consumers and business, particularly as exist in the online environment. However, it appears that a number of States will be pushing for a reduction in the strength of these provisions, in particular through a widening of the situations in which a consumer can alienate his or her rights under the convention, at the next meeting of the Special Commission¹⁰⁰. One of the

more recent proposals, advanced by Professor Catherine Kessedjian (Deputy Secretary General of the Hague Conference on Private International Law), is that the traditional dichotomy between the "country of origin" and the "country of destination" could be resolved through a certification process. By this process, when a site has obtained the certification label, it could provide for the application of the law of the country of origin and for the courts of that country for the residual cases which could not be solved by the dispute mechanism part of the certification¹⁰¹.

However, successful formulation of the treaty would provide increased certainty in the areas of Internet jurisdiction and the enforcement of judgments obtained in such litigation though ultimately a treaty dealing with all legal aspects of the Internet is both essential and inevitable.

CONCLUSION

Digital communications, biotechnology, the Internet, modern global markets and marketing methods, have and will continue, to highlight the flaws and inefficiencies in the present system of intellectual property protection. The emergence of new technologies, and the extension of the existing copyright regime to encompass these developments, is quickly rendering the current approach unworkable.

The *Copyright Act 1968 (Cth)*, even in light of the changes proposed in the Digital Agenda Bill, remains a patchwork of ad hoc amendments, and lacks the simplicity and efficiency to be an effective vehicle for the enforcement of rights in original forms of expression and information. More importantly, it seems many people lack sympathy for its underpinning's, which in turn is due more to copyright's opaqueness rather than any lack of moral congruence.

Increasingly, one must look to alternative frameworks of protection, in particular, to one based on regulating rights in information and the misappropriation of same, fully

cognisant of why the common law eschewed such an approach¹⁰². To strike a fair balance between access and restriction rights to information is an enterprise which can be attempted. To seek such a balance using 17th century causes of action, with the attendant social circumstances and technology which engendered them, is all but doomed to failure.

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¹ Other intellectual property causes of action, particularly passing off, inverse passing off, *Trade Practices Act 1974 (Cth)* equivalents and registered trade marks are directly apposite but not canvassed.

² The recent 1996 WIPO Copyright Treaty creates a technology neutral right of 'communication to the public' as to which see below, but does not address private international law issues.

³ For example, digital watermarks and the software protection technology developed by InterTrust Technologies Corporation see <http://www.magex.co.uk> and <http://www.nytimes.com/library/tech/00/06/biztech/articles/28online.html>. See also the IMPRIMATUR project begun by the European Commission in 1995 to trace the use of digital subject matter with a view to inclusion of such provisions in the Berne Convention. See Audio Visual Conference 6-8 April 1998, [Internet] <http://europa.eu.int/eac/papers/barlas.html>.

⁴ See *Ticketmaster Corporation v Tickets.com Inc.* (C.D. Cal., March 27, 2000); *Shetland Times Limited v Jonathan Wills & Ors* (1996) 1 EIPR 723; *Ticketmaster Corp v Microsoft Corp* 97-3055DDP (CD Cal Apr. 12, 1997).

⁵ *Nottinghamshire County Council v Anning & Ors* (1997) Vol 13 No 5 CLSR Briefing 367.

⁶ As to whether ISPs are liable for Acts of those who use their networks see *Telstra v APRA* (1997) 146 ALR 649 where the High Court held that Telstra was liable for copyright infringement because of the acts of a subscriber who played music, infringing copyright, while a caller was held 'on hold'. Note also sections 22(6), 36, 39B, 101 and 112E of the *Copyright Amendment (Digital Agenda) Bill 1999* and Blakeney & Macmillan, "Internet & Communications Carriers Liability" [1998] EIPR 11.

⁷ *Report No. 8147.0: Use of the Internet by Householders, Australia*, February 2000, Australian Bureau of Statistics [Internet] <http://www.abs.gov.au>.

⁸ See the report of the National Office of the Information economy at: http://www.noie.gov.au/projects/information_economy/economy_analysis/ie_stats/state_of_play.htm

⁹ See <http://www.commercenet.com/research/stats/april99.html>.

¹⁰ For example SMTP, FTP, telnet.

¹¹ The Internet Engineering Task Force (IETF) defines most Internet standards. For a while this included Web standards such as HTTP,

HTML and URLs. However, the World Wide Web Consortium (also known as W3C) has taken over much of the standards development process for Web-related protocols. The result is that the IETF still does most of the standards development work for HTTP, whereas W3C concentrates its efforts on HTML and the URL scheme. See Loshin P, *TCP/IP Clearly Explained* (3rd ed.), (1999): San Francisco, Morgan Kaufman, 352. For the views of the WWW's creator (Tim Berners-Lee), on the controversy surrounding linking and intellectual property see <http://www.w3.org/DesignIssues/LinkLaw.html>.

¹² See IETF RFC 1738 at <http://www.ietf.org/rfc/rfc1738.txt?number=1738>.

¹³ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 608-609. Note that the recent decisions of the High Court in *Autodesk v Dyason (No. 1)* (1992) 22 IPR 163 and *Data Access v Powerflex* (1999) 166 ALR 228 appear to raise the level of originality required when dealing with digital works.

¹⁴ See ss 116A and 132(6AA) of the Bill.

¹⁵ s111 of the Act.

¹⁶ The copyright owner's right to control derivative uses of their works in part derives from the exclusive reproduction right conferred on the owners of copyright in literary, dramatic, musical and artistic works under s31(1) of the Act. See Ricketon S, *Intellectual Property: Cases and Materials* (2nd ed.), (1998): Sydney, Butterworths, 166.

¹⁷ s14 of the Act.

¹⁸ *Autodesk Inc v Dyason* (1993) 173 CLR 330.

¹⁹ Note in this respect the amendments proposed to the definition of 'computer program' in the latest version of the Digital Agenda Bill, see s47AB of the Bill.

²⁰ (1997) FLR 435.

²¹ 659 F. Supp. 449.

²² The proposed reforms retain a definition of a 'broadcast', but it is redefined to mean a broadcast within the meaning of section 6(1) of the *Broadcasting Services Act 1992 (Cth)*. The reason for this is that the Government decided as a matter of policy to retain most of the existing statutory licences and exceptions in the Act in relation to broadcasting and not extend these licences to apply in relation to a 'communication'.

²³ See page 27 of the Explanatory Memorandum to the Digital Agenda Bill.

²⁴ s26 of the Act.

²⁵ *Supra*, note 6.

²⁶ See article 8 of the WCT at <http://www.wipo.int/eng/diplconf/distrib/94dc.htm>. Note that Australia is not a signatory to the treaty and had not acceded to the treaty at 21 June 2000.

²⁷ See page 4 of the Explanatory Memorandum to the Digital Agenda Bill.

²⁸ 991 F.2d 511 (1993)

²⁹ It is arguable whether this interpretation is now embodied in Art 7 of the WIPO Intellectual Property Treaty 1997.

³⁰ (1990) 18 IPR 109. Subsequently appealed to the High Court in *Autodesk v Dyason (No. 1)* (1992) 22 IPR 163 and in an unprecedented application to vacate its previous decision in *Autodesk v Dyason (No. 2)* (1993) 25 IPR 33. [1999] FCA 1384.

³² See the submission of the Attorney General's Department (AGD) and the Department for Communications, Information Technology and the Arts (DCITA) to the Standing Committee where it was submitted that: "It is intended that the reference to temporary copies made in the course of a communication

would include temporary copies made in the course of browsing...". *Joint Submission from the Attorney-General's Department and the Department of Communications, Information Technology and the Arts*, [Internet] <http://www.aph.gov.au/house/committee/laca/digitalagenda/Sub75.pdf>.

³³ S 43A(2) of the Bill.

³⁴ See page 83 of the Interim Report, available online at <http://www.ipcr.gov.au/ipcr/interim/INDEX.HTM>.

³⁵ Tucker R, "Information Superhighway Robbery: The Tortious Misuse of Links, Frames, Metatags and Domain Names", 4 *Va J.L. & Tech.* (Fall 1999) [Internet] <http://vjolt.student.virginia.edu>.

³⁶ For a history of the system of hypertext links see *A Little History of the World Wide Web*, World Wide Web Consortium [Internet] <http://www.w3.org/History.html>. Note the recent claim by British Telecom (BT) that it has a patent in respect of hypertext links. BT has requested ISPs in the United States to pay licence fees for links used in pages stored on their servers, see "BT claims patent on Web links", 20 June 2000, *BBC Online*, [Internet] <http://news6.thdo.bbc.co.uk/hi/english/sci/tech/newsid/5F798000/798475.stm>.

³⁷ *ACLU v. Reno*, 929 F. Supp. 824, 832 (E.D. Pa.), prob. Juris. noted, 117 S.Ct.554 (1996)

³⁸ Domain Name System.

³⁹ The HTML 4.01 Specification as released by the World Wide Web Consortium on 24 December 1999, proposes a new form of framing called 'inline framing'. The IFRAME element allows Web authors to insert a frame within a block of text. This gives Web page designers similar control over the source of a textual component of a Web page as is presently available in relation to images (ie. the ability to specify a remote document as the source of say, a paragraph of text, in a Web page). See further <http://www.w3.org/TR/html401/present/frames.html>.

⁴⁰ *Shetland Times Ltd. v. Wills*, [1997] F.S.R. 604.

⁴¹ See <http://www.shetland-times.co.uk/>.

⁴² *The Washington Post Company, et al. v. Total News, Inc. et al.*, 97 Civ. 1190 (PKL) (S.D.N.Y.).

⁴³ *The Washington Post Company, et al. v. Total News, Inc. et al.*, 97 Civ. 1190 (PKL) (S.D.N.Y.), Complaint, paragraph 8. See also Mitchell D, "Para-Site Draws Ire, Suit from News Giants", 24 February 1997, *Wired News* [Internet] <http://www.wired.com/news/business/0,1367,2230,00.html> and *Futuredontics Inc. v Applied Anagramics Inc* No. 97-56711, 1998 U.S. App. Lexis 17012 (Ninth Cir., July 23, 1998).

⁴⁴ Martin H. Sampson, "Hypertext link at Your Own Risk", 24 June 1997, *New York Times* [Internet] <http://www.nytimes.com/library/tech/reference/indexcyberlaw.html>.

⁴⁵ *Ibid.*

⁴⁶ *Ticketmaster Corporation v. Microsoft Corporation*, Civ. No. 97-3055 (DDP) (C.D. Cal.).

⁴⁷ See the plaintiff's complaint available online at <http://www.ljx.com/LJXfiles/ticketmaster/complaint.html>.

⁴⁸ See Tedeschi B, "Ticketmaster and Microsoft Settle Linking Dispute", 15 February 1999, *New York Times* [Internet] <http://www.nytimes.com/library/tech/99/02/cyber/articles/15tick.html>.

⁴⁹ (C.D. Cal., March 27, 2000).

⁵⁰ Discussion of the contractual enforceability of such agreements is beyond the scope of this paper.

⁵¹ Akin to a strike out application under the law of most Australian jurisdictions.

Browsing, Caching, Downloading & Linking Websites

- ⁵² See generally, Kaplan C, "Legality of 'Deep Linking' Remains Deeply Complicated", 7 April 2000, *Cyber Law Journal* [Internet] <http://www.nytimes.com/library/tech/reference/indexcyberlaw.html>.
- ⁵³ *Supra*, note 35, paras 38-39.
- ⁵⁴ See <http://www.cs.rice.edu/~dwallach/dilbert/>.
- ⁵⁵ 75 F.Supp. 2d 1290 (D. Utah, Dec. 6, 1999). The current litigation between the Recording Industry Association of America (RIAA) and MP3Board.com concerns similar issues in relation to the provision of links to pirated MP3 music files. See http://www.riaa.com/News_Story.cfm?id=292.
- ⁵⁶ For a summary of the case see <http://www.phillipsnizer.com/int-art176.htm>.
- ⁵⁷ See Kaplan C, "Copyright Decision Threatens Freedom to Link", 10 December 1999, *Cyber Law Journal* [Internet] <http://www.nytimes.com/library/tech/reference/indexcyberlaw.html>.
- ⁵⁸ See further Morrison A, "Hijack on the road to Xanadu: The Infringement of Copyright in HTML Documents via Networked Computers and the Legitimacy of Browsing Hypermedia Documents", 1999 (1) *The Journal of Information, Law and Technology* (JILT) [Internet] <http://el.warwick.ac.uk/jilt/99-1/morrison.html>, where the author suggests that the frequency modulation and demodulation performed by computer modems may amount to reproductions or adaptations of copyright works and infringe the copyright therein.
- ⁵⁹ See sections 47B-47F of the Act, recently introduced by the *Copyright Amendment (Computer Programs) Bill 1999*. Note that the one of the recent amendments to the Digital Agenda Bill as passed by the House of Representatives (46G) appears to remove any existing right to *decompile* a computer program for any of the purposes enumerated in ss47B-47F of the Act.
- ⁶⁰ Or XML (Extensible Markup Language) as the case may be.
- ⁶¹ *Exxon Corporation v Exxon Insurance Ltd* [1982] 1 Ch 119. Note also the U.S. decision of *Matthew Bender & Co. v West Publishing Co.* [1997] U.S. Dist. LEXIS 2710, in which the Court denied copyright protection to a system of legal referencing.
- ⁶² Copyright Reform and the Digital Agenda: Proposed Transmission Right, Right of Making Available and Enforcement Measures, Attorney General's Department, July 1997 [Internet] <http://www.law.gov.au/publications/digital.htm>.
- ⁶³ See Blakeney & Macmillan, "Internet & Communications Carriers Liability" [1998] EIPR 11.
- ⁶⁴ See generally, Hillis B, "Thinking About Linking: Part II - Can Law Accommodate the Power of the Internet to Share Information?", [Internet] <http://www.llrx.com/features/Weblink2.htm>; Musciano C, "The best way to FRAME-proof your pages, boost table speed, & more", [Internet] <http://www.netscapeworld.com/netscapeworld/nw-05-1997/nw-05.html.html>.
- ⁶⁵ The *Copyright Amendment (Moral Rights) Bill 1999*, which proposes to add to the existing right against false attribution of authorship contained in Part IX of the Act, was at the time of writing awaiting debate in the lower house, where it was introduced on 8 December 1999.
- ⁶⁶ Mayss A, *Principles of Conflict of Laws* (3rd ed) (London: Cavendish Publishing Ltd, 1999), 2.
- ⁶⁷ See Jew B, "Cyberjurisdiction - Emerging Issues and Conflicts of Law When Overseas Courts Challenge Your Web" (1999) [Internet] <http://www.gtlaw.com.au/pubs/cyberjurisdictionemergingissues.html>.
- ⁶⁸ *Ibid.*
- ⁶⁹ That is, it is the law that 'disposes' of the case in the sense of determining the substantive issues between the parties.
- ⁷⁰ See Akindemonio O, *Information Technology Law in Australia* (Sydney: LBC, 1999), 275.
- ⁷¹ See also Gellar P, "International Intellectual Property, Conflicts of Laws and Internet Remedies" [2000] EIPR 125; Ricketson S, Davies M & Lindell G, *Conflict of Laws: Cases and Materials* (Sydney: Butterworths, 1997), 144-147; *Supra*, note 66, 135-140.
- ⁷² *Supra*, note 70, 2:77.
- ⁷³ See Dearing M, "Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?", 4 *J Tech. L & Policy* 1 [Internet] <http://journal.law.ufl.edu/~techlaw/4/dearing.html> and Kuester J & Graves J, "Personal Jurisdiction and the Internet: Where is Cyberspace?", [Internet] <http://www.tkhr.com/articles/personal.html>.
- ⁷⁴ Dearing, *ibid.*
- ⁷⁵ 480 U.S. 102 (1987).
- ⁷⁶ 89 F.3d at 1257. U.S. Appellate Court, Sixth Circuit [Internet] <http://www.jmls.edu/cyber/cases/bensusan.html>.
- ⁷⁷ 937 F. Supp. 295, 299 (SDNY filed sept 9, 1996).
- ⁷⁸ *Ibid.*
- ⁷⁹ 130 F.3d 414 (9th Cir. 1997).
- ⁸⁰ 937 F Supp 161 (D.Conn 1996)
- ⁸¹ 947 F Supp 1328.
- ⁸² Stott D, "Personal Jurisdiction in Cyberspace" (1997) XV *Journal of Computer & Information Law* 819, 852.
- ⁸³ 952 F Supp 1119 ((W.D.Pa.1997) [Internet] <http://www.bna.com/e-law/cases/zippo.html>. See the recent cases of *Butler v Beer Across America*, 2000, US Dist LEXIS 1322 (N.D. Ala. 10 February 2000); *Westcode v RBE Electronics*, 2000, US LEXIS: 815 (E.D. Pa Feb 1, 2000); *S Moranz Inc v Hamg & Shine Ultrasonics Inc.* 79F Supp 2d 537 (E.D. Pa, 20 December 1999) which provide contrasting authority to the view in *Maritz* and *Inset Systems*. In the first of those cases, the court stated that "the fact that many companies have established virtual beachheads on the Internet and the fact that the Internet is now accessible from almost any point on the globe have created complex, new considerations in counting minimum contact for purposes of determining personal jurisdiction".
- ⁸⁴ See Wolf C, "Internet Jurisdiction: The Evolving Test for Jurisdiction", [Internet] http://profs.findlaw.com/netjuris/netjuris_1.html; Dealing M, *supra*, note 73; Stott D, *supra*, note 82.
- ⁸⁵ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) [Internet] <http://www.bna.com/e-law/cases/zippo.html>.
- ⁸⁶ 52 USPQ 2d 121 8 (5th Circuit, 1999).
- ⁸⁷ *Supra*, note 5.
- ⁸⁸ The "Order for Injunction" issued by the High Court on June 3 of 1997. See <http://www.users.globalnet.co.uk/~dlheb/legal1.htm>.
- ⁸⁹ See the email sent by Nottinghamshire County Council lawyer to the journalist. <http://www.users.globalnet.co.uk/~dlheb/legal1.htm>.
- ⁹⁰ Until 3 July 1997, there have been 35 mirror sites all around the world, and each of them provides links to other mirror site. Cyber Rights and Cyber Liberties <http://www.xs4all.nl>.
- ⁹¹ See the letter written by US Webmaster, Mr. Junger, at <http://www.arraydev.com/commerce/IIBC/9703-07.htm> and the letter written by Australian Webmaster Mr Baker, at <http://www.Xs4all.nl/~vaman/jetaust.htm>.
- ⁹² Tim Bell, Chairman of the Nottinghamshire County Council, quoted in Craddock A, "Nottingham v. Net: Game, Set, Match to Net", 4 August 1997, *Wired News* [Internet] <http://www.wired.com/news/politics/0,1283,5763,00.html>.
- ⁹³ [1999] NSWSC 526.
- ⁹⁴ *Helicopter Utilities v Australian National Airlines Commission* (1963) 80 WN (NSW) 48 at 51; *Dunlop Rubber Company v Dunlop* [1921] 1 AC 367; *Tozier and Wife v Hawkins* (1885) 15 QBD 680.
- ⁹⁵ *Helicopter Utilities v Australian National Airlines Commission* (1963) 80 WN (NSW) 48 at 511.
- ⁹⁶ The draft is available online at <http://www.hcch.net/e/conventions/draft36e.html>.
- ⁹⁷ See the second Issues Paper on the convention formulate by the Commonwealth Attorney General, available at <http://law.gov.au/publications/hagueissue2/issuespaper2.html>.
- ⁹⁸ See Committee on the Judiciary: Hearing Testimony Presented to Subcommittee on Courts & Intellectual Property, *Oversight hearing on "The Internet and Federal Courts: Issues and Obstacles*, June 29, 2000, [Internet] <http://www.house.gov/judiciary/4.htm> <http://www.newsbytes.com/pubNews/00/151438.html> & <http://www.house.gov/judiciary/4.htm>.
- ⁹⁹ See for example the testimony of Marc Pearl, General Counsel & Senior Vice President of the Information Technology Association of America, at <http://www.house.gov/judiciary/pear0629.htm>.
- ¹⁰⁰ See the comments of the Consumer Project on Technology at <http://www.cptech.org/ecom/hague-march-2000.html>.
- ¹⁰¹ Proposed at the Geneva Round Table on Electronic Commerce and Private International Law available at <http://www.hcch.net/e/events/press01e.html>.
- ¹⁰² See for example *Victoria Park Racing and Recreation Ground v Taylor* (1937) 58 CLR 479.