CHAPTER – IV
HYPERLINKING VIS-À-VIS COPYRIGHT VIOLATION
IN CYBERSPACE

4.1 INTRODUCTION
Internet technology and cyberspace are double edged weapons. On the one hand, it is the most effective tool for copyright authors for reproduction, organization and distribution of copyrighted material. On the other hand, it has posed a number of legal and technological challenges. There are various methods, ways and means used for infringement of copyrights in cyberspace and digital form. However, the researcher in this chapter has restricted analysis of copyrights infringement to Hyper-Linking and Framing in cyberspace.

4.2 TECHNICALITY INVOLVED IN HYPER LINKING
Hyper linking is *sine qua non* of a website. Knowledge and copyrighted material can be organized and provided to the reader in the most effective way with the help of hyper-linking. Internet cannot work effectively without the linking of websites. There are different ways and types of linking technology. It is important to understand linking technology and different types of linking in order to understand what types of linking may lead to copyright infringement of authors.

HTML \(^ {329}\) link is a pointer to an address of a page (or some times to a paragraph within a page) stored on a host. It can be defined as characteristic or property of an element such as symbol, word, phrase, sentence or image that contains information about another source and points to and causes to display another document when executed. \(^ {330}\) The author of a web can create a link to another part of the same page, to another document of his own site, or to a document on any other internet host, an address of which he knows or can find out. \(^ {331}\) The author can target a particular page inside the site by noting the URL \(^ {332}\) of that page by using that in the link. \(^ {333}\) The

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\(^ {329}\) Hypertext Markup Language.


\(^ {332}\) URL means Uniform Resource Locator.
linked portion of the website is normally shown as highlighted and underlined. When the link is clicked, the user's browser establishes a connection directly to the target site and fetches the target page directly from it, just as if the user had typed the URL on his browser to go to the site. These hyperlinks are created by burying Uniform Resource Locators (URLs) into the HTML code of a website. The user can retrieve the information (or resource) stored on the same or on any other website linked with the website.

In short, a ‘hyperlink’ directs web browsers to another document or resource or another part of the same document or resource linked to the users’ content, which may be a word, a picture, etc. Therefore, there can be a few or a number of links in a document. For example, if a document contains fundamental rights of citizens of India, there can be several links to other documents, which define the word ‘citizen’, documents explaining the meaning and need of fundamental rights, documents explaining basic case laws on fundamental rights, etc. In the process of linking instructions are converted in the form of an HTML code that incorporates the domain name of the linked site, while appearing on screen as a word or an image. Since URLs are easily available to everybody, links can be established without the knowledge of the owner of the linked site. The use of hyperlinks does not make any extra copy of the work other than the one created in the end user's computer memory, which is required in order to view the linked web page or any other (unlinked) website. Therefore, lining party does not require to make any copy of the material in order to link it to the content.

The linking system per se does not require any action or permission from the publisher of the link’s destination site. Therefore, the publisher often does not know

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334 Ibid.
335 DR. FAROOQ AHMAD, CYBER LAW IN INDIA 159 (2nd ed., 2005).
that a link to his site has been created. The link is like an address of a street or a home. It provides the source or the path to the data stored on the same or some other web site. A hyperlink can be compared to a library card catalogue that simply directs the user to the book or resource in the library. In a similar manner, the link directs users to the resource stored on the internet.

A committee of the American Bar Association observed:  
“As computer programming goes, adding a web link on a home page is relatively simple and requires only knowing the address of the linked page. The WWW technology … based on a simple programming language called HTML (Hyper Text Mark-up Language) … does not require coordination from both ends of a link to establish one. ... The simplest link acts merely as an automated directory -- when the hypertext link is clicked with the mouse, the connection to the page with the link is dropped and the user's computer then connects with the linked site, without further connection with the original page. ... The simplicity of making web links and the lack of any centralized control are largely to credit for the enormous (and somewhat anarchic) growth of the Web”.

4.2.1 Types of Linking
There can be various ways or methods of linking, such as simple hyperlinks which is also called Hypertext Reference (HREF) links. Other examples of linking are framing or Inlinking of images called IMG linking. Framing allows the operator of a website to divide a browser window into multiple, independently scrollable frames with different layouts, and to place separate documents, from different Internet sources, into each window. Inlined images linking (sometimes called IMG (“Image”) links) enables graphics to be visible on screen as part of a web document's main body (i.e., not in a separate frame) even though they originate outside the document's HTML
code - that is, somewhere else on the website publisher's server, or even at a different website.\textsuperscript{340}

a) Simple hyperlinks (or Hypertext Reference (HREF) links)

Broadly, links on the internet can be divided into the following categories:

i) Surface linking

Surface linking is the linking to the first page or home page of the website. Each website contains what is technically called a “home page” or the first access point.\textsuperscript{341} The home page of the website usually provides information about organization or website, such as the name, logo, other information, etc. Surface or homepage link transfers the user from the web page of one site (from which link is provided) to the homepage of the linked site. After clicking on the link, the linked site is displayed on the user's screen in its original form, without any reference to the linking site. These types of links are also known as HREF links.

ii) Deep linking

Unlike a surface link that connects the user to the linked site's homepage, a deep link connects the user to an interior page of the site, i.e., any web page other than the homepage.\textsuperscript{342} Deep linking refers to linking to an internal or subsidiary page of a web site that may normally be located several levels down from the home page. A deep link takes the user directly to a particular web page, sometimes located many levels down from the home page. This allows the user to avoid having to look at or click through the home page and any other intervening page.\textsuperscript{343} Where ordinarily a user would follow several links to get to a particular web page, a deep link takes the user


\textsuperscript{341} DR. FAROOQ AHMAD, CYBER LAW IN INDIA 159 (2\textsuperscript{nd} ed., 2005).


\textsuperscript{343} YEE FEN LIM, CYBERSPACE LAW: COMMENTARIES AND MATERIALS 460 (1\textsuperscript{st} ed., 2002).
directly to that particular web page, thereby circumventing the home page and any other intervening pages.  

b) **Inlining or Embedded Links**

In-line links allow a website to display a work residing on another website's server, within the context of its own website, as if the inline linked work resided on its own server. The user is typically unaware that the image (or document) has been imported from another website. The fact that the link is activated automatically by the browser gives surfers an impression that they are viewing an image from the web page that they are browsing, while the image actually comes from another web page. The viewer cannot distinguish that the image has been originated and been imported from a separate site, and may never come to know that it was not created or stored at the site being visited by him. In this respect, inlining is different from deep linking where the user is usually aware that he has “changed pages”, either from the different appearance of the newly accessed page, or from the change in the URL address displayed in the web browser. Thus, an embedded link enables a site operator to insert images without having to copy them. With this type of hyperlink (also referred to as a “dynamic” or “automatic” link), an element (such as an image, a graphic, a logo, etc.) from another web page (belonging to the same or another site) can be inserted in a web page without leaving the page of the linking site.

**c) Framing**

Another type of linking which resulted into many litigations is Framing. Unlike linking, framing is a relatively recent phenomenon, introduced by Netscape in

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Version 2 of its Navigator product. Framing, which also creates links or associations between web pages, is a method of arranging and viewing web pages, introduced to Internet users in 1996. In framing, a website of other is shown in a small window within a frame of the framer’s website. The framer does not require any action or permission, from the other site, to display their website in the small window. Each window is called a ‘frame’ and has a unique URL for determining what is displayed within the frame. The framed site is viewable in its entirety but is often reduced in size or partially obscured by the frame, forcing the viewer to scroll through that window to view the periphery of the framed site. The internet user may get confused about the source of the material because of the framing and the linking. In framing, the framer displays the copyrighted material, in a small window on his/her website, without actually copying or reproducing it. The end user, who accesses a website, can click on the window and the original (framed) website gets opened. The framed site functions no differently than if it were unframed, allowing the user to navigate through links on the framed site, all without terminating the connection to the framing site.

As discussed above, on the one hand, knowledge and information can be arranged in a logical manner with the help of linking. On the other hand, deep-linking, framing and inline linking have posed the question of copyright and other IPR violations. The issue of linking and copyright infringement is not completely resolved by courts. There are arguments both for and against linking.

Objectives of this sub-chapter are: to analyze the legal implications of the linking; to evaluate what types of linking cause copyright infringement; to find out what types of copyrights are infringed with the help of linking; to comment upon Indian and US Laws and case laws on linking.

4.3 LEGAL IMPLICATION OF LINKING AND FRAMING

Recently, both linking and framing have come under intense legal scrutiny, as the law in this area struggles to keep pace with the rapidly evolving technology and practices of the internet.\(^{354}\) Linking to a website's home page rarely sparks disputes or presents legal issues. Links to home pages have been widely accepted as natural consequences and part and parcel of the internet ever since its inception. However, deeplinking, framing and inline linking have posed many legal and moral problems. Following are the fundamental case laws on the issue of deeplinking, framing and inline linking and copyright infringement:

In *Ticketmaster v. Tickets.com*,\(^ {355}\) the plaintiffs, Ticketmaster Corporation and Ticket Online-CitySearch, Inc. (hereafter referred as Ticketmaster), and defendant Tickets.com, Inc. (hereafter referred as Tickets.com), were in the business of selling online tickets to all kinds of events (sports, concerts, plays, etc.) to the public. Both the plaintiff and the defendant had websites providing information about events, such as time, date, location, description of the event and ticket prices. The web pages of the plaintiffs and defendant had many subsidiary (or interior) web pages, describing one event each. Each page of Ticketmaster's website had a separate electronic address or Uniform Resource Locator (“URL”) which, if possessed by the internet user, allows the user to reach the web page for any particular event by by-passing the 'home' web page and proceeding past the index to reach the interior web page for the event in question.\(^ {356}\) Ticketmaster had exclusive agreements with the events it carried on its web pages so that tickets were not generally available to those events except

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\(^{355}\) Ticketmaster v. Tickets.com 2003 U.S. Dist. LEXIS 6483.

through Ticketmaster (or reserved for sale by the event itself, or available from premium ticket brokers who generally charge higher than the face value). For a number of events Tickets.com also used to be a ticket seller. Wherever Tickets.com did not itself sell the tickets, a place (on Tickets.com’s website) was given to the customers to click for a reference to another ticket broker, or to another on-line ticket seller.

In the instances of Ticketmaster, Tickets.com had provided a link titled “Buy this ticket from another on-line ticketing company”. Clicking on the link used to instantly transfer the customer to the interior web page of Ticketmaster (bypassing the home page) for the particular event. The plaintiff had alleged that ticket.com had copied interior web page and extracted basic information from them. The first claim (copyright infringement) was denied because the complaint had alleged actual copying of copyrighted material. The court held that a copyright may not be claimed to protect factual data. The court had further clarified that hyperlinking does not itself involve a violation of the Copyright Act since no copying is involved, the customer is automatically transferred to the particular genuine web page of the original author. Further, the court held that “The contract claim is not preempted. Aside from copying (which is preempted), the contract claim alleges adherence by Tickets to a contract not to use for commercial purposes (possibly not preempted) and not to deep link (not preempted).”

Ticketmaster later narrowed its claims only to contract, to copyright infringement and trespass to chattels theory. Tickets.com moved for summary judgment against those claims. Ticketmaster contended that, although URLs are strictly functional, they are entitled to copyright protection because there are several ways to write a URL, and, thus, original authorship is used. The court on the issue held that, “A URL is simply an address, open to the public, like the street address of a building, which, if known, 

357 http://docs.law.gwu.edu/facweb/claw/tickemaster.pdf (last updated July, 02, 2014).
358 http://docs.law.gwu.edu/facweb/claw/tickemaster.pdf (last updated July, 02, 2014).
can enable the user to reach the building. There is nothing sufficiently original to make the URL a copyrightable item, especially the way it is used.”364 Another issue of the copyright violation was, whether Tickets.com’s deep linking caused the unauthorized public display of Ticketmaster’s event pages in violation of Ticketmaster’s exclusive rights of reproduction and display under 17 U.S.C. § 106? While arguing about the deeplinking, the Ticketmaster also stated that a smaller window containing Ticketmaster’s web site was framed by the larger window of Tickets.com. Tickets.com, on the above issue clarified that, the occurrence of the ‘Framing’ depends on the settings of user’s computer, which is not controlled by tickets.com. Therefore, framing may occur in some cases and may not occur in other cases. According to the court, “even if the TM (Ticketmaster) site may have been displayed as a smaller window that was literally “framed” by the larger TX (Tickets.com) window, it is not clear that, as matter of law, the linking … event pages would constitute a showing or public display in violation of 17 U.S.C. § 106(5). Accordingly, summary judgment is granted on the copyright claims of TM (Ticketmaster) and it is eliminated from this action.”365

In Ticketmaster Corp. v. Microsoft Corp.366 the Microsoft defendant was sued by Ticketmaster Corporation for practice of deep linking without the permission of the plaintiff. The effective diversion of the advertising revenue, which otherwise would have gone to plaintiff, was the basic claim of the plaintiff. The plaintiff, Ticketmaster also had entered into contract with other firm, and they were ready to pay (for linking) according to terms and conditions of the contract. Therefore, the Ticketmaster claimed that free linking by Microsoft leads to devaluation of contractual relationship. Further, it was claimed that such free linking would undercut Ticketmaster’s flexibility, both in designing its website and in its marketing efforts and arrangements with other sites. The issues were not settled by the court. In February 1999, parties entered into a settlement agreement outside the court. “It is settled on mutually agreeable terms”, said Microsoft Corporate spokesman, Tom Pilla.367 Details of the

366 Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 (CD CA, complaint filed on April 28, 1997).
settlement were not made public, but the deep links were removed, directing Sidewalk users to the Ticketmaster homepage.\textsuperscript{368}

*Shetland Times, Ltd. v. Dr. Jonathan Wills and Another* \textsuperscript{369} is another important Scottish case on the subject matter of linking. In this case, the plaintiff Shetland Times was the provider of many items in the printed version of its newspaper. The defendant was the owner and operator of a website of a similar nature. The defendant allegedly reproduced headlines of Shetland Times and they were hyperlinked to the internal pages of the plaintiff’s site. The defendant had bypassed the front page (home page) of the Shetland Times, which carries paid advertisements. Therefore, it had diminished the value of the website for potential advertisers. The main issue in *Shetland Times* case was whether “deeplinking” to internal or embedded pages through the use of the plaintiff web site's news headlines was an act of copyright infringement under the United Kingdom's Copyright Designs and Patents Act of 1988.\textsuperscript{370} The court agreed that the plaintiff presented prima facie case and issued an interim interdict barring the defendant from getting involved in the above mentioned activities. The case was settled out of court by the parties. The defendant agreed not to deeplink with the plaintiff’s site.

In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*,\textsuperscript{371} the defendant was directed by the court to remove the plaintiff’s copyrighted material (Church Handbook of Instructions) from its website. After removing the Church Handbook of Instructions from its website, the defendant posted a message on its website and provided URLs of the websites at which the book was available. The court issued a preliminary injunction against the defendant on the ground of contributory infringement. The court held that posting a message with a URL provides users the location of the infringing material, and by apparently aiding the users in viewing the copyrighted material, the defendant had committed contributory infringement.

\textsuperscript{368} See, http://www2.southeastern.edu/Academics/FacultyExcellence/Pattie/DeepLinking/cases.html (last updated July, 03, 2014).

\textsuperscript{369} *Shetland Times, Ltd. v. Dr. Jonathan Wills and Another* [1997] FSR 604

\textsuperscript{370} http://www.netlitigation.com/netlitigation/cases/shetland.htm (last updated July, 07, 2014).

\textsuperscript{371} *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2\textsuperscript{nd} 1290 (D. Utah, Dec. 6, 1999).
In *Verlagsruppe Holtzbrinck v. Paperboy*, the German Federal Court of Justice, while stressing the importance of the deep links held that the defendant, an online search engine did not violate either Copyright or Competition Law by providing deep links. The court further held that the plaintiff can prevent deep links with the help of technical measures.

In *Washington Post Co. v. Total News, Inc.*, the defendant, TotalNews, was a publisher of the website i.e. www.totalnews.com. Defendant TotalNews had created pages with frames and it was hyperlinked to Washington Post, USA Today, CNN and other news websites. The Washington Post and other filed a case, on 20th February, 1997 against TotalNews Inc. Although defendants, too, derive revenue by selling advertisements placed within the totalnews.com website, defendants provide little or no content of their own. It used to rely upon the contents generated by other eight news organizations. TotalNews's website was used to employ four frames: the TotalNews logo used to appear in the lower left frame, the various links were located on a vertical frame on the left side of the screen, TotalNews's advertising was framed across the screen bottom, and the “news frame,” the largest frame, appeared in the center and the right. After clicking on the organization’s link the end user (reader) was allowed to view the content of the said organization. In some of the instances, framing was used to distort or modify appearances of the linked website. Defendants’ website was designed to feature the content of plaintiffs’ and others’ websites, inserted within a “frame” on the computer screen that includes defendants’ totalnews.com logo and URL as well as advertising that defendants have sold. In order to provide their totalnews.com service, defendants have caused plaintiffs’ sites to appear within a window displayed as part of totalnews.com, surrounded and partially obscured by advertising and other material unrelated to the original content.

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of plaintiffs' sites. The TotalNews used to generate revenue from advertisements on its website. The matter was settled out of court by parties.


The Futuredontics, Inc., plaintiff in general alleged that it operates a dental referral business utilizing the anagramatic phone number “1-800-DENTIST”. Applied Anagramics, Inc. (AAI) also owns the registered service mark “1-800-DENTIST.” It is further stated that AAI (APPLIED ANAGRAMICS, INC.) has granted the plaintiff exclusive use of the telephone number and service mark throughout the United States. It is also stated in the first amended complaint that “The current 1-800-DENTIST dental referral service has been entirely designed and developed by Futuredontics, which is solely responsible for its success.” Defendant Applied Anagramics, Inc., without authorization, created a hyperlink which caused content from plaintiff Futuredontics’ website to appear in one of the several frames on Applied Anagramics’ site.

The defendant argued that the copyright infringement claim shall be dismissed because framing does not create any derivative work as defined under US Copyright Law (i.e.17 U.S.C. § 101).

The court relied on the defendant’s argument based upon the logic given in *Lousi Galoob Toys, Inc. v. Nintendo of America Inc.* In Lousi Galoob Toys case, the court held that Game Genie merely enhances audiovisual displays and it does not constitute derivative work because it does not “incorporate a portion of a copyrighted work in some concrete or permanent form.” The court explained that “[I]nherent in the concept of a "derivative work" is the ability for that work to exist on its own, fixed and transferable from the original work.” To exist on its own, fixed and transferable from the original work means having separate form or existence. If the above analysis about the derivative work is true, then in framing, inline linking and surface or deep linking, the work is not reproduced or fixed in any form other than the original work. The original work is shown in the small window or is liked by the link provider (linking party). It means, according to the above view, no claim can be made for infringement of derivative work.

**4.3.1 Liability of the linking (link provider) can be analyzed based upon following principles**

As discussed above, in a number of cases, a number of arguments are raised, but issues with respect to linking are not finally decided by the courts. The common issues posed in the above cases and other issues are as follows:

**4.3.1.1 Theory of Implicit authority or licence or free-linking ethos of the Internet**

It can be argued that the mere presence of a site on the web implicitly grants others the permission to link to the page of that website. The web or internet is an open forum viewed and accessed by anybody irrespective of his/her nationality, physical location and distance. Interconnectivity of the internet allows the user to connect the material stored on any server. Normally, there is no further permission expected or required to view a resource on the internet. Stated another way, linking to home pages has become an intended consequence of - and fundamental to - the nature and operation of the web. A resource or material on internet is uploaded with full knowledge that it will be viewed and accessed by the public. Therefore, it is argued

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386 *Lousi Galoob Toys, Inc. v. Nintendo of America Inc.* 964 F. 2d 965 (9th Cir. 1992).
that presenting a resource on the internet gives an implicit authority or licence to the other to view the page or material.

The inventor of the hyperlink, Tim Berners-Lee, has specifically declined the need to grant permission to link to his website. According to him permission for linking is unnecessary; the argument was justified by him based upon his firm belief in the free-linking ethos of the Internet. It is true that free accessibility and distribution of information is the very foundation of Internet culture. Rex S. Heinke & Lincoln D. Bandlow argued that mere publication of materials on the Web, absent affirmative measures to prevent access, may imply a license to link. The counter-argument to this argument is that on almost every website a copyright statement is uploaded. The copyright statement specifies that “all rights are reserved” and that all rights shall also include the right not to link to the resource on the internet.

Nevertheless, as Internet pioneers and netizens have been forced to accommodate the arrival of traditional business and corporate interests in the online environment, intellectual property notions of entitlements and exclusion have begun to threaten the practice of linking. According to Alain Strowel and Nicolas Ide, when the

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homepage does not contain any advertising, there does not seem to be any basis on which they (linking) could be prohibited.  

4.3.1.2 Limits to the implied authority or licence arguments on internet

According to some of the authors, defence of implied licence cannot be made applicable to the deeplinking because it may result in loss in profit which is directly against the basic objectives of the commercial website. Ordinarily, wherever the law is not express and clear it expects the logic of reasonable man, reasonable care or reasonable way or manner of behavior to be followed in a particular situation. In view of the above principle in instances of linking also the author of the website and the law should expect the same. The owner of the website expects the viewer to view the documents or the resource of the website in a particular way or manner. He/she expects the reader should go through the home page to the internal page. Therefore, normally an author of website keeps advertisements, logo, disclaimer, etc. on the home page. Since the internet is a public place and material on internet can be viewed by anybody, the behavior of people using it can be compared with the expected manners or the way of behavior at any public place. In a public place, the controlling authority expects the visitors to enter through the gate of the public place rather than jumping from the wall or entering through the windows. The person jumping from the window or wall cannot take the defence of permanent permission or implied authority merely because it is a public place. The implied licence, which is argued as a natural right in digital age on internet is subject to reasonable expectation expressed by the author through and with the help of the design of website. It may be submitted that managing the website and uploading the material on the website gives implied licence to the viewer to view or sometimes download the resources. The said natural right is restricted by the author by deciding the ways or manner to approach the resource or document. Breaking the expected ways or manner suggested and expected by the author is not only against the interest of the author, it is also violation of the implied condition laid down by the author. The logic of the implied licensing cannot override the logic of implied condition, which any reasonable prudent man can assume or understand.

It may be further argued that the lack of notice about the deep linking provides implied
consent to link the website. As discussed above, in instances of public places the
wrongdoer cannot claim implied license or permission to jump from the wall though
express notice is lacking. Likewise, when the owner of a website expects that people
shall visit the deep page going through the home page, the linking party (link provider)
shall not be allowed to take defence of the lack of notice on the website, because that
is a natural expectation of the author. It is further submitted that the linking can be
provided by the owner of some other resource or website on the internet and not by
ordinary viewers of the website. The owners of the website on the internet are
expected to take more care than an ordinary prudent man merely viewing the website
would do.

4.3.2 Objectives of websites and deeplinking
Websites, based upon their objectives, can be broadly divided into two categories, i.e.
commercial websites and non-commercial websites. If the object of a website is to
disseminate information to the public at large without making it directly or indirectly
a source of revenue, the website is known as a non-commercial website. Similarly, if
the object of the website is to earn profit or revenue, the website is considered as a
commercial website. In a commercial website, earning money is the prime objective
of registering and maintaining the website, whereas disseminating information is a
prime objective of a non-commercial website.

The commercial websites can be directly paid by end users or they may be freely
available to end users. In instances of the first category of websites (directly paid
websites), the operator of the website provides a user name and an account ID to the
end users. The main source of revenue of the second category of commercial websites
(i.e. websites not directly paid by end users) is advertisements on the website.
Usually, on the commercial websites, banners of various paid advertisements are
shown. A visitor to a website visits the banner of advertisement on a website. Every
visit of the end user to the home page of the website is calculated as a ‘hit’. This
means that the number of ‘hits’ depends upon the number of visitors to the web.
Therefore, the rates of the advertisements are fixed based upon the number of ‘hits’ a
website gets.
As discussed earlier, deeplinking skips a visit to the home page which has banners of advertisements. The deeplinking takes visitors directly to a sub-page of the website, which normally does not have the advertisement banners. The website does not get a ‘hit’, if the visitor retrieves documents/resource directly from the sub-page by using a deeplink. The owner of the commercial website keeps more and more useful resources on the website, so it shall get more and more hits. The commercial website is recognized as a good platform for advertisements, based upon the number of hits. In other words, the commercial website gets more and more revenue and advertisements if it is getting more and more hits. As discussed earlier, deeplinks have two negative consequences on the commercial website. Firstly, advertisements on the website are not visited by viewers because viewers visit interior page of the website directly by using a deeplink, and banners of advertisements are displayed on the home page. Secondly, the commercial website does not get hit, so it causes a loss of revenue.

It means the prime objective of a commercial website (i.e. revenue generation) is not achieved because of the practice of deeplinks. Therefore, deeplinking diminishes the value of commercial websites.

As discussed earlier, to disseminate information about the organization, etc., to the public at large is a prime objective of maximum non-commercial websites. For example, an educational institute may run an online journal to establish the brand value of the institute. The object of running a journal may be that the people visiting the journal will view the name, logo, etc., of an institution. Usually, the operator of the website keeps the name, logo and other information of the organization on the home page of the website. The useful resource or material is stored on the subsequent pages of the website. In instances of deeplinking, first page of the website is not visited by end viewers. Therefore, they would not be able to view the name, logo and other information of the organization. Thus, object of the non-commercial website i.e. disseminating the information about organization with the help of useful resources, is not achieved, if the practice of deeplinking to the resource is allowed.

Therefore, in both the instances (i.e. commercial and non-commercial), the website is made to be viewed by people at large; and if there would be more and more links (to home page), the website will be viewed by more people. Since, in deeplinking,
objectives of both the websites are not achieved, it has been called in question on the
grounds of violation of IPR (i.e. trade mark laws, copyright laws, unfair competition
laws, etc.) or misappropriation of property.

4.3.3 Infringement of right to derivative work and linking practices
In order to understand derivative right infringement through linking, following
questions need to be analyzed. The main question to be decided is whether derivative
work needs to be fixed in some concrete or permanent form in order to claim
infringement of the work? The second question is whether framing or linking leads to
fixing of the work in some concrete and permanent form? The third question that
needs to be answered is whether framing or inline linking leads to ‘preparation’ of the
derivative work?

The US Copyright Act defines derivative work (under 17 U.S.C. § 101) as:
A ‘derivative work’ is a work based upon one or more pre-existing works, such as a
translation, musical arrangement, dramatization, fictionalization, motion picture
version, sound recording, art reproduction, abridgment, condensation, or any other
form in which a work may be recast, transformed, or adapted. A work consisting of
editorial revisions, annotations, elaborations, or other modifications which, as a
whole, represent an original work of authorship, is a ‘derivative work’ (emphasis
added).

Section 102 of the US Copyright Act grants copyright protection to “original works of
authorship fixed in any tangible medium of expression, now known or later
developed, from which they can be perceived, reproduced, or otherwise
communicated, either directly or with the aid of a machine or device.”
Under Section 101 of the US Copyright Act, "[a] work is ‘fixed’ in a tangible
medium of expression when its embodiment in a copy or phonorecord, by or under the
authority of the author, is sufficiently permanent or stable to permit it to be perceived,
reproduced, or otherwise communicated for a period of more than transitory
duration." The term ‘copy’ is defined under Section 101 of the US Copyright Act,

according to Section 101 ‘Copies’ are material objects, other than phonorecords,\textsuperscript{395} in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.\textsuperscript{396}

Thus, federal copyright law does not protect works that exist only in an author's mind, and which have not yet been committed to paper, to film, to disk, or to some other tangible medium.\textsuperscript{397} Copyright infringement is defined as the unauthorized exercise of any of the exclusive rights.\textsuperscript{398} If one follows above analysis, the derivative work shall be fixed in some form in order to infringe it, because derivative work is a work and work shall be fixed in some concrete form.

As discussed earlier, in order to analyze copyright infringement, the first question that needs to be answered is whether derivative work needs to be fixed in some concrete or permanent form in order to claim infringement of the work? It is important to note that in derivative work, the word ‘prepare’ is used instead of the word ‘create’.\textsuperscript{399} The word create is used for original copyrighted work. The avoidance of the word ‘create’ (which is defined in terms of fixation), together with the absence of the terms ‘copies’ and ‘phonorecords’ and the absence of any other reference to fixation, strongly suggests that the right to ‘prepare’ derivative works can be infringed without any additional fixation of the copyrighted work.\textsuperscript{400} It needs to be noted that the legislature has used two different words in the same statute, i.e. ‘Create’ and ‘Prepare’. It means

\textsuperscript{395} According to title 17 U.S.C, § 101, ‘Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

\textsuperscript{396} 17 U.S.C. § 101.


\textsuperscript{399} See 17 U.S.C. § 106(2).

they have different intentions in using different words in the same statute. Therefore, requirement of fixation of the work as it is needed for creation or reproduction of original work shall not be applied for preparation of the derivative work.

Furthermore, it may be argued that framing or inline linking is not mentioned in the list of ‘derivative work’ under Section 101 of US Copyright Act. Under Section 101 of US Copyright Act, “A ‘derivative work’ is a work based upon one or more pre-existing works, such as a translation, ….” The term ‘such as’ is used in the definition of Section 101 of the US Copyright Act. The literal meaning of the term ‘such as’ is ‘like’ or ‘similarly’.401 According to Grammarly Handbook ‘such as’ is a part of the non-restrictive clauses.402 According to Section 101 of the US Copyright Act, “the terms ‘including’ and ‘such as’ are illustrative and not limitative.” Therefore, the term “such as” shall be given the same meaning or connotation as ‘include’. In inclusive or non-restrictive clauses, the legislature authorizes the judiciary to interpret and add the ‘words’ or ‘terms’ in the context of the definition.

Framing and inline linking shall be interpreted as infringement of right to derivative work because of the following reasons: a) the definition of the derivative work is an inclusive definition, the legislature has given some illustrations by using the term ‘such as’ under Section 101 of the US Copyright Act. The judiciary is bestowed with the authority to interpret the term ‘derivative work’ and add the work which may be considered as derivative work. The framing or inline linking is not expressly mentioned in the definition of the derivative work under Section 101, still it may be added by judicial interpretation. Because the framing and inline linking are “works based upon one or more pre-existing works …”

As discussed above, the Congress has distinguished between ‘original’ and ‘derivative’ work. Therefore, for claiming infringement of derivative work, fixation may not be an essential criterion in all forms of infringement. In framing, the work is not fixed in concrete or permanent form by infringer, still it can be considered an infringement of the work.

401 http://dictionary.reference.com/browse/such+as (last updated July, 07, 2014).
The concept of ‘unfixed derivative work’ may create some confusion with respect to original copyrighted work or independent derivative copyrighted work. In some of the instances, there may be an attempt to claim copyright work or infringement without showing how work is permanently fixed. In the original copyrighted work or independent derivative work, the criteria of concrete or permanent fixation required to be fulfilled. In the era of the technological development and in the light of the above discussion, though only one criterion i.e. perceived by the people is fulfilled, the claim of the derivative work shall be granted. The above analysis shows that framing and inline linking infringes the right to derivative work.

In instances of normal deep-lining, apart from framing and inline linking, the derivative work is not prepared. Therefore, the author cannot claim infringement of copyright for preparation of derivative work.

4.3.4 Linking practices and contributory infringement of copyrighted work

There is no express provision imposing liability for the act of a third party both under Indian and USA copyright legislations. Nevertheless, the theory of contributory liability is partially incorporated under section 51(a) (ii) of the Indian Copyright Act, 1957. The USA Supreme Court, in *Sony Corp. of America v. Universal City Studios, Inc.* noted that:

“The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”

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403 For further clarification on deep-linking and copyright infringement see, sup-chapter 4.2.1, 4.3, page no. (Infra) 94-125.
The doctrine of contributory infringement was developed in *Harper v. Shoppell*\(^{407}\) in 1886. It was further applied in *Sony Corporation of America v. Universal City Studios, Inc.*.\(^{408}\) The contributory infringement occurs when one knowingly “induces, causes or materially contributes to the infringing conduct of another.”\(^{409}\) The contributory infringement can be classified into two types: first type of contributory infringement occurs when the defendant knowingly creates an instrumentality for infringing the copyright of author i.e. infringement by providing means to infringe. Second category of contributory infringement is ‘participatory infringement’. Participatory infringement focuses on the conduct of parties who have knowledge of the infringing activity and induce, cause, or materially contribute to the infringing conduct of others.\(^{410}\) For imposing contributory liability, there shall be corresponding liability on somebody, i.e. principal offender. According to the theory of contributory infringement, there can be no contributory infringement or inducement of infringement in the absence of proof of direct infringement.\(^{411}\) Further, in *United States v. Carroll Towing*,\(^{412}\) Judge Learned Hand found that if the potential for loss multiplied by the magnitude of that loss exceeds the burden required to prevent it, the failure to take preventive measures constitutes ‘negligence’.\(^{413}\) The formula provided by judge Hand is both a sword and a shield - it can be used to analyze contributory negligence as well as primary negligence.\(^{414}\) If the burden to the plaintiff of preventing the putative injury is less than the probability of the injury occurring and the potential magnitude of the loss, the plaintiff’s failure to take those preventive measures is negligence.\(^{415}\)

\(^{409}\) Gershwin Pub’g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
\(^{412}\) United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947)
\(^{413}\) *Id.* at 173
As discussed earlier, there is no express provision for contributory infringement under copyright laws in India. However, section 51(a) (ii) of the Indian Copyright Act, 1957 can be referred to interpret the existence of contributory infringement under the Indian Copyright Act, 1951. According to Section 51 (a) (ii), copyright in a work deemed to be infringed, when any person without licence, or in contravention of the conditions of licence, “permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright”. According to section 51 (a) (ii), the person permitting a place to be used by third person for communication of the work to the public is responsible. The act of actual infringement by communication of the work to the public is conducted by third person. The person is responsible for the act of a third party under section 51 when: a) permission is given to use the place for communication of the work to the public, which constitutes an infringement of copyright in work b) permission is given for profit c) the person permitting a place to be used is aware or has reasonable grounds for believing that such communication to the public would be an infringement of copyright. However, the application of the contributory liability or liability for the act of third party under section 51 (a) (ii) of the Copyright Act, 1957 is limited to permission to use a place for communication of the work to the public. The analysis on application of contributory infringement and vicarious liability to linking has been provided after analysis of the concept of vicarious liability.

4.3.5 Linking Practices and Vicarious Liability

The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of ‘respondeat superior’. Shapiro, Bernstein and Co. v. H. L. Green Co., is one of the landmark cases on vicarious liability for sales of counterfeit recordings. In this case, the claim of copyright infringement was made against the owner of a chain of departmental stores where a concessionaire was selling counterfeit recordings. Noting that the normal agency rule of ‘respondeat superior’ imposes liability on an employer for copyright infringements by an

\[416\] Apart from above intermediary can be held responsible under section 79 of the IT Act, 2000. See, Section 81 of IT Act, 2000.

\[417\] Shapiro, Bernstein and Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963)
employee, the court endeavoured to fashion a principle for enforcing copyrights against a defendant whose economic interests were intertwined with the direct infringer's, but who did not actually employ the direct infringer.\textsuperscript{418} In cases of vicarious liability, one may be liable when he has the ability to supervise infringing activities and has a direct financial interest in those activities.\textsuperscript{419}

Now the question is whether the deep linking party is responsible for the contributory, vicarious or indirect liability. As discussed earlier, for making somebody responsible under the doctrine of contributory, vicarious or indirect infringement, the claimant has to prove that there was a principal offender or third party’s conduct led to copyright infringement. In the instances of home page, deep, inline linking and framing, the third party may be: a) the content/resource or website provider; or b) ordinary end user of the internet. In a scenario when the content provider is infringing the copyright or is hosting the illegal material, the linking party can be responsible for contributing (helping or assisting) in infringement. If that content provider is an agent of the linking party, the linking party can be held responsible for the conduct of the agent.

In the second scenario, a third party will be the ordinary end user of the internet. Therefore, a basic question which needs to be answered is: whether end-users of internet are responsible for copyright infringement in the instances of home page, deep, inline linking and framing.

4.3.6 End-User’s Liability: A defence for contributory infringement or Responsibility of End-User in instances of Deep-linking, Framing and Inline Linking

The end user is a person who actually accesses the resource with the help of or through the link provided by the linking party. The end user may perform an act, which may lead to copyright infringement as defined in copyright laws. In the internet scenario, usually the end user is free to retrieve any resource on the internet. It is argued that presenting a resource on internet gives an implicit authority or licence to


other to view the page or material. The author of the material, at the time of posting it on the internet is aware that internet is a public forum and the material may be viewed by anybody from any corner of the world. The defence of implied authority or licence is justified because the material is posted with the knowledge that it is a public forum. Therefore, in normal scenario (viewing material without linking), no liability on end user can be imposed for viewing copyrighted material. The viewers (end-users) can be held responsible if it is further misused without authorization by the authority. Now the question is: can we make the end users responsible for viewing material from linked site or page, when they are not responsible for viewing it directly from the website where author has posted the material?

As discussed earlier, the end-users do not play any role in linking the resource on the internet. The act of linking is performed by the linking party. The linking party provides links by copying URL of the linked resource. For analyzing the liability of end users, the analysis needs to be divided into different scenario as per the different technologies used for linking. In the instances of links to home page linking, deep-linking and inline linking, firstly, the end-users may not have knowledge that the content (link) they are clicking is linked with some other resource or website. The end-user may ordinarily presume that the content he/she is clicking on is linked to the same website or resource on another page of the same site. The end-user probably may come to know about the linking to another resource after viewing the linked page. It means in the above scenario, the linking would be without the specific knowledge of the end-user. There is no way to find out before actually clicking on the link, whether or not a link is provided to the resource kept on another website. The end-user may get some idea about the linking to another site, after actually clicking the link. Secondly, there is a probability that the linking party would have linked the resource after taking due permission of the author or the resource may be free to be linked by anybody. Thirdly, the end-user is otherwise free to view the resource by visiting the website on which the resource is posted. Therefore, there is no question of making end-users responsible for viewing the resource by using the link provided by linking party.

420See, sub-chapter 4.3.1.1. on “Theory of Implicit authority or licence or free-linking ethos of the Internet”
In the scenario of framing, the end-user can observe that some other website is shown in the window of the website. In this scenario also firstly end-users do not have specific knowledge or reason to believe that the act of window framing is conducted without due permission of the author of the resource. Secondly, the end user may presume that there may be some arrangement between the linking party and the author of the resource or that both the resources are owned by the same author.

As discussed earlier, for making somebody responsible under the doctrine of contributory, vicarious or indirect infringement, the claimant has to prove that there was a principal offender or that the conduct of the third party led to copyright infringement. In linking and framing the end-user (i.e. third party) cannot be held responsible. Therefore, vicarious liability or liability for contributory infringement cannot be imposed on the linking party.

Furthermore, it is submitted that some of the end-users may infringe the copyrights of the author by further misusing it after viewing. For example, the end user may download a resource and reproduce it without authorization from the author. This kind of misuse may happen irrespective of whether the resource is linked or not by the linking party. The linking party does not in any way induces or materially contribute in the infringement activities of the end-users. The linking party also does not create any instrumentality for infringing the copyright of the author. As discussed above, the liability of contributory infringement can be imposed in two situations: Firstly, when the defendant knowingly creates an instrumentality for infringing the copyright. Secondly, when the party has knowledge of the infringing activity and the party induces, causes, or materially contributes to the infringing conduct of others. In linking or framing, the linking party or framing party does not create any instrument for copyright infringement. Further, the linking party or framing party does not induce or materially contribute in infringement because an act of the end-user does not constitute copyright infringement in usual situations. Therefore, the linking party cannot be held responsible for a contributory infringement for home page, deep, inline

linking and framing. Whenever a third party will be the ordinary end-user of the internet, the linking party cannot be held responsible for vicarious liability because it is not an agent of the linking party.

4.3.7 Linking on internet and defence of technological measures

In Verlagsruppe Holtzbrinck v. Paperboy, the German Federal court of justice while stressing the importance of the deep links, held that the plaintiff can prevent deep links with the help of technical measures by providing blocking code on the deep pages. According to Mark Sableman and others, anyone familiar with the ingenuity of web users, however, may well wonder whether any technological solution will ever effectively and completely prevent one party from associating or linking to another. It means the technological measures cannot be effective and complete solution to the problem of linking. Further as argued in Ticketmaster Corp. v. Microsoft Corp., free linking would undercut the website owner’s flexibility, both designing its website and its marketing efforts and arrangements with other sites.

The logic of using technological solutions is equivalent to landowner preventing trespass by building a fence around the property. The common law does not allow a trespasser to trespass the property even if it is not fenced or blocked by any other means. Similarly, in linking, the infringer shall not be allowed to take defence of non-use of technological solution to prevent linking.

4.3.8 Linking and infringement of right to display the copyrighted work publicly

In the process of linking and framing, the work is neither reproduced nor fixed in any concrete or permanent form by the linking party. The reproduction or creation of the new work is subject to the fixation of it in some concrete form. Thus, if there is no fixation of work in some concrete form, there cannot be copyright infringement.

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424 Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 (CD CA, complaint filed on April 28, 1997)
order to analyze the infringement of right to display copyrighted work publicly, a basic question that needs to be answered is whether the right to display, a right granted under title 17 U.S.C. § 106(5), is subject to fixation in concrete and permanent form by the infringer? Or whether ‘fixation’ of the work by the infringer is one of the criteria for claiming infringement of the right ‘to display the copyrighted work publicly’? The second question that needs to be analyzed is whether home page, deep, inline linking and framing leads to infringement of right to display?

Section 106(5)\textsuperscript{125} of the US Copyright Act states that the owner of a copyright has exclusive rights to do and to authorize “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;...\textsuperscript{126} (emphasis added)

The word ‘display’ is defined under Section 101 of title 17 of the US Copyright Act. According to Section 101, to “display” a work means to show a copy of it, \textit{either directly or by means} of a film, slide, television image, \textit{or any other device or process} or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.\textsuperscript{127} (emphasis added) The right ‘to display the copyrighted work publicly’ is not subject to fixation because of following reasons: firstly, in the definition of the word ‘display’, word ‘show’ is used instead of the word ‘create’ or ‘prepare’. As discussed earlier, the word ‘create’ is subject to fixation and the word ‘prepare’ is subject to interpretation. Fixation may not be one of the requirements for preparation of the work. Secondly, the wording “\textit{either directly or by means... any other device or process}” suggests that a copy of the copyrighted work can be shown directly by making or reproducing a copy from the ‘original work’ or it can be shown to the public by “\textit{any other device or process}” directly from the original work of the author. Therefore, this right does not seem on its face to be limited to ‘fixed copies’.\textsuperscript{128} In the instances of framing and inline linking, a copy of the work is

\textsuperscript{125} 17 U.S.C. § 106(5)
\textsuperscript{126} 17 U.S.C. § 106(5)
\textsuperscript{127} 17 U.S.C. § 101
normally created by an author in the virtual form. That work (created by author) is displayed publicly by the ‘process’ of framing and inline linking (by linking party), which is one of the exclusive rights granted to the author under Section 106(5) of the US Copyright Act. 429 An analysis of statutory provisions and associated commentaries suggests that a website framing and inline linking could infringe an author’s exclusive right to display her/his work publicly,430 though it is not fixed in any form by the infringer. It further needs to be noted that, on February 6, 2002, the US Court of Appeals for the Ninth Circuit held that unauthorized inline linking to images residing on the copyright owner’s website violates the copyright owner’s right of public display.431 In July 2003, the court withdrew that portion of its opinion which was relating to inline linking, leaving it to the lower court to take a fresh look at the issue.432 It is now open for the court to reconsider whether inline linking is violative of copyright or not.

In deep-linking (apart from inline linking and framing), the work is not directly displayed to the public. After clicking on the link, the work is displayed to the end-user. Thus, the linking party is facilitating (or helping) the end-user in getting copyrighted work displayed. As discussed earlier, normally the end-user cannot be held responsible for copyright infringement. Therefore, the liability for contributory infringement cannot be imposed on the linking party.

4.3.9 Linking and infringement of special rights of the author

Right to authorship and right to integrity are special rights granted to an author in various jurisdictions. The right of authorship and the right to integrity are granted under section 106A of US Copyright Act.433 According to section 106A clause (a) 1 (A) & (B), the author of a work of visual art shall have the right to claim authorship

429 17 U.S.C. § 106(5)
433 17 U.S.C. § 106A
and integrity of that work. Further, section 3 of the Berne Convention Implementation Act, 1988 of US states that “the provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the Common Law—

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.” (emphasis added)

Section 57 (1) of the Indian Copyright Act, 1957, provides for authors’ special rights. According to section 57 clause (1), “Independently of the author's copyright and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right:–

(a) to claim authorship of the work; and

(b) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work (…) if such distortion, mutilation, modification or other act would be prejudicial to his honour or reputation.” 434 (emphasis added) In Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.,435 the court held that the language used in section 57 is of the widest amplitude and cannot be restricted to the literary expression only and also covers other expressions such as visual and audio manifestations.

In framing and inline linking, the above special rights are infringed because of the following reasons: In case of inline linking, the user is confused about the original source and hence may never come to know about the author.436 Further, in inline linking copyrighted graphic image could be pulled into a site with its image appearing on a single page combined with other images, thus creating another work, virtually

434 Words “which is done before the expiration of the term of copyright” have been omitted by the Copyright (Amendment) Act, 2012
new and different from the original, thereby strongly implicating the right to integrity of the work. In framing, the work is shown in the window of the other.

Thus, the end user may not be sure about the exact source of the work. The reader or user may presume that the work is co-authored with the author of framing website. In both the practices, URL (i.e. address or source) of the website is not shown on the screen. Therefore, in framing and inline linking, the right to authorship granted under section 106A of US Copyright Act and section 57 (1) of the Indian Copyright Act, 1957 can be infringed.

Furthermore, in framing, the copyrighted work of others is shown in small windows mounted with larger window of framing party. Now the question is, whether showing work mounted with the window of other, without the permission of author leads to infringement of right of integrity?

The author may claim infringement of right of integrity “if such distortion, mutilation, modification” or “other act” would be “prejudicial” to the honour or reputation of the author. The author of a good content or material gets the honour because of the quality of its work. In instances of the work shown mounted with the window of other, the work of the author is distorted. Furthermore, the act of framing may be prejudicial to the honor of the author because his prestige to be associated with a quality work or his own work is being shared by mounting the larger window around his window by the framing party. Therefore, in framing the right to integrity of the work gets infringed.

4.3.10 Implications of Linking on Right to communicate work to the public in India

In India, the Parliament has not granted any express right like right ‘to display the copyrighted work publicly’, as it is granted under US Copyright Act. Section 14 (a) (iii) of the Copyright Act, 1957 has granted a right “to perform the work in public, or communicate it to the public.” The term “communication to the public” is defined under section 2 (ff) of the Indian Copyright Act, 1957. According to section 2 (ff),

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‘communication to the public’ means “making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.”

As discussed above, the term ‘communication to public’ means “making any work available for being seen or heard...by means of display...other than by issuing copies”. The right to communicate work publicly is not subject to the creation of the independent work or preparation of the work. According to section 2(ff), exclusive right “to communicate to the public” is infringed if the work is communicated to the public “by means of display...other than by issuing copies”. ‘Display’ of the work other than by issuing copies may happen by ‘displaying’ it in public directly from the original work or by reproducing the original work or by creating independent work from original work. Therefore, the “the communication of the work to public” may be by fixing the work by the infringer or the communication to the public may be directly from the authors’ original work. Hence the defence of non-fixation of the work taken in US court will not be applicable in India, with respect to the right to communication of the work to the public.

In Framing and Inline Linking, the work is not fixed in any concrete form by framing or linking party. The right to communication to public as discussed above is not subject to creation of the independent work or fixation of work in India. In framing, the work stored on the website of others is shown in small windows, but actual copies are not issued by the framing party. The right to show or display copyrighted work to the public even without issuing copies is assigned to the author. Similarly, in inline linking, the work is shown to the public without making any extra copy of the work. Therefore, framing and inline linking without the permission of the author is infringement of the right to communicate work to the public. As discussed earlier, the linking is justified based upon the doctrine of ‘implied licence’. The defence of

‘implied licence’ cannot be justified because it is limited by implied expectation or restrictions (see sub-chapter 4.3.1.2.).

The main question to be decided is whether normal (deep or home page) linking, other than framing or inline linking, leads to infringement of right to communicate work to the public? As disused earlier, the home page linking is not challenged a court of law; rather the owners are happy to be linked (home page) by the other. The deeplinking was a subject matter of dispute in many litigations. The law is not yet finally settled on a legality of deeplinking; maximum cases are settled out of court. There is no litigation on the issue of deeplinking and copyright infringement in India. Sections 14 and 51 of the Indian Copyright Act, 1957 provides, right to reproduce the copyrighted work, issuing copies of the work to the public or communication of the work to the public. As discussed above, the deeplink establishes a link to the contents stored at different places. It does not reproduce the work. The end-user may click the link and reproduce the copyrighted material. The deeplinking does not per se lead to issuing any copies to the public or it does not actually communicate the work to the public. The linking party can hardly help the end-user to reach the resource. The link directs the end-user towards the resource by providing the link.

In this sense, the deep-linking party (other than inline linking or framing) performs the following functions: a) The deep-linking party helps or assists the end-user to reproduce the copyrighted work; b) The deep-linking party may help or assist other parties in issuance of copies of the work to the public; c) The deep-linking party can help to communicate copyrighted work to the public. Therefore, analysis on the liability of the linking party can be divided into the following three categories:

a) The liability of the deep-linking party in instances of the copyrighted work being reproduced by the end user: As discussed earlier,⁴³⁹ if reproducing of the work is allowed by the author of the copyrighted work, the liability cannot be imposed on the end-user. It is further justified, firstly because the end users are not a consenting party for the linking. Secondly, the end-user may not have any knowledge of the authorship of the work and

⁴³⁹ See, chapter no. 4.3.6. P. 115.
whether linking is provided with the consent of the author of the work or not. Furthermore, as discussed above, if there is no liability on end-users, the linking party cannot be held responsible for contributory or vicarious liability under Common law. For imposing contributory liability there shall be a principal offender. The liability on the end user and on the owner of the website can be imposed in instances of unlawful websites or contents. In the instances of unlawful contents, if a link is provided by the linking party, the contributory liability can be imposed because the website providers are responsible for providing unauthorized material and, in some cases, end-users are also responsible for assessing the material.

b) The deep-linking party may help or assist other parties in issuance of copies of the work to the public: The liability for helping in issuing copies of the copyrighted material cannot be imposed, when the authors themselves are issuing the copies. The defence taken in these types of examples would be quite clear. The linking party will argue that the copies are issued by the author of the work. Therefore, issuing per se cannot be the copyright infringement. Issuing not being a copyright infringement, no liability for helping (contributory liability) can be imposed. The contributory liability may be imposed if the act of issuing copyrighted work is conducted by the third party, without the permission of the author. In instances involving a third party, the issuing party will be the main or principal offender and the linking party will be a contributory offender.

c) The deep-linking party can help to communicate work to the public: In these examples also, the above logic would be applied. Wherever the author of the work is communicating, no liability for helping (contributory infringement) can be imposed. But wherever the communication itself is copyright infringement, a contributory liability on the linking party can be imposed.

4.4 CONCLUSION

The above analysis shows that there can be a liability for direct infringement of copyright on linking parties in the instances of framing and inline linking under US and Indian laws. But the linking parties cannot be held responsible for direct infringement in scenario of deep linking (apart from framing and inline linking). The
linking parties can be held responsible for contributory infringement in instances of providing resource itself is a copyright infringement. They (linking parties) cannot be held responsible for contributory liability when the copyrighted resource is either provided by the author or is provided with the permission of the author.

At present, in deep-linking, there is a wrongful loss to the author but there are no legal remedies available under Indian and US copyright laws. Furthermore, the judiciary has an opportunity to declare framing and inline linking as infringement of the copyright. The framing, inline linking and deeplinking should be declared as exclusive rights of the author of the work under the US and Indian Copyright Laws. The linking by a search engine shall not be made an offence in order to balance the interests of society and interest of the author. The internet cannot work effectively at least without the linking by search engine. Therefore, prohibiting linking by search engine would hamper the growth of internet and the interests of society. It will also have adverse implications on the fundamental freedom and basic human rights i.e. right of expression including right to receive information.

In this chapter the author has discussed nature and types of linking and whether it leads to copyright infringement. In the next chapter the author has concluded finding of all the chapters of research and recommended changes in domestic and international law.