July 1999

Frames with a twist: Post-it notes on the Web

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Recommended Citation
Jay Forder. (1999) "Frames with a twist: Post-it notes on the Web".

Introduction
Anyone who has worked in a collaborative environment realises the usefulness of post-it notes. Short comments or instructions stuck on other documents are seen as an efficient and useful way of communicating.

But would you be so understanding if someone were to stick post-it notes on your Web site? A USA company, Third Voice Inc, recently announced such a service. What are the legal ramifications?

The Third Voice system
A pre-release version of the enabling software can be downloaded from Third Voice's web site. It operates as a plug-in for Microsoft's Internet Explorer 4.0 browser. The first official version should be released by the time this issue is published. It will support IE 5.0 and Netscape Navigator.

A user wanting to post notes must first register at the Third Voice web site. According to the demonstration at the site, this involves giving a user-specified name, password and email address. Presumably the user-specified name is needed to enable users to be distinguished from each other and the password to prevent others from mimicking a user. As to the email address, the terms of service suggest personal details will not be disclosed without the user's consent unless required by law.

To post notes or read notes posted by others, a registered user must first log in to the Third Voice site. This apparently creates a frame structure in which other Web pages can be viewed. Symbols representing notes can be inserted in any existing text block in the displayed page. A subsequent user who views the page via the Third Voice system can see these symbols. Clicking a symbol expands it to show the associated note. The notes cannot be edited or deleted except by the originator. Other users of the Third Voice system can read the notes in context and post additional comments of their own. Any Web page can thus become an interactive discussion beyond the control of the owner. According to the San Jose Mercury News, early users have called Microsoft a liar at Microsoft.com, and posted Monica jokes at WhiteHouse.gov.

I could not find a detailed explanation of the technology on the Third Voice site. But I gather the original Web page on its host server is not altered. As the posting of a note does not involve unlawful access or the gaining of “write” permission on a host machine, laws prohibiting unauthorised access are irrelevant. It is most likely that the symbols and comments are inserted into a temporary copy of the page “on the fly”. The end user sees the copy with the symbols. The look of the site is changed. The issues are very similar to those raised by frames generally.

Disputes involving frames
Since the release of Netscape Navigator 2.0 in early 1996, it has been possible to split a viewer's screen into several smaller windows or frames. Each frame can independently display different content. This can be a useful feature for Web page designers displaying their own content. However, it enables content from a remote site to be displayed within a frame and surrounded by content from the local site. The address displayed by the user's browser may continue to be that of the local site and the user may be unaware that the content of the frame comes from another site. To distinguish the latter I would call it “off-site” framing.

The practice has been the subject of controversy since 1997 when The Washington Post and others (including Time Inc, CNN and Reuters) took action against Total News, Inc. Plaintiffs objected when Total News offered, as part of their complete news service, links to items on plaintiffs' sites. The links effectively pulled plaintiffs' content onto the screen while surrounding it with advertisements generated by Total News, giving the impression that Total News...
was responsible for the service. The complaint alleged Total News was a “parasitic” site that simply republished news and content from other sites so as to attract users and advertisers. Plaintiffs threw the book at Total News. Allegations included misappropriation, federal trademark dilution, trademark and copyright infringement, false representations and advertising, unfair competition and tortious interference. Unfortunately for those interested in the legal issues, the suit was settled when plaintiffs gave Total News permission to continue linking to their sites as long as they did not use off-site framing.

There have been a number of subsequent disputes. For example, the LA Times announced several attempts to stop others from using frames to link to their material without permission. Two Indiana daily newspapers filed suit against several Internet firms alleging trademark infringement for framing. None of these have resulted in a final determination of the issues. In Futuredontics v. Applied Anagrams, the judge refused to grant a preliminary injunction (in November 1997) and equally refused to dismiss the claim of copyright infringement (in January 1998). The US court obviously saw the copyright claim as not obviously valid but having some merit.

**The post-it note model**

So where would that leave us? There is a major difference between the post-it note model and normal disputes involving “off-site” framing. To be effective, users of post-it notes need to know all the details of the originator of the content. If all this information is accurately represented, arguments about misrepresentation, misleading conduct or passing off wouldn’t apply. Likewise there is unlikely to be any trademark infringement.

In the USA, arguments about the constitutional protection of freedom of expression would also be relevant. In the absence of that protection in Australia, what legal arguments might arise? Should these notes be treated in the same way as other comments on chat sites or bulletin boards? Certainly the stated aim of the software developers is to make the Web a more open and interactive experience. They deny that their system is breaching anyone’s rights.

However, the disgruntled Web page owner might take a different view. There would certainly be an action for defamation if the comments were defamatory but the practical difficulty would be in identifying the author. Alternatively, it might be possible to argue that Third Voice’s role in making the post-it note visible makes them liable as a publisher. Argument would no doubt move into the untested realm of the “innocent disseminator” defence.

In the absence of defamatory material, could the disgruntled owner indirectly control the practice by successfully arguing a copyright infringement? The page with post-it notes is not an adaptation of the original. The narrow definition of an “adaptation” in sec 10(1) of our Copyright Act 1968 (Cth) doesn’t allow this argument. Nor is it likely to be viewed as a compilation. The most likely argument is that it might breach the terms of an implied licence to use the work for a particular purpose.

Use of the Web necessarily involves making copies of the original page. A copy must be in the system’s memory (RAM) to be displayed on the user’s screen. The originator of a Web page must impliedly licence the user to make a copy for this purpose. It might be argued that this licence does not extend to a copy made for the purpose of altering the look of the original.

There might be two responses to this argument.

- **Section 41 of the Act** allows fair dealing with a work for the purpose of criticism or review. It might be argued that virtual post-it notes are covered by this section.
- **Third Voice** might argue that they are not the infringer. Apart from making the technology available, they play a purely passive role. They do not initiate or request the copy nor add the comments. The complainant would then have the problem of having to identify and prevent each user accessing the system.

A third interesting defence might present itself if the Copyright Amendment (Digital Agenda) Bill were passed in its current form. The proposed sec 43C states:

> “The copyright in a work... is not infringed by making a temporary reproduction of the work... as part of the technical process of making a communication, or in the course of looking at material on a computer screen.”

It is not clear whether this would cover the type of alleged infringement with which we are dealing here.

**Conclusion**

There are legal and policy arguments on both sides. There is little certainty about which would have the stronger arguments. This is another instance of Internet technology pushing the boundaries of known and accepted doctrine.

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3. Note the Third Voice site was slow and unresponsive. The writer was unable to complete the documentation or find detailed explanations of the technology despite trying on a number of occasions over the period 16/6/99 to 21/6/99.
4. For an excellent collection of links on hyperlinking and framing, see [http://www.jura.un-hauslingen.de/~vbel/Asp.html](http://www.jura.un-hauslingen.de/~vbel/Asp.html).
8. See discussion in “Recent events: Internet defamation – major share fraud” by Patrick Quirk in issue 14 of this newsletter (May 1999).