

# Intellectual Property Brief

---

Volume 7 | Issue 1

Article 3

---

2020

## What's all the Hype About Hyperlinking?: Connections in Copyright

Dawn Leung

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/ipbrief>

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

---

### Recommended Citation

Leung, Dawn (2020) "What's all the Hype About Hyperlinking?: Connections in Copyright," *Intellectual Property Brief*. Vol. 7 : Iss. 1 , Article 3.

Available at: <https://digitalcommons.wcl.american.edu/ipbrief/vol7/iss1/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Intellectual Property Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

---

## What's all the Hype About Hyperlinking?: Connections in Copyright

# WHAT'S ALL THE HYPE ABOUT HYPERLINKING?: CONNECTIONS IN COPYRIGHT

DAWN LEUNG\*

## I. INTRODUCTION

The Internet today undeniably revolves around hyperlinking. Whether people use the Internet for business promotion, news reporting, social networking, or anything else, up-to-the-minute ‘sharing’ and dissemination of information dominate and are the norm for businesses and consumers alike, and hyperlinks are an enormous part of that.<sup>1</sup> The rules and customs of hyperlinks shape the way we interact with the world and with each other every day. For example, millions of items of Internet content now come with clickable ‘buttons’ that allow users to share, tweet, “like”, or otherwise post the item on multiple social media outlets. However, the average person does not bother to verify whether the websites or files they linked to are from a company’s official website or from an infringing user’s website. People often do not consider whether there is any copyrighted material in what they post or whether they are allowed to share the website or file in the first place. They have no idea that their simple act of posting a hyperlink or clicking a “share” button involves an issue that has riled rightsholders, businesses, lawyers, and courts all over the world.

Ever since the Internet and the World Wide Web became available for mainstream use, legal controversies concerning hyperlinks have constantly

---

\* Dawn Leung is a graduate of the University of Maryland Francis King Carey School of Law. She has a Bachelor of Music degree from the Conservatory of Music at Wheaton College in Illinois, and, when she is not exploring the law, she is teaching piano in her private studio.

1. See, e.g., Andrea Caumont, *12 Trends Shaping Digital News*, PEW RESEARCH CENTER (Oct. 16, 2013) <http://www.pewresearch.org/fact-tank/2013/10/16/12-trends-shaping-digital-news> (finding 50% of the public cite the Internet as their main news source; 71% of people ages 18 to 29 cite the Internet as the main news source).

arisen in areas such as copyright, trademark, tort, defamation, or invasion of privacy.<sup>2</sup> Some have argued that hyperlinking alone should be considered infringement of rights and that laws should be implemented to restrict such activity.<sup>3</sup> Others have argued that implementing restrictions on (or requiring authorization for) hyperlinking could create a chilling effect on use of the Internet, restrict the fundamental right of free speech, and severely limit what are now the normal everyday practices of hundreds of millions of Internet users.<sup>4</sup>

This article analyzes the current status of copyright law as related to hyperlinks and the various ways these issues have been dealt with both internationally and in the U.S. Part II provides some background information about the technology and terminology of hyperlinks. Part III explores how foreign governments and courts have viewed hyperlinks and copyright. It examines the legality of hyperlinks and whether liability may change if a party links to infringing content. The article particularly focuses on key cases such as *Shetland Times v. Wills*,<sup>5</sup> *Warman v. Fournier*,<sup>6</sup> *Universal Music Australia Pty. Ltd. v. Cooper*,<sup>7</sup> and the recent *Nils Svensson v. Retriever Sverige AB*.<sup>8</sup> Part IV follows by discussing how the WIPO Internet Treaties have affected international treatment of hyperlinks and copyright, particularly as related to the “making available” rights. Part V then examines how the U.S. has viewed hyperlinks and

---

2. See generally, Michael Dockins, *Internet Links: The Good, the Bad, the Tortious, and a Two-Part Test*, 36 U. TOL. L. REV. 367 (2005) (surveying hyperlink-related legal issues in various legal fields).

3. See generally, Jonathan B. Ko, *Para-Sites: The Case for Hyperlinking As Copyright Infringement*, 18 LOY. L.A. ENT. L.J. 361 (1998) (arguing that hyperlinking should be considered copyright infringement, and “[a]lthough increased protection may impede the progress of the Internet, inasmuch as prohibiting or limiting hyperlinking decreases its overall efficiency, offering better copyright protection to authors will increase the use of the Internet as a medium of expression”).

4. See, e.g., Public Knowledge and Electronic Frontier Foundation, Comments Submitted in Response to U.S. Copyright Office’s Feb. 25, 2014 Notice of Inquiry at 6-8 (April 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Public\\_Knowledge\\_EFF.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Public_Knowledge_EFF.pdf) (expressing concern that legislating the “simple and ubiquitous act of hyperlinking” could put copyright liability on every day users).

5. *Shetland Times v. Wills*, [1997] S.L.T. 669 (Sess. Cas. 1996).

6. *Warman v. Fournier*, [2012] F.C. 803 (Can.).

7. *Universal Music Australia Pty. Ltd. v. Cooper* [2005] FCA 972, 150 FCR 1, *aff’d*, *Cooper v. Universal Music Australia Pty. Ltd.* [2006] FCAFC 187.

8. Case C-466/12, *Nils Svensson v. Retriever Sverige AB (Svensson)*, 2014 CURIA 76.

copyright, including in cases such as *Pearson Education, Inc. v. Ishayev*,<sup>9</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>10</sup> and *A&M Records, Inc. v. Napster, Inc.*<sup>11</sup> In examining the legality of hyperlinks in the U.S., the article also looks at related issues such as implied license and secondary liability. Finally, in Part VI, this article compares and contrasts the U.S. and foreign treatment of copyright and hyperlinks and looks deeper at the practical considerations users and their lawyers face today.

## I. THE TECHNOLOGY AND TERMINOLOGY BEHIND HYPERLINKS

The Internet at its most basic level is a global system of interconnected computer networks, and the World Wide Web is a system of connected documents, i.e., websites or webpages, accessed over the Internet. Websites contain hyperlinks, which are text, images, and other elements that allow connections to other websites, text, pictures, videos, sound files, or other content. As the court said in *American Civil Liberties Union v. Reno*, “These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique.”<sup>12</sup> Websites and other files on the Internet are linked to each other using HTML (Hypertext Markup Language), which tells the user’s Internet browser (e.g., Microsoft Internet Explorer or Mozilla Firefox) to go to another document (an external link) or to another part of the same document (an internal link). The actual HTML code is hidden, though a user can view the code in a hyperlink by right-clicking the hyperlink and then clicking on “View Source” or “Inspect Element” or other similar commands on the drop-down menu. HTTP (Hypertext Transfer Protocol) allows computers to communicate

---

9. *Pearson Educ., Inc., et al. v. Ishayev, et al. (Pearson I)*, 963 F.Supp. 2d 239 (S.D.N.Y. 2013).

10. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

11. *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part rev’d in part, remanded*, 239 F.3d 1004 (9th Cir. 2001).

12. *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 836-37 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997); see also European Copyright Society, *Opinion on the Reference to the CJEU in Case C-466/12 Svensson*, at \*1, para 2 (Feb. 15, 2013), <http://blog.iri.uni-hannover.de/wp-content/uploads/tmp/European-Copyright-Society-Opinion-on-Svensson-First-Signatoriespaginated.pdf> (“Although hyperlinking takes many forms and has multiple functions, there can be no doubt that it is the single most important feature that differentiates the Internet from other forms of cultural production and dissemination”).

with one another and seek information on distant servers. The URL (Uniform Resource Locator) acts as a website or file's address (e.g., [www.\\_\\_\\_\\_.com](http://www.____.com)). The websites or files that are connected through a hyperlink are sometimes called "anchors." The hyperlink entry point is called the "source anchor," and the destination is called the "target anchor."

When the typical user thinks of a hyperlink, he or she often thinks of the element on the website in the form of an image or highlighted text that the user can click on to access the requested website or file. However, there are actually several different types of hyperlinks:<sup>13</sup>

- **Surface Links or Simple Links** – A surface link or simple link takes the user from the "source anchor" website to the homepage of the "target anchor" website. The target anchor website is shown in its original form with no reference to the source anchor website. For example, [www.nyt.com](http://www.nyt.com) takes you to the New York Times homepage.
- **Deep Links** – A deep link takes the user from the source anchor website to an interior page or subpage of the target anchor website, not the homepage. For example, one could have a deep link to a particular article within the New York Times website.<sup>14</sup>
- **Framed Links** – A framed hyperlink shows the target anchor website literally framed within the borders of the source anchor website. The target anchor website appears within the source anchor website's margins, which often include the source anchor website's title, logo, menu, advertising banners, and other elements. Although it appears that the user has not fully left the source anchor

---

13. See Alain Strowel & Nicolas Ide, *Liability with Regard to Hyperlinks*, 24 COLUM. VLA J.L. & ARTS 403, 407-9 (2001) (surveying the different types of hyperlinks); Alexander Tsoutsanis, *Why Copyright and Linking Can Tango*, 9 J. INTELL. PROP. L. & PRAC., 495, 496-98 (2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333686](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333686) (discussing different types of hyperlinks).

14. See, e.g., *Shetland Times v. Wills*, [1997] S.L.T. 669 (Sess. Cas. 1996). (Shetland Times claimed deep links on Shetland News' website violated their copyright and bypassed their homepage advertising revenue); *Ticketmaster Corp. v. Microsoft Corp.*, No. 97-3055 DDP (C.D. Cal., complaint filed Apr. 28, 1997) (Microsoft's "Seattle Sidewalks" website deep linked to Ticketmaster subpages, allegedly bypassing homepage advertising revenue, but Microsoft drove additional business to the Ticketmaster website, and Ticketmaster received all revenue from ticket sales." The case settled, and Microsoft agreed to remove the deep links and instead link only to Ticketmaster's homepage).

website, the source anchor website has not created a copy of the target anchor but rather is displaying the original target anchor website. The framed website could be an internal link within the source website or it could be an external link from a completely separate website. The primary URL displayed in the user's browser is based in the source anchor website, though the URL may include a reference to the target anchor.

- **Embedded Links or Inline Links** – An embedded or inline link allows a source anchor website to show a file (e.g., an image, sound file, or video) that is hosted (i.e., stored) on another target anchor website (e.g., a YouTube video embedded on a website). The target file appears to be part of the source anchor webpage, but like framed links, the source anchor website has not created a copy of the file but instead is showing the original file. The user does not have to leave the current website, and they do not need to click on the hyperlink in order to see the file, other than maybe clicking “play” if it is a video or sound file.

As one commentator noted, simple and deep links “push” or redirect a user from one web page to another, while framed and embedded links “pull” or retrieve content from another server and allow the user to stay on the same webpage.<sup>15</sup>

## II. FOREIGN TREATMENT OF HYPERLINKS AND COPYRIGHT

Hyperlinks have been at the forefront of copyright-related legal controversies around the world, both in and out of court. Some foreign governments have become involved in hyperlinking controversies. In France, a group of publishers went to the French government claiming they had lost readership and revenue because Google News hyperlinked to their articles and allegedly profited from them. Google eventually agreed to create a €60 million Digital Publishing Innovation Fund to support French digital publishing initiatives.<sup>16</sup> The Spanish government recently passed

---

15. Tsoutsanis, *supra* note 13, at 496-98.

16. *See Google and France Reach Landmark Agreement*, FRANCE 24 (Feb. 2, 2014), <http://www.france24.com/en/20130201-google-france-reach-landmark-agreement> (Google

legislation that said if a user is found to repeatedly link to unlawful content in a way that goes beyond a mere “technical intermediation,” he or she may be subject to fines up to €600,000. The legislation also said it would be considered an infringement to provide indexed lists of hyperlinks to allegedly unlawful content, irrespective of whether the hyperlinks were provided by third parties.<sup>17</sup>

Hyperlinking issues have also been heavily litigated in various foreign courts over the years. The 1996 Scottish court case *Shetland Times v. Wills* is often cited as the first notable hyperlinking court case. The Shetland Times alleged that deep links to Shetland Times articles on the Shetland News’ website violated the Shetland Times’ copyright.<sup>18</sup> At the time of the case, the Shetland Times gained much of their website’s revenue from advertisements on its homepage. The court said there was potential for loss of revenue because many of the deep links bypassed the Shetland Times’ homepage and went straight to the articles themselves. The court found “no substance... in the suggestion that the [Shetland Times was] gaining an advantage by their newspaper items being more readily available through the [Shetland News’] web site.”<sup>19</sup> The court then issued an interim interdict – the Scottish equivalent of a preliminary injunction – against the Shetland News. The case was settled before the final verdict with an agreement that allowed the Shetland News to link to the Shetland Times web pages as long as the hyperlinks clearly identified the Shetland Times as the originator of the linked articles.<sup>20</sup>

The use of hyperlinks and the related legal policies have evolved since

---

also agreed to help French publishers increase their online revenue by using Google’s advertising technology at a reduced cost).

17. See Elenora Rosati, *Reform of Spanish IP Law: what is it all about?*, THE IPKAT (Feb. 25, 2014), <http://ipkitten.blogspot.com/2014/02/reform-of-spanish-ip-law-what-is-it-all.html>; Elenora Rosati, *What is the recent Spanish IP reform all about copyright-wise?*, THE IPKAT (Nov. 5, 2014), <http://ipkitten.blogspot.com/2014/11/what-is-recent-spanish-ip-reform-all.html>; *see also*, Raquel Xalabarder Plantada, *A Bill to Amend the Spanish IP Law*, KLUWER COPYRIGHT BLOG, (Jul. 10, 2014), <http://kluwercopyrightblog.com/2014/07/10/a-bill-to-amend-the-spanish-ip-law>; Pablo Hernández, *Key Aspects of the New Reform of the Spanish Copyright Act*, KLUWER COPYRIGHT BLOG, (Nov. 10, 2014), <http://kluwercopyrightblog.com/2014/11/10/key-aspects-of-the-new-reform-of-the-spanish-copyright-act>.

18. *Shetland Times v. Wills*, [1997] S.L.T. 669 (Sess. Cas. 1996). Shetland Times also alleged in their complaint that Shetland News’ use of the articles’ actual headlines in the hyperlinks violated their copyright; today, the Shetland Times website at <http://www.shetlandtimes.co.uk> is freely accessible.

19. *Id.*

20. *Id.*



the *Shetland Times v. Wills* case. More recently, foreign courts have generally taken the view that hyperlinks, in and of themselves, do not infringe on a content owner's copyright. For example, in *Warman v. Fournier*, the defendant posted a hyperlink to a photograph on the plaintiff's website.<sup>21</sup> The Federal Court of Canada held that, where the copyrighted work was legally uploaded or posted, linking to the work does not create a reproduction of the work, and such activity does not amount to copyright infringement.<sup>22</sup>

In the Australian case *Universal Music Australia Pty. Ltd. v. Cooper*, hyperlinks on the Cooper website led to downloadable infringing copies of music files on a third party website.<sup>23</sup> The Australian Federal Court noted that "the downloaded subject matter is not transmitted or made available from the Cooper website and nor does the downloading take place through the Cooper website."<sup>24</sup> Rather, the infringement happened on the third party website. Thus, the court found that hyperlinks themselves do not constitute an infringing communication to the public.<sup>25</sup>

By contrast, in *Copiepresse SCRL v. Google Inc.*, a Belgian court considered allegations that Google had violated the plaintiff's copyright by storing and providing access to cached copies of the plaintiffs' website and articles.<sup>26</sup> The court ultimately held that, where Google had stored cached copies of the plaintiffs' webpages and articles, Google had committed copyright infringement by making those cached copies available through hyperlinks.<sup>27</sup>

---

21. *Warman v. Fournier*, [2012] FC 803 (Can.).

22. *Id.* (noting that the plaintiff could remove the photo if he did not want people to link to it); *see also*, *Crookes v. Newton*, [2011] SCC 47, [2011] 3 S.C.R. 269 (Can.) (stating that in a defamation case that hyperlinks "communicate that something exists, but do not, by themselves, communicate its content... A hyperlink, by itself, should never be seen as 'publication' of the content to which it refers.").

23. *Universal Music Australia Pty. Ltd. v. Cooper* [2005] FCA 972, 150 FCR 1, *aff'd*, *Cooper v. Universal Music Australia Pty. Ltd.* [2006] FCAFC 187.

24. *Id.*

25. *Id.*; *See also Cooper v. Universal Music Australia Pty. Ltd.* [2006] FCAFC 187. On appeal, Cooper was found to have authorized the infringement on the third party website; Copyright Act 1968 (Cth) § 10 (Austl.) (stating that the right of communication to the public includes the right "to make available online").

26. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Brussels, Feb 13, 2007, No. 06/10.928/C (*Copiepresse SCRL v. Google Inc.*), (Belg.). The Belgian court put aside the question of whether deep links to the original articles were infringing because the plaintiffs did not raise the issue in their complaint.

27. *Id.*; *See also* Steven Musil, *Google Settles Copyright Dispute with Belgium Newspapers*, CNET (Dec. 13, 2012) <http://www.cnet.com/news/google-settles-copyright->

The most high-profile recent case involving hyperlinking was *Nils Svensson v. Retriever Sverige AB* (“Svensson”), where a group of Swedish journalists alleged that news aggregator Sverige had infringed the journalists’ exclusive right to make their works available to the public by providing Sverige clients with hyperlinks to the articles.<sup>28</sup> The right to make works available to the public – known as the “making available” right or the “communication to the public” right – is in the European Union’s (EU) Directive 2001/29/EC (the “InfoSoc Directive”), which provides that EU Member States “shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works... including the making available to the public of their works.”<sup>29</sup> The original articles at issue did not have a paywall, subscription, or other access restrictions but rather were freely accessible on the *Göteborgs-Posten* newspaper website. In response to the plaintiff journalists, Sverige argued that providing lists of hyperlinks to works communicated to the public and freely available on other websites does not constitute copyright infringement of the works. The Court of Justice of the European Union (CJEU) said that it is sufficient for an “act of communication” that a work is made available to a public “in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity.”<sup>30</sup> Additionally, the term “public” refers to an indeterminate number of potential recipients.<sup>31</sup> The court found that Sverige’s hyperlinks were “acts of communication” because they made the works available, and the hyperlinks were “to the public” because they were aimed at all their website’s users.<sup>32</sup> However, because the original articles were “freely

---

dispute-with-belgium-newspapers/ (holding was affirmed on appeal, but the parties settled; Google agreed to help the Belgian newspapers generate revenue online).

28. Case C-466/12 *Nils Svensson v. Retriever Sverige AB* (*Svensson*), 2014 CURIA 76.

29. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Infosoc Directive), O.J. (L 167/10) art. 3(1).

30. Case C-466/12, *Svensson*, para. 19; *see also*, Case C-466/12, *Svensson*, para. 17 (the Directive’s criteria of ‘act of communication’ “must be construed broadly” in order to ensure a “high level of protection for copyright holders”); European Commission, *Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, 10 December 1997, COM(97)0628-C4-0079/98-97/0359(COD), p. 25-6 (“[T]he critical act is the ‘making available to the public,’ thus the offering [of] a work on a publicly accessible site, which precedes the stage of its actual ‘on-demand transmission.’ It is not relevant whether any person actually has retrieved it or not.”).

31. Case C-466/12, *Svensson*, para. 21-23.

32. Case C-466/12, *Svensson*, para. 20 and 26.

available” on the newspaper’s website to all potential Internet users, the public that would access the articles through Sverige’s hyperlinks were not a “new public” that the rightsholders had not taken into account when they initially posted the articles online. Thus, the CJEU held that providing hyperlinks to works that are “freely available” on another website does not constitute an infringing “communication to the public.”<sup>33</sup> The Court noted that it would have come to the same conclusion whether or not it was obvious to the user that they were viewing content hosted by the same or another website (i.e., where the content was framed or embedded).<sup>34</sup> However, where a hyperlink allows users to bypass or circumvent any access restrictions – such as a paywall, subscription, or other technical barrier – that the originating website put in place so the work would not otherwise be freely available, those users are a “new public” that the rightsholders did not take into account when they authorized the initial communication. In such a case, the hyperlinks would require the rightsholder’s authorization in order to avoid infringement.<sup>35</sup>

### III. THE WIPO INTERNET TREATIES AND THE “MAKING AVAILABLE” RIGHTS

The InfoSoc Directive, on which the CJEU based its *Svensson* ruling, was implemented in part in response to the WIPO (World Intellectual Property Organization) Internet Treaties, which include the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”). The WIPO Internet Treaties require signatory states to recognize the rights of “making available” and “communication to the public” in their national laws.<sup>36</sup> The WCT, for example, stipulates that authors have the right to authorize “any communication to the public of their works, by wire or wireless means, including the making available to

---

33. Case C-466/12, *Svensson*, para. 24-28 (“[S]ince there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings”).

34. Case C-466/12, *Svensson*, para. 29-30.

35. Case C-466/12, *Svensson*, para. 31 (noting that such a circumventing link “constitutes an intervention without which those users would not be able to access the works transmitted”).

36. Directive 2001/29/EC, *supra* note 29, art. 3(1); WIPO Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65 (“WCT”); WIPO Performances and Phonograms Treaty arts. 10, 14, Dec. 20, 1996, 36 I.L.M. 76 (“WPPT”).

the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”<sup>37</sup> The Basic Proposal that led to the WCT stated: “The relevant act is the making available of the work by providing access to [the work]. What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals.”<sup>38</sup> The key act under the “making available” right is the mere offering of the work so the public may access it if and when they choose. With the ever-growing amount of content made available on the Internet, signatory nations have to consider what the potential implications are for the use of hyperlinks under their nation’s laws.

The U.S. implemented the WIPO Internet Treaties through the Digital Millennium Copyright Act (“DMCA”) in 1998,<sup>39</sup> but Congress did not include any explicit references to “making available” or “communication to the public.” Congress concluded that the U.S. Copyright Act already covered those rights because it provides copyright owners with the right to reproduce or copy their work, to distribute copies of the work, to publicly

---

37. WCT art. 8, Dec. 20, 1996, 36 I.L.M. 65; *see also* WPPT art. 10, Dec 20, 1996, 36 I.L.M. 76 (“Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”); WPPT art. 14, Dec 20, 1996, 36 I.L.M. 76 (“Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”).

38. WIPO, Chairman of the Committees of Experts, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/4, 30 August 1996, p. 44, para 10.10.; *see also* WIPO, *Copyright in the digital environment: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, WIPO/CR/KRT/05/7, February 2005, p. 13, para. 56 (“[T]he concept extends not only to the acts that are carried out by the communicators, the transmitters themselves... but also to the acts which only consist of making the work or object of neighboring rights accessible to the public.”); WIPO, Chairman of the Committees Of Experts, *Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights Of Performers And Producers Of Phonograms To Be Considered By The Diplomatic Conference*, WIPO Doc. CRNR/DC/5, 30 August 1996, p. 54, para. 11.03 (the right of making available applies to situations “where members of public may access fixed performances from a place and at a time individually chosen by them. Thus, availability is based on interactivity and on on-demand access”).

39. Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

display the work, and to perform the work.<sup>40</sup> Although there is still some debate as to whether that is truly the case, in the course of the U.S. Copyright Office's current study on the "making available" issue,<sup>41</sup> some commenters have expressed concern that making the "making available" or "communication to the public" rights more explicit or restricted under U.S. copyright law would have negative effects on the use of hyperlinks or the Internet in general, particularly if such rights impose copyright liability on Internet users for their everyday activities.<sup>42</sup>

---

40. 17 U.S.C. § 106 (enumerating the exclusive rights under U.S. copyright; U.S. copyright law explicitly delineates the right to perform the work and, in the case of sound recordings, to perform the work publicly through digital transmission; the copyright law also gives a copyright owner the right to prepare derivative works); see H.R. REP. NO. 105-551, at 9 (1998) ("The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law."); see also *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 & H.R. 2180 Before the H.R. Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 43 (1997) (the Register of Copyrights advised Congress there was "no need to alter the nature and scope of the copyrights and exceptions, or change the substantive balance of rights embodied in the Copyright Act"); *Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 114 (2002) (citing to a letter from Marybeth Peters, Register of Copyrights, United States Copyright Office) ("While Section 106 of the U.S. Copyright Act does not specifically include anything called a 'making available' right, the activities involved in making a work available are covered under the exclusive rights of reproduction, distribution, public display and/or public performance."); Supplementary Register's Report on the General Revision of the U.S. Copyright Law 14 (1965) (noting the potential for "transmission of works by... linked computers, and other new media of communication" that "may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation").

41. See *Making Available Study*, U.S. COPYRIGHT OFFICE, [http://copyright.gov/docs/making\\_available](http://copyright.gov/docs/making_available) (last visited Nov. 14, 2015).

42. See, e.g., Andrew Bridges, Comments Submitted in Response to U.S. Copyright Office's Feb. 25, 2014 Notice of Inquiry at 11 (April 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Andrew\\_Bridges.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/Andrew_Bridges.pdf) (expressing concern that making linking into an act of "making available" could "criminalize the fundamental building blocks of the Internet"); Digital Public Library of America (DPLA), Comments Submitted in Response to U.S. Copyright Office's Feb. 25, 2014 Notice of Inquiry at 2 (April 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/DPLA.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/DPLA.pdf) (saying that a broad "making available" right could create a chilling effect and impose liability on libraries for linking to copyrighted content in their collections, while "free and open linking" would avoid hampering development of legitimate library initiatives and the Internet as a whole); Public Knowledge and Electronic Frontier Foundation, Comments Submitted in Response to U.S. Copyright Office's Feb. 25, 2014 Notice of Inquiry at 6-8 (April 4, 2014), [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/Public\\_Knowledge\\_E](http://copyright.gov/docs/making_available/comments/docket2014_2/Public_Knowledge_E)

## IV. U.S. TREATMENT OF HYPERLINKS AND COPYRIGHT

### A. U.S. Treatment of Hyperlinks Generally

Similar to some of their foreign counterparts, U.S. courts today generally agree that hyperlinking “does not itself involve a violation of the Copyright Act... since no copying is involved.”<sup>43</sup> A New York federal court in *Pearson Education, Inc. v. Ishayev (Pearson I)* recently said that providing hyperlinks, “without more, is insufficient to establish an act of infringement.”<sup>44</sup> “A hyperlink does not itself contain any substantive content... Because hyperlinks do not themselves contain the copyrighted [works, providing] them does not infringe on any of a copyright owner's five exclusive rights.”<sup>45</sup> Similarly, in *Ticketmaster Corp. v. Tickets.com, Inc.*, a federal court in California, examining Tickets.com’s deep links to

---

FF.pdf (expressing concern that a making available right would outlaw “desirable behaviors that are currently lawful” and put users at risk of copyright liability for the “simple and ubiquitous act of hyperlinking”).

43. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390 at \*2 (C.D. Cal. March 27, 2000) (also dismissing Ticketmaster's breach of contract claim because their website’s “Terms and Conditions,” which stated that deep linking was prohibited, were not prominently displayed; Ticketmaster did not require users to click the “Agree” button next to the “Terms and Conditions”; the court said Ticketmaster could amend its complaint to claim that Tickets.com knew about the “Terms and Conditions” and impliedly agree to them); see also *Online Policy Group v. Diebold, Inc.*, 337 F.Supp. 2d 1195, n. 12 (N.D. Cal. 2004) (“[H]yperlinking per se does not constitute direct copyright infringement because there is no copying, [although] in some instances there may be a tenable claim of contributory infringement or vicarious liability.”); *Strowel*, *supra* note 13, at 420-421. Some have speculated that, although a single hyperlink cannot be copyrighted in itself, a non-alphabetical index or compilation of hyperlinks that is the result of original expression and creative choices may constitute the “indexer’s own intellectual creation” and thus be copyrightable.

44. *Pearson Educ., Inc. v. Ishayev (Pearson I)*, 963 F.Supp. 2d 239, 250 (S.D.N.Y. 2013). Defendant Ishayev emailed a hyperlink to a file sharing website where a user could access unauthorized copies of copyrighted material, but the link itself was not a digital copy of any protected materials, and “sending an email containing a hyperlink to a site facilitating the sale of a copyrighted work does not itself constitute copyright infringement”; the court noted things would be different if the defendant himself had illegally uploaded the copyrighted materials to the linked website; see also *MyPlayCity, Inc. v. Conduit Ltd.*, No. 10 Civ. 1615(CM), 2012 WL 1107648, at \*12 (S.D.N.Y. Mar. 30, 2012) (stating that “merely providing a ‘link’ to a site containing copyrighted material does not constitute direct infringement of a holder's distribution right”).

45. *Pearson I*, 963 F.Supp. 2d at 250-51 (stating that a hyperlink is “the digital equivalent of giving the recipient driving directions to another website on the internet.”).

Ticketmaster's website, said that a URL lacks the originality required for copyright protection.<sup>46</sup> The court also held that Tickets.com's deep linking to Ticketmaster's subpages did not violate Ticketmaster's public display rights under 17 U.S.C. § 106(5) because Tickets.com made it clear to the user that he or she was being directed to a page that was owned by Ticketmaster, not Tickets.com.<sup>47</sup>

Although the U.S. did not explicitly include the "making available" rights in the Copyright Act, some U.S. courts have looked at similar issues through the lens of an implied license. As a Nevada federal district court said in *Field v. Google Inc.*, "An implied license can be found where the copyright holder engages in conduct 'from which [the] other [party] may properly infer that the owner consents to his use.'"<sup>48</sup> In *Field*, the plaintiff had posted 51 of his copyrighted works on his website. He argued that Google had violated his exclusive rights to reproduce and distribute his works by allowing users to access cached copies of the works through links to Google's online repository.<sup>49</sup> The court found that the plaintiff knew that Google automatically provides cached links for webpages included in its index and search results, and he knew that users could instruct Google not to provide a cached link to a given webpage by using a "no-archive" meta tag.<sup>50</sup> Despite this knowledge, the plaintiff chose not to use the "no-archive" meta tag when he posted his works on his website, which was

---

46. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 at \*4-6 (C.D. Cal. Mar. 7, 2003) (the court analogized hyperlinks to a street address that merely enables a person to find a desired location); see also *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390 at \*2 (C.D. Cal. Mar. 27, 2000) (analogizing hyperlinks to a library card index system that directs you to the original work); Dan L. Burk, *Proprietary Rights in Hypertext Linkages*, 2 J. INFO. L. & TECH. (1998), [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998\\_2/burk](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/burk) ("In the case of hypertext, the user's browser or other application can then retrieve the material from its location, a process that is not only hidden from the user, but far more convenient than physically venturing into library stacks to retrieve hardcopy referenced in a plain footnote").

47. *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21406289 at \*6. Tickets.com's website stated, "Although we can't sell them to you, the link above will take you directly to the other company's web site where you can purchase them"; Tickets.com also extracted basic event information - event, location, date, time, ticket price - from Ticketmaster's interior web pages and displayed the information on Tickets.com's website, but the court noted that such purely factual information is not protectable under copyright.

48. *Field v. Google Inc.*, 412 F.Supp. 2d 1106, 1116 (D. Nev. 2006) (citing *De Forest Radio Tel. & Tel. Co. v. U.S.*, 273 U.S. 236, 241 (1927)).

49. *Field*, 412 F.Supp. 2d at 1109.

50. *Field*, 412 F.Supp. 2d at 1113-14, 1116.

“accessible, for free, to the world.”<sup>51</sup> Thus, the court held that the plaintiff had granted Google an implied license to reproduce and distribute his works through the cached links.<sup>52</sup>

In *Righthaven LLC v. Klerks*, the same court considered an article that was freely available on the *Las Vegas Review–Journal’s* website; a third party posted the entire article on a non-commercial website that the defendant maintained.<sup>53</sup> The defendant was found to reasonably argue that the copyright holder “offered the article to the world for free, encouraged people to save and share the article with others without restrictions, and permitted users to ‘right-click’ and copy the article from its website.”<sup>54</sup> Even though the plaintiff contended that it had not given such license to anyone, the court found an implied license because the defendant “may have properly inferred that the owner consented to the use, especially in light of the established and accepted custom of users freely and openly sharing certain information posted on the internet.”<sup>55</sup>

As mentioned earlier, surface linking takes you to a website’s homepage,

---

51. *Id.*; see *Id.* at 1116 (citing *Keane Dealer Servs., Inc. v. Harts*, 968 F.Supp. 944, 947 (S.D.N.Y. 1997)) (“Consent to use the copyrighted work need not be manifested verbally and may be inferred based on silence where the copyright holder knows of the use and encourages it.”).

52. *Field*, 412 F.Supp. 2d at 1109, 1113-14, 1116.

53. *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 WL 3724897, at \*1 (D. Nev. Sept 17, 2010).

54. *Righthaven LLC v. Klerks*, 2010 WL 3724897, at \*4 (the court also looked at the defendant’s fair use argument but only went as far as saying that such a defense was “reasonably assertable”).

55. *Righthaven LLC v. Klerks*, 2010 WL 3724897, at \*4; see also *Batesville Servs., Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253, at \*1 (S.D. Ind. Nov. 10, 2004) (a third party, the Veterans Society, had an implied license to use plaintiff Batesville’s photos to advertise the Veterans Society; defendant Funeral Depot had a contract with the Veterans Society whereby defendant maintained some control over some Veterans Society subpages that displayed plaintiff’s pictures; defendant attempted to use the Veterans Society’s implied licenses from plaintiff for advertising and links; on defendant’s website, defendant used thumbnail versions of plaintiff’s photos to link to Veterans Society subpages; plaintiff alleged that the Veterans Society violated the implied license by using the photos to promote Funeral Depot’s business; there was an issue of fact about whether the Veterans Society’s implied license allowed the advertising of another company’s business; the court said if the implied license did not apply to defendant, then the linking might be infringement because of defendant’s participation in creating the content to which it then linked; the court said there is no per se exclusion of linking from copyright liability, and deliberately encouraging the use of infringing websites, by posting links to those sites, may result in copyright infringement liability; where a party posts links to an infringing site and controls and modifies the infringing site, liability for copyright infringement is possible).



while deep linking takes you to an internal webpage, such as a particular article on a news website. In the 1990s and early 2000s - the early days of the modern mainstream Internet<sup>56</sup> - some people expressed concern that deep linking to a subpage allows users to bypass homepage commercial advertising - and thus a site owner's revenue - or gives the impression that the two sites endorse each other.<sup>57</sup> Others see deep linking as a necessary and useful vehicle for steering users to the linked websites, particularly now in the age of Twitter and other social media outlets where such deep linking has become somewhat the norm.<sup>58</sup>

Surface linking and deep linking usually involve reasonably clear re-direction to a completely different webpage, but with framed or embedded links, the copyrighted work from the target anchor website appears to be within the source anchor website. There is some concern that the frame

---

56. See Martin Bryant, *20 years ago today, the World Wide Web opened to the public*, THE NEXT WEB (Aug. 6, 2011) <http://thenextweb.com/insider/2011/08/06/20-years-ago-today-the-world-wide-web-opened-to-the-public/> (discussing how the World Wide Web became publically available in 1991 and began to be widely used in the 1990s).

57. See, e.g., *Shetland Times v. Wills*, [1997] S.L.T. 669 (Sess. Cas. 1996) (Shetland Times claimed deep links on Shetland News' website violated their copyright and bypassed their homepage advertising revenue); *Ticketmaster Corp. v. Microsoft Corp.*, No. 97-3055 DDP (C.D. Cal., complaint filed Apr. 28, 1997) (hyperlinks on Microsoft's "Seattle Sidewalks" website linked to Ticketmaster subpages where users could view detailed event and ticket information; using a search engine on the Microsoft site, users could search for "Ticketmaster" and see results listing the physical locations of Ticketmaster outlets and links to pages for each location; each of the linked pages included advertisements placed by Microsoft that contained links to various local attractions; Ticketmaster asserted it "must maintain control of the manner in which others utilize and profit from its proprietary services, or face the prospect of a feeding frenzy diluting its content," but "Microsoft was driving additional business to the Ticketmaster [website], and Ticketmaster received all of the revenue from ticket sales;" the case settled).

58. See *Hypertext Linking and Copyright Issues*, AMERICAN LIBRARY ASSOCIATION, <http://www.ala.org/advocacy/copyright/copyrightarticle/hypertextlinking> (last visited Nov. 14, 2015) (discussing practical and legal concerns related to deep linking); see also Michael Gorman, *EU Court of Justice: hyperlinks to copyrighted content are legal, if both sites let users see it for free*, ENGADGET (Feb. 13, 2014) <http://www.engadget.com/2014/02/13/eu-court-copyright-infringement-hyperlinks-ruling> ("It's common practice for those of us who make our living on the internet to link out to other websites in the stories we publish -- in fact, we here at Engadget consider it a necessary part of good reporting."); Ben Zigterman, *EU court decides not to ruin the Internet*, BOY GENIUS REPORT (Feb. 13, 2014) <http://bgr.com/2014/02/13/hyperlink-copyright-infringement-court-ruling> (discussing the CJEU's decision in *Nils Svensson v. Retriever Sverige AB* that hyperlinks to freely available articles are not copyright infringement; noting that the decision is "good news for anyone who has ever posted a link to Twitter or Facebook, which is just about everyone").

alters the content's appearance<sup>59</sup> or creates the impression that the framed target anchor website voluntarily associates with the source anchor website.<sup>60</sup> However, rather than focusing on how the work simply appeared to the average user, courts have often focused more on the technological process of whether an actual copy of the work was made and, if there was a copy, who actually made it. For example, in the high-profile case of *Perfect 10, Inc. v. Amazon.com, Inc.*, Google's image search framed images from an infringing third party website.<sup>61</sup> The court used a "server test" that defined "display" as the act of serving and storing online content.<sup>62</sup> The court also said that "distribution" requires "actual dissemination" of a copy. The infringing third party website, not Google, stored the full-size images. In framing the full-size images, Google did not copy the images but instead communicated HTML instructions that told a user's browser where to find the full-size images on the third party website.<sup>63</sup> Thus, the court held that the framed full-size images at issue did

---

59. RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 15:7 (2014) (noting the concern that the altered appearance may create an unauthorized display or a derivative work under 17 U.S.C. § 106); see, e.g., *Washington Post Co. v. TotalNews, Inc.*, No. 97 Civ. 1190 (S.D.N.Y. complaint filed Feb. 20, 1997), dismissed upon settlement (June 5, 1997) (plaintiff publishers alleged that Total News' framing of the publisher's websites prevented readers from seeing the publishers' advertisements, banners, and URLs and covered them with Total News' banners and ads in violation of the publisher's copyright and bypassing its revenue; the parties settled four months after filing with an agreement requiring Total News to obtain a "linking license" to authorize the links and stipulating requirements as to how Total News could display the link without framing with Total News' banners).

60. See *Hard Rock Café Int'l v. Morton*, No. 97 Civ. 9483(RPP), 1999 WL 717995, at \*1 and \*25-27 and n.16 (S.D.N.Y. Sept. 9, 1999) (noting the source anchor website and the framed target anchor website were combined into a "single visual presentation" and a user could be unaware that she or he had left the source anchor website because the browser displayed the framing website's URL; also noting that framing was a "flexible device" and that there may be instances where the user would easily be able to distinguish the framed website from the framing website; the court interpreted a license agreement between the parties and found that the defendant's framing violated the terms of the agreement).

61. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

62. *Perfect 10, Inc.*, 508 F.3d at 1159-62 ("the Copyright Act... does not protect a copyright holder against acts that cause consumer confusion"); but see The Copyright Alliance, Comments of the Copyright Alliance, 3-4 (April 4, 2014) [http://copyright.gov/docs/making\\_available/comments/docket2014\\_2/reply/Copyright\\_Alliance.pdf](http://copyright.gov/docs/making_available/comments/docket2014_2/reply/Copyright_Alliance.pdf) (arguing that the *Perfect 10* court's view incorrectly "tied" the reproduction right and the display right under 17 U.S.C. § 106 and, as a result, improperly narrowed the "making available" or "communication to the public" rights).

63. *Perfect 10, Inc.*, 508 F.3d at 1159-61 (HTML instructions directed a user's browser to a third party website publisher's computer where the infringing image was stored; the

not constitute an infringing “display” or “distribution” of the images.<sup>64</sup> Google was liable for direct infringement where their computers stored or cached thumbnail versions of Perfect 10's copyrighted images and communicated copies of those thumbnails to users; however, the court found fair use.<sup>65</sup>

Similarly, in *Flava Works, Inc. v. Gunter*, the Seventh Circuit considered whether Gunter's social video website, myVidster, violated Flava Works' copyright by embedding infringing videos of Flava Works' content from third party websites.<sup>66</sup> Judge Posner said that, because myVidster did not directly host the infringing video but rather linked to versions of the video hosted elsewhere, myVidster did not commit copyright infringement.<sup>67</sup> The infringer was the Flava Works customer who copied Flava Works' copyrighted video by uploading it to the third party non-Flava Works websites.<sup>68</sup> The court compared linking to content hosted elsewhere to *The New Yorker* listing theatrical plays and giving contact information for the relevant theaters where the plays are performed. In such a case, the magazine or the website is not performing, transmitting, or communicating the plays. Judge Posner said that to suggest that a website like myVidster was transmitting or communicating the work would “make the provider... an infringer even if he didn't know that the work to which he was directing a visitor to his website was copyrighted.”<sup>69</sup> This reasoning is in line with

---

court noted that “providing these HTML instructions is not equivalent to showing a copy”).

64. *Perfect 10, Inc.*, 508 F.3d at 1159-63 (merely “indexing” the Internet and allowing users to find information should not constitute infringement).

65. *Id.* at 1159-68 (“a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool”); *compare Field*, 412 F.Supp. 2d at 1113-14, 1116 (the plaintiff knew he could instruct Google not to provide cached links to copies of webpages by using a “no-archive” meta tag, but he declined to use the “no-archive” meta tag on his website; thus, the court found that Google had an implied license to reproduce and distribute the plaintiff's works through the cached links).

66. *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012). Flava Works only allowed legal access to its videos through a paywall; under Flava Works' terms of use, the user must agree not to copy, transmit, or sell the video; the user may download the content to his or her computer for “personal, noncommercial use” only.

67. *Flava Works, Inc.*, 689 F.3d at 759-61 (noting that myVidster did not touch the video data stream; neither myVidster nor the myVidster user made an infringing copy of the work).

68. *Flava Works, Inc.*, 689 F.3d at 758-61 (noting that if myVidster invited people to post copyrighted videos without authorization, it would then be liable for contributory infringement).

69. *Flava Works, Inc.*, 689 F.3d at 761 (noting this would “blur the distinction between direct and contributory infringement”).

the DMCA's "safe harbor" for Internet service providers (ISPs), which provides that ISPs are not liable for copyright infringement if they link to material they do not know is infringing.<sup>70</sup>

While the courts in *Perfect 10* and *Flava Works* focused on the technological process of whether an actual copy of a work was made, the court in the now withdrawn opinion of *Kelly v. Arriba Soft Corp.* seemed to focus more on how the work appeared to the average user on the defendant's website.<sup>71</sup> The court noted that "the user typically would not realize that the image actually resided on another web site."<sup>72</sup> The court held that the inline linking or framing of full-sized images of the plaintiff's copyrighted photographs as displayed in the context of defendant's image search was in direct competition with the plaintiff's website and thus violated the plaintiff's public display rights.<sup>73</sup> However, the court said that the inline or framed thumbnail images of the photographs were not infringing because the "thumbnail" images were a "transformative" fair use in that they served a different function than the original images. Specifically, the thumbnails did not supplant the use of the owner's original images; instead, they benefited the public by enhancing Internet information gathering techniques.<sup>74</sup> After some harsh criticism, the Ninth Circuit withdrew this opinion on procedural grounds, saying that the *Kelly* district court should not have reached the issue of the legality of the full-

---

70. See 17 U.S.C. § 512. To avoid liability, ISPs must also be unaware of facts that would make the infringement apparent, act quickly upon learning of such conduct to remove or disable access to the infringing material, not receive direct financial benefit from the infringing activity, and terminate repeat infringers.

71. *Kelly v. Arriba Soft Corp. (Kelly I)*, 280 F.3d 934 (9th Cir. 2002).

72. *Kelly I*, 280 F.3d at 939 (the full-size image was not technically located on defendant's website but was taken directly from the originating website; an "Image Attributes" page, which the user accessed by clicking on a thumbnail image, displayed the original full-size image, a description of its dimensions, a link to the originating web site, and the defendant's banner and advertising).

73. *Kelly I*, 280 F.3d at 944-48 ("Kelly's images on a computer screen would constitute a display;" and "Arriba is showing Kelly's original works without his permission").

74. *Kelly I*, 280 F.3d at 940-44 (noting the small, low quality thumbnail images would not likely be used for the same "illustrative or artistic purposes" as the original images); see also *Field v. Google Inc.*, 412 F.Supp. 2d 1106 (D. Nev. 2006) (finding fair use where Google allowed access to works through "cached" links because the search engine served a different, socially beneficial purpose and did not merely supersede the original works, there was no evidence that the search engine operator profited from such use, the images' creator had sought to make his works available to widest possible audience for free, the operator used no more of works than necessary, and there was no evidence of impact on the potential market for the creator's works).

sized framed images because neither party had moved for summary judgment on that issue.<sup>75</sup>

### *B. U.S. Treatment of Secondary Liability and Hyperlinks*

Where a party links to infringing content on a third party website, U.S. courts often view hyperlinks through the secondary liability doctrines of contributory and vicarious infringement.<sup>76</sup> Contributory infringement is a legal doctrine under which a person is liable if he or she knowingly or intentionally induces, encourages, or materially contributes to the infringing conduct of another.<sup>77</sup> For example, the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* said, “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”<sup>78</sup> To find

---

75. *Kelly v. Arriba Soft Corp. (Kelly II)*, 336 F.3d 811 (9th Cir. 2003) (“[T]he district court should not have reached the issue [of whether Arriba’s framing of full-size images constitutes direct infringement] because neither party moved for summary judgment as to the full-size images”); see also *Perfect 10 v. Google Inc.*, 416 F.Supp. 2d 828, 841-42 (C.D. Cal. 2006), *aff’d in part, rev’d in part*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (describing how the *Kelly I* opinion was withdrawn after harsh criticism).

76. See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). While the U.S. Copyright Act itself does not expressly provide for secondary liability, “[t]he 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”.

77. See *Arista Records LLC v. Lime Group LLC*, 715 F.Supp. 2d 481 (S.D.N.Y. 2010) (ruling that, to establish inducement of copyright infringement, a plaintiff must show that the defendant engaged in purposeful conduct that encouraged copyright infringement with the intent to encourage such infringement).

78. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 918-19, 923-26, 936-38 (2005). Grokster and StreamCast Networks actively encouraged direct infringement by distributing links to articles “promoting its software’s ability to access popular copyrighted music,” responding to requests for help in “locating and playing copyrighted materials,” and targeting a known market of infringing use; see also *Bernstein v. JC Penney, Inc.*, No. 98-2958 R EX, 1998 WL 906644, at \*1 (C.D. Cal. Sept. 29, 1998) (rejecting plaintiff’s “multiple linking” theory alleging liability where the website linked to a site that linked to several other sites, one of which contained infringing material; dismissing a contributory infringement claim where defendant successfully argued that (a) Internet users viewing of the material at issue was not infringing; (b) linking is capable of substantial non-

contributory infringement, the plaintiff must first establish that a third party had committed direct infringement,<sup>79</sup> and the contributorily infringing party must know or have reason to know that the direct infringer had reason to know the material was copyright protected.<sup>80</sup> The Supreme Court said that “mere knowledge of infringing potential” would not be enough to subject a party to liability.<sup>81</sup> Similarly, “An allegation that a defendant merely provided the means to accomplish an infringing activity is insufficient to establish a claim for copyright infringement. Rather, liability exists if the defendant engages in personal conduct that encourages or assists the infringement”<sup>82</sup> As the Ninth Circuit Court said in *Perfect 10*, “[A]n actor’s contribution to infringement must be material to warrant the imposition of contributory liability.”<sup>83</sup> A person can also be found liable under the doctrine of vicarious infringement when he or she supervises the directly infringing activities of others, profits from those activities, and fails to “exercise the right to stop or limit” them, as in the tort doctrine of *respondiat superior*.<sup>84</sup>

---

infringing uses; and (c) the court could not infer that defendant knew or substantially participated in the direct infringement).

79. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14, n. 2 (9th Cir. 2001) (“Secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party.”).

80. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d at 1172 (citing *Napster, Inc.*, 239 F.3d at 1022) (holding that “a computer system operator can be held contributorily liable if it ‘has actual knowledge that specific infringing material is available using its system’”).

81. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 936-37 (2005) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439, n. 19 (1984)).

82. *Tarantino v. Gawker Media, LLC*, No. CV 14-603-JFW (FFMx), 2014 WL 2434647 at \*3-5 (C.D. Cal. April 22, 2014) (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 937 (2005))(plaintiff could not assert contributory infringement because plaintiff did not allege any specific act of direct infringement by a third party but rather asserted merely general or speculative allegations of direct infringement by unknown third parties).

83. *Perfect 10, Inc.*, 508 F.3d at 1172 (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971)); *Grokster Ltd.*, 545 U.S. at 942 (Ginsburg, J., concurring) (concurring opinion identifying two categories of contributory liability: 1) actively or intentionally encouraging or inducing infringement through specific acts or 2) distributing a product that is used to infringe copyrights “if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses”).

84. *Grokster*, 545 U.S. at 914, 930 (“One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it.”); see also *Arista Records, Inc., et al. v. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918, at \*10 (S.D.N.Y. Aug. 29, 2002) (“A company may be found vicariously liable for copyright

For example, in the famous case of *A&M Records, Inc. v. Napster, Inc.*, Napster linked users to copyrighted musical works other users had posted.<sup>85</sup> The court found that Napster knew about and had the ability to supervise the use of the website for illegal copying. Napster had provided the software, search engine, and servers that allowed users to engage in the infringing conduct, and it financially benefited from users who engaged in this activity. Thus, the court held that Napster was liable for contributory and vicarious copyright infringement.<sup>86</sup>

In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, the defendants had made directly infringing copies of copyrighted material available on their own website, and the court issued an order to take down the infringing copies, with which defendants complied.<sup>87</sup> However, the defendants then provided links to other websites where the infringing materials were available and sent out e-mails actively encouraging others to download the infringing materials from those websites. In response, the plaintiffs claimed that such activity constituted contributory infringement.<sup>88</sup>

---

infringement if it has the right and ability to supervise infringing activity and also has a direct financial interest in that activity”); *Perfect 10, Inc.*, 508 F.3d at 1173 (“[A] plaintiff must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement”); Manny D. Pokotilow, et al., *Internet Linking and Framing Issues*, (ALI-ABA Course of Study, May 10–11, 2007) SM045 ALI-ABA 37 (observing that *Grokster* is applicable to “employers who provide Internet access to employees and then look the other way or even encourage employees to gain access to and copy protected material for the completion of their respective jobs”).

85. *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp.2d 896 (N.D. Cal. 2000), *aff'd in part rev'd in part, remanded*, 239 F.3d 1004 (9th Cir. 2001).

86. *Napster, Inc.*, 114 F.Supp.2d at 918-22 (the court issued a preliminary injunction against Napster); *see also In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, *Deep v. Recording Indus. Ass'n of Am., Inc.*, 540 U.S. 1107 (Jan. 12, 2004) (defendant Aimster claimed that, unlike Napster, communication between users was by encryption, so he could not possibly know what people were transmitting through Aimster; court noted that Aimster’s tutorial only gives examples of file sharing copyrighted music); Compare, *Perfect 10, Inc. v. Yandex N.V.*, 962 F.Supp.2d 1146 (N.D. Cal. 2013), *amended and superseded by*, No. C 12–01521 WHA, 2013 WL 4777189 (N.D. Cal. Sept. 6, 2013) (full-size versions of copyrighted images hosted on third-party websites could not be direct copyright infringement, thus links from Internet search engines that connected to those third-party websites could not contributorily infringe creator’s copyrights, particularly given lack of evidence that operator intentionally tried to circumvent copyright liability).

87. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.Supp.2d 1290, 1292 (D. Utah 1999).

88. *Id.*

The court agreed and issued a preliminary injunction.<sup>89</sup>

In *Arista Records, Inc. v. MP3Board, Inc.*, MP3Board allegedly posted hyperlinks to thousands of pirated music files.<sup>90</sup> The court denied the plaintiff record companies' motion for summary judgment under contributory or vicarious infringement because there was insufficient evidence of direct infringement as a result of MP3Board's conduct. However, the court also denied MP3Board's motion for summary judgment for non-infringement because there was sufficient evidence for a fact-finder to conclude that MP3Board had engaged in activity that "materially contributed" to copyright infringement. The court found that MP3Board 1) used a search engine specifically for finding hyperlinks for sites with audio files, 2) encouraged others to post such hyperlinks to other sites, 3) had its employees personally search for audio files requested by users, 4) solicited users to provide files that employees were unable to find, and 5) posted passwords for users to access audio files.<sup>91</sup>

More recently, in *Pearson Education, Inc., v. Ishayev (Pearson II)*, the publishers alleged that Ishayev was secondarily liable for copyright infringement because he knowingly sold hyperlinks that allowed others to download unauthorized copies of their copyright protected solutions manuals from an infringing website.<sup>92</sup> The court said that, where such knowledge of infringing conduct is proven, "sending hyperlinks that permit others to download protected materials would plainly amount to conduct that encourages or assists in copyright infringement."<sup>93</sup> The court found that Ishayev had "reason to know" the copyright protected status of the materials, but, when considering evidence as to whether Ishayev himself was responsible for providing the hyperlinks, such evidence was conclusive against Ishayev only as to one of the eight claims at issue.<sup>94</sup>

---

89. *Id.* at 1294-96.

90. *Arista Records, Inc., et al. v. MP3Board, Inc.*, No. 00 CIV. 4660(SHS), 2002 WL 1997918, at \*1 (S.D.N.Y. Aug. 29, 2002).

91. *Arista Records*, 2002 WL 1997918 at \*3-12 (there were also issues of fact as to whether MP3Board had the actual or constructive knowledge required for contributory infringement or "the right and ability to supervise infringing activity" and "a direct financial interest" in such activity as required for vicarious infringement); *see also Live Nation Motor Sports, Inc. v. Davis*, No. CIV.A.3:06-CV-276-L, 2007 WL 79311, at \*1 (N.D. Tex. Jan. 9, 2007) (defendant was liable for copyright infringement when he provided links to Internet audio webcast link of plaintiff's racing events).

92. *Pearson Educ., Inc., et al. v. Ishayev, et al. (Pearson II)*, 9 F.Supp. 3d 328 (S.D.N.Y. 2014).

93. *Pearson II*, 9 F.Supp. 3d at 338-39.

94. *Id.* at 338-341.



Courts have similarly issued injunctions against defendants who knowingly linked to DeCSS software, which allowed users to overcome DVD protective encryption systems.<sup>95</sup> This software violated the DMCA's anti-circumvention provisions, which prohibit circumvention of a copyright owner's technological protection measures for controlling access to a copyrighted work.<sup>96</sup> For example, in *Universal City Studios, Inc. v. Reimerdes*, a New York federal district court said, "To the extent that defendants have linked to sites that automatically commence the process of downloading DeCSS upon a user being transferred by defendants' hyperlinks... [d]efendants are engaged in the functional equivalent of transferring the DeCSS code to the user themselves."<sup>97</sup> Judge Kaplan, careful to avoid a chilling effect on hyperlinking and the related freedom of speech issues, held that "there may be no injunction against, nor liability for, linking to a site containing circumvention technology... absent clear and convincing evidence that those responsible for the link (a) know at the relevant time that the offending material is on the linked-to site, (b) know that it is circumvention technology that may not lawfully be offered, and (c) create or maintain the link for the purpose of disseminating that technology."<sup>98</sup> In response to this test on appeal, however, the Second

---

95. See Pokotilow, *supra* note 85, at 45-6 ("The material on DVDs is encrypted to prevent unauthorized copying," using a system called "Content Scrambling System" ("CSS")); see, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (motion picture studios brought action enjoining defendants from posting DeCSS circumventive software and related links to such software).

96. See 17 U.S.C. § 1201 (anti-circumvention provisions; these also prohibit the creation and making available of technologies that defeat technological protections against unauthorized access to a copyrighted work); see S. REP. NO. 105-190, at 2-9, 27-8 (1998) (the DMCA was created in response to the WCT, which required signatory nations to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights... and that restrict acts... which are not authorized by the authors concerned or permitted by law").

97. *Reimerdes*, 111 F.Supp. 2d at 325 ("Substantially the same is true of defendants' hyperlinks to web pages that display nothing more than the DeCSS code or present the user only with the choice of commencing a download of DeCSS and no other content. The only distinction is that the entity extending to the user the option of downloading the program is the transferee site rather than defendants, a distinction without a difference"; "Defendants urged others to post DeCSS in an effort to disseminate DeCSS and to inform defendants that they were doing so").

98. *Reimerdes*, 111 F.Supp. 2d at 340-41 ("Anything that would impose strict liability on a web site operator [for using hyperlinks] would raise grave constitutional concerns, as web site operators would be inhibited from linking for fear of exposure to liability.").

Circuit said that it saw “no need... to determine whether a test as rigorous as Judge Kaplan’s is required to respond to First Amendment objections to the linking provision of the injunction that he issued.”<sup>99</sup> In contrast to the New York and Second Circuit courts in *Reimerdes*, a California court in *DVD Copy Control Association, Inc. v. McLaughlin* refused to enjoin the defendants from linking to sites containing DeCSS because hyperlinks “to other websites are the mainstay of the Internet and indispensable to its convenient access to the vast world of information.”<sup>100</sup>

## V. SUMMARY AND CONCLUSION

Countries and courts around the world have grappled to keep up with the continuously evolving, increasingly ubiquitous use of hyperlinks. Users today and their lawyers must consider the global nature of the Internet when they create or use hyperlinks. As a result, it has become essential to know what the U.S. and other countries and jurisdictions say about copyright law as related to hyperlinks in order to navigate the Internet and avoid liability.

When a party creates a hyperlink to legally created content, courts such as the Canadian court in *Warman v. Fournier*<sup>101</sup> and the U.S. courts in *Pearson Education, Inc. v. Ishayev*<sup>102</sup> and *Ticketmaster Corp. v. Tickets.com*<sup>103</sup> seem to generally agree that hyperlinks by themselves do not infringe on a rightsholder’s copyright, particularly when the hyperlink is a surface link or a deep link. Even when the content is framed or embedded, some courts, at least in the U.S., seem to focus on the fact that

---

99. *Corley*, 273 F.3d at 456-57 (“It suffices to reject the Appellants’ contention that an intent to cause harm is required and that linking can be enjoined only under circumstances applicable to a print medium.”).

100. *DVD Copy Control Ass’n, Inc. v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. Jan 21, 2001) (saying that an order to enjoin defendants from linking to websites with DeCSS would be “overbroad and extremely burdensome... A website owner cannot be held responsible for all of the content of the sites to which it provides links. Further, an order prohibiting linking to websites with prohibited information is not necessary since the Court has enjoined the posting of the information in the first instance”; the court still enjoined defendants from posting the DeCSS software on their websites).

101. *Warman v. Fournier*, [2012] FC 803 (Can.).

102. *Pearson Educ., Inc., et al. v. Ishayev, et al. (Pearson I)*, 963 F.Supp. 2d 239 (S.D.N.Y. 2013).

103. *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV997654HLHVBKX, 2003 WL 21406289 at \*4-6 (C.D. Cal. Mar. 7, 2003).

framing or embedding a website or file through a hyperlink does not create an infringing copy but rather displays the original website or file.<sup>104</sup>

Under the rights of “making available” and “communication to the public,” the CJEU in *Nils Svensson v. Retriever Sverige AB* said that anyone may link to freely available content when there are no access restrictions.<sup>105</sup> However, the court still left questions as to what “freely available” truly means and what “access restrictions” are sufficient to protect a content owner’s right of “communication to the public.” In the U.S., although the Copyright Act does not explicitly include “making available” rights, the Nevada federal district court in *Field v. Google Inc.* and *Righthaven LLC v. Klerks* was in line with the reasoning in *Svensson* when it said that the copyright holders in those cases had given others implied licenses to use or link to their content by making their works accessible to the world for free, without restrictions.<sup>106</sup> But like in *Svensson*, the court in *Righthaven* had little to say about what measures are sufficient to prevent the inference of an implied license or how a user might violate the ‘terms’ of such a license. The plaintiff in *Field* knew about Google’s option not to be included in its cached link repository, and he declined to use it;<sup>107</sup> but other linking websites may not offer such options to content owners. Additionally, the CJEU in *Svensson* and the Nevada federal court in *Field* and *Righthaven* put much of the burden of ascertaining whether content was really “freely available” on the party who creates the hyperlink. However, it is not always easy, practicable, or even reasonably possible for the average user to ascertain whether a target website, even a respected one, was authorized or licensed to include specific content. Putting the burden of this risk on end users could create a chilling effect in itself.

When a hyperlink leads to infringing content, the issue of liability becomes more complex, and there seems to be less consensus about how

---

104. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (the court found that Google did not commit copyright infringement when it framed the images at issue; Google did not copy the images but instead communicated HTML instructions that told a user’s browser where to find the images on a third party website); *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012) (defendant did not commit copyright infringement by embedding the videos at issue; defendant’s website did not directly host the video but rather linked to versions of the video hosted elsewhere).

105. Case C-499/12, *Nils Svensson v. Retriever Sverige AB (Svensson)*, 2014 CURIA 76.

106. *Field v. Google Inc.*, 412 F.Supp. 2d 1106, 1109, 1113-14, 1116 (D. Nev. 2006); *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 WL 3724897, at \*1 (D. Nev. Sept 17, 2010).

107. *Field*, 412 F.Supp. 2d at 1113-14, 1116.

copyright law should view such hyperlinking activity. In *Universal Music Australia v. Cooper*, where the hyperlink led to infringing copies of music, the Australian court still found that hyperlinks themselves do not constitute infringement.<sup>108</sup> On the other hand, where the hyperlink led to cached copies of copyrighted materials, both the Belgian court in *Copiepresse SCRL v. Google Inc.*<sup>109</sup> and the Ninth Circuit in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>110</sup> found liability for copyright infringement. However, the Ninth Circuit also found fair use.<sup>111</sup> Furthermore, under the secondary liability doctrines of contributory and vicarious liability in the U.S., there is potential liability on some level for those who post a hyperlink and actively encourage the infringement or have “reason to know” that what they are linking to or how they are linking to it may be unauthorized or illegal.<sup>112</sup>

The laws and policies behind hyperlinking are still developing and evolving. Although there is some evidence of agreement on certain copyright and hyperlink-related issues, many of the cases and legal principles mentioned here in this article are, of course, specific to their jurisdiction. However, due to the global nature of the Internet and the ‘online community,’ some wider legal consensus on these issues may be needed soon.

Meanwhile, in order to avoid liability, it might be wise for users and others who create hyperlinks to verify whether they are authorized to link to the target content, ascertain who created the target anchor website (i.e., whether the creator was an official company, content owner, or infringer), read a target anchor website’s terms of service and other relevant disclaimers, or obtain permission to link to the target website content. Additionally, the source anchor website operator should periodically review the hyperlink to make sure the target content or access to it has not

---

108. *Universal Music Australia Pty. Ltd. v. Cooper*, [2005] FCA 972, 150 FCR 1, *aff’d*, *Cooper v. Universal Music Australia Pty. Ltd.*, [2006] FCAFC 187.

109. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Brussels, Feb 13, 2007, No. 06/10.928/C (*Copiepresse SCRL v. Google Inc.*), (Belg.).

110. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

111. *Id.*

112. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp. 2d 896 (N.D. Cal. 2000), *aff’d in part rev’d in part, remanded*, 239 F.3d 1004 (9th Cir. 2001). Where Napster linked users to copyrighted musical works other users had posted, the court found Napster liable for contributory and vicarious copyright infringement because Napster knew about and had the ability to supervise the use of the website for illegal copying; Napster provided the software, search engine, and servers that allowed the infringing conduct; and it financially benefited from the activity.

changed or been removed.<sup>113</sup> At the same time, rightsholders and content owners might consider using some kind of access restriction to protect their content, such as a paywall or subscription requirement. They will have to decide how “freely available” they want their copyrighted content to be on the World Wide Web.

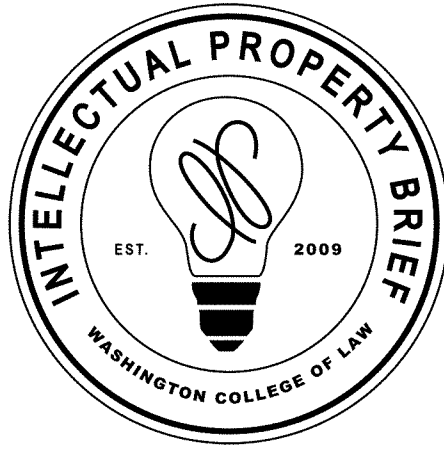
Twenty or thirty years ago, few could have imagined how hyperlinks would become such a pervasive, second-nature, and essential part of our everyday lives. New Internet or connectivity-related technologies, and thus new uses for hyperlinks, come into our lives with increasing regularity. Although the law should not to restrict hyperlinks in a way that hampers such innovation, businesses and consumers will require more and more legal guidance in order to know how to effectively and thoroughly promote and protect their interests online. Therefore, hyperlinks are guaranteed to be at the forefront of copyright controversies for a long time to come.

---

113. See Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1328-36 (2001) (surveying various defenses and strategies for avoiding link liability).

\*\*\*

# AMERICAN UNIVERSITY INTELLECTUAL PROPERTY BRIEF



## ARTICLES

LOST IN SPACE:

A COPYRIGHT DILEMMA

*Sedef Ayalp*

MEDIATION AT THE

COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

*Gidget Benitez*

## CREATIVE COMMONS LICENSE

The Intellectual Property Brief is licensed under a Creative Commons Attribution License 3.0 (CC BY 3.0). You are free to copy, distribute, transmit, adapt, or to make commercial use of the work without seeking permission. However, you must include the author's name and "Originally Published in the American University Intellectual Property Brief" where applicable.

<http://creativecommons.org/licenses/by/3.0/>.



# AMERICAN UNIVERSITY INTELLECTUAL PROPERTY BRIEF

4300 Nebraska Ave NW • Washington, D.C. 20016  
E-mail: [ipbrief@wcl.american.edu](mailto:ipbrief@wcl.american.edu)  
[www.ipbrief.net](http://www.ipbrief.net)

---

VOLUME 7

MAY 2016

ISSUE 2

---

CRYSTAL EVANS  
*Senior Managing Editor*

JACQUELINE MORLEY  
*Senior Copyright Editor*

CAROLYN MAHONEY  
*Marketing, Outreach, &  
Events Chair*

*Blog Editors*

ATHENA FAN  
UGOOMA DANIEL  
NICHOLAS DOYLE  
NICHOLAS GORDON  
CHELSEA RECKELL

GIDGET G. BENITEZ  
*Editor-in-Chief*

VICTORIA GÓMEZ-MORGAN  
*Associate Articles Editor*

KIMBERLY ARRIOLA  
*Senior Trademark Editor*

ALEXANDRA FOSTER  
*Symposium Chair*

*Publication Assistants*

JANET LEE  
EMILY GILSON  
FADIA GALINDO  
ETHAN STEINFELS  
RACHAEL STELLY  
DANIEL KIM  
ANNIE ANDERSON  
SURESH MEMULA  
CHARLES LEE  
MEGAN DEFRANCESCO

PAUL HARPER  
*Senior Articles Editor*

SEDEF AYALP  
*Senior Patent Editor*

DANIEL KIM  
*Short Circuit Editor*

*Federal Circuit Bloggers*

MEL FRANCIS QUINTOS  
NEEMA RAFIKIAN  
KALPESH UPADHYE

*Junior & Senior Bloggers*

KATELEN WALSH CALLY RICHTER  
JOANNA SCLEIDOROVICH H JACQUELINE BREMER  
ROBERT ROSADO ROBERT HERGUNER  
TAORAN SUN SHAKIR HUSSAINI  
DAVID WEISSMAN RILEY FOLEY  
ELIZABETH NWABUEZE NATALIE CUADROS  
EMILY CHAU JOHN FRANCE