

# Hyperlinks and Copyright Infringement

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## Introduction

A hyperlink usually links one document (an anchor) on the Internet to another document (the target). Usually referred to as a links, hyperlinks may be one directional, bi-directional or may be used in more complex patterns.

There are several types of hyperlinks, with the common ones being:

1. Surface links which link to the homepage of another website;
2. Deep links which link to a specific page or paragraph inside a website;
3. External links which link to a document which is not the document on which the link is located;
4. Internal links which link to a location within the same document (such as to the top of an HTML page) or another document within the same website;
5. Inline links which, as Wikipedia puts it, “display remote content without the need for embedding the content. The remote content may be accessed with or without the user selecting the link. A inline link may display a modified version of the content; for instance, instead of an image, a thumbnail, low resolution preview, cropped section, or magnified section. The full content will then usually be available on demand, as is the case with print publishing software – e.g. with an external link. This allows for smaller file sizes and quicker response to changes when the full linked content is not needed, as is the case when rearranging a page layout”;
6. Hot areas in which each “hot area” links to a different target. For example, a political map of the world may link to documents with information about each country such that when a particular country is selected, possibly by the click of a mouse, the document with information about the country selected is displayed;
7. Random access links which link to documents depending on options chosen by the user. So, if a particular country was chosen from a list, the link might lead to the display of a list of the states of the selected country. Such links are, however, not always dependent on user interaction and may depend on a random, calculated process;
8. Hardware-accessed links which are activated directly via input devices such as keyboards, remote controls and microphones without the graphical user interface;
9. Inbound links are links which are directed into a particular website while outbound links are links which are directed away from a particular website.
10. Object hyperlinks which link real world objects such as our wireless mobile device to the Internet;
11. Broken, dead or dangling links which link to targets which are nonexistent or permanently unavailable.

The effect of following a hyperlink varies on the link in question and the system used. A hyperlink may result in:

1. the target document replacing the anchor document in the same window/tab;
2. the target document replacing the anchor document in a different window/tab;

3. the target object embedded in or otherwise the displayed in the anchor document;
4. part of one document being included into another document by reference (transclusion);
5. copyrighted material to be framed without the consent of the owner of the copyrighted material (through framing which enables a screen to be split into several smaller windows or frames which function independently and allow different documents on the same screen);
6. hypertext being followed by an automatic software programme which traverses links and gathers the retrieved pages (crawling, inter alia, used by search engines and content aggregators).

## **Legal Issues**

There have been several legal issues which have arisen in relation to hyperlinking. These issues are primarily in relation to copyright law. Although, from a practical point of view, it would probably not make sense to attempt to sue anyone for hyperlinking to one's website, technically, hyperlinking could, in some jurisdictions, be considered to be copyright infringement especially if the target is copyrighted material which the person creating the link does not own since, in creating the link, he is effectively making available copyrighted content which he does not own.

In addition to this, if the target document which is linked to contains material which is itself infringing material, such hyperlinking could give rise to legal liability.

There seems to be little global consensus on the issue though, and different types of links are treated differently. The primary justification which is used to argue that hyperlinking is legal is the doctrine of fair use. In addition to this, it is also sometimes argued that a person who makes available material online grants an implied license to two others to link to the material he has made available. This implied license is, however, considered to be very closely related to contract law and the doctrine of estoppel which is not always entirely in consonance with theories of copyright.

## **Embedded Links and Framing**

Embedded or IMG links pose a particular problem since a copy of the target document is not made or required for the target document to be displayed. So, in the case of such links, while the right to reproduction is clearly not violated, the right of communication to the public is violated by the person who creates the link. Embedded links do not automatically mention the source of the anchor document and, therefore, unless the source of the document is explicitly stated, the right moral rights of an author to attribution could also be violated by the creator of the link.

It is extremely difficult to justify the use of embedded or IMG links on the basis of either an implied license since the assumption that an implied license exists would effectively negate the copyright of the owner of the target document. For the same reasons, the doctrine of fair use also has to be fairly liberally interpreted to justify such links unless the material displayed on the anchor document is a modification of the target (such as a thumbnail of an image) which merely directs a user to the target document.

As far as Internet service providers are concerned, assuming they meet the criteria specified to avail of safe harbors provided for in the law, they would be exempt from liability. And from the point of view of the end-user, he would not be violating the public display right as the copyright owner would have already made the target document available for public display. The end-user would merely be making

a RAM copy of the target document to view it as he would have to do in the case of any other non-embedded target document. Therefore, the involvement of the end-user would be similar regardless of whether or not the link was embedded, and the prevalent position is that an end-user would generally not have infringed copyright merely by viewing or accessing a target document (assuming that the target document is not itself infringing material).

Similar issues arise with respect to framing.

In the US, the Visual Artists Rights Act specifically excludes from the scope its protection “electronic publication or similar publication”. Protection is accorded only to tangible goods with a limited number of physical copies.

It is unclear whether or not framing is legal under US law. One problem is that an implied license for the purpose of framing may simply not exist especially if the target document had been posted online before the technology for framing had been developed. In one case, *Futuredontics Inc. v. Applied Anagramic Inc.*, 1997 46 USPQ 2d 2005 (C.D. Calif. 1997), a dental website, Applied Anagramic, Inc. framed content from the website of a competitor. It was held that the links altered the appearance of documents from the target site, and that such alteration (which in the case included the insertion of the anchor’s trade marks and logos) would be infringement if it were made without authorisation.

In the same year, 1997, a group of newspapers and media companies led by the Washington Post sued Total News and others on the grounds of copyright and trademark violations for framing target documents from their sites. The matter was settled out of court.

One of the issues which is relevant to framing is whether a derivative work has been created through the process of framing. There are a number of cases which have dealt with derivative works. Among them are *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, and *Lee v. A.R.T. Co.*, two US cases with similar facts but different outcomes. In the latter the defendant was not held liable for buying notecards and mounting them on ceramic tiles but in the former the defendant was liable when the recent pictures he had previously bought after mounting them on tiles.

In *Lewis Galoob Toys, Inc. v. Nintendo, Inc.* [449 U.S. 340, 347 (1991)] it was held that the visual displays produced by a device which altered the appearance of Nintendo games on screen did not constitute derivative works. A similar conclusion was reached in *Micro Star v. Formgen Inc.*

A preliminary injunction was denied in a case involving framing, *Futurodontics, Inc. v. Applied Anagramics, Inc.*, since the plaintiff failed to offer sufficient evidence that a derivative work had been created by framing.

On the other side of the pool, framing has, at times, been considered to be a violation of the transformation right. In Germany, the Hanseatic Oberlandesgericht of Hamburg stated that the practice was illegal in the Roche Lexicon case although it did not consider the derivative work argument. Instead, it held that reproduction requires the consent of the copyright owner and it explicitly rejected the argument of an implicit license having been granted. In another German case, the OLG Celle also held that framing is illegal (in the Weyhe-online case) basing its conclusion on unfair competition regulations.

In the Dutch case of *KPN v. Xbase Software Ontwikkeling BV*, it was held that a frame provider could be subject to criminal and civil penalties even if he did not create a derivative work himself since he could be held guilty of contributory infringement.

## “Normal” Links

In the US, the Ticketmaster Corp. v. Tickets.com established (on the basis of Section 106, Title 17 of the USC) that hypertext linking does not itself involve a violation of the Copyright Act since no copying is involved. Comparing hyperlinking to library index cards which refer persons to particular items, the court observed that persons are directed to genuine and original targets without any deception. Such hyperlinking does not involve the reproduction, distribution or copying of target documents or the making of derivative works.

However, in Cooper v. Universal Music Australia Pty. Ltd. [2006] FCAFC 187, a full bench of the Australian Federal Court held that Stephen Cooper, the operator of the website <mp3s4free.net> as well as the ISP which hosted the website were guilty of authorizing copyright infringement since they made available a search engine using which users could illegally download unlicensed MP3 files.

In an earlier case, surprisingly based on trademark dilution and not copyright infringement, Ticketmaster had also objected to Microsoft deep linking to its website saying that caused it to lose advertising revenue. The case was settled out of court. [CV 97-3055 RAP (1997)]

Thus, the Australian and US positions could be considered to be contrary at first glance although one vital difference is that in the Australian case, links were provided to illegal music whereas in the US case, Tickets.com which sold sports, entertainment and travel tickets provided links to web pages on Ticketmaster Corp.’s site for tickets which were not available at its own site. Even in the US, knowingly linking to infringing material has been held to be unlawful. In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* [75 F. Supp. 2d 1290 (D. Utah 1999)], a website which directed its users to infringing copies of a church’s protected handbook, after having been required to take down unauthorised copies of that same handbook from its own website was held guilty of contributory copyright infringement.

There doesn’t seem to be a global consensus on the issue. In the Netherlands, for example, Karin Spaink was convicted of copyright infringement for linking [Church of Scientology v XS4ALL (Unreported, July 9, 1999) (NL)] although this ruling was overturned in 2003.

And in a July 2002 Dutch case, deep linking by Newsbooster, an online news update service, was held to have violated rights under Denmark’s implementation of the EU Database Directive as well as Section 71 of the Danish Copyright Act. [[Pressenhus.dk v Newsbooster.com. Unofficial translation of the case from Transcript of Bailiff’s Court Records](#)] The Database Directive established a Database Right distinct from copyright which enables the creators of databases to prevent “the repeated and systematic extraction or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with normal use of the database or which unreasonably prejudice the legitimate interests of the maker of the database”. And Section 71 of the Danish Copyright Act prohibits “repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database”. It was this Section which caused the Court to find that the use of “bots” to scour the websites of the newspapers was illegal.

However, in Holland, the Court of First Instance of Rotterdam held that deep linking was legal under the Copyright Act of 1912 or violate the Database Act in PCM v kranten.com [Case/Docket number: 138609/KG ZA 00-846, the District Court in Rotterdam (August 22, 2000)]. In this case, kranten.com, an internet service provider and news headline site, aggregated updated headlines of various newspapers and deeplinked to the relevant articles. But on facts virtually identical to those in the Newsbooster case, the appellate court in Munich concluded that deep linking by NewsClub.de violated

the plaintiff's database rights under s.87b of the German copyright law.

However, in [\(a\) SV online GmbH v Net-clipping](#) and [\(b\) Handelsblatt v Paperboy](#) arguments about violations of the database right, copyright or unfair competition have been rejected and deeplinking has been held to be legal.

In 1999, Rico Calleja stated that in the UK, the Shetland Times “stands as the sole but uncertain authority for the proposition that a link to a website prima facie infringes copyright on the basis that websites fall within the definition of a cable programme service under the Copyright, Designs and Patents Act 1988. The inclusion of headlines from someone else's website as hypertext links was held, albeit at an interlocutory stage, to constitute an infringement of the copyright in a cable programme service.” [ENTLREV 1999, 10(7), N94-95]

## **Conclusion**

Thus, whether or not linking is technically legal seems to be a question which is not only unresolved but debatable.

## **References**

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