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### Linking to Infringement: A Comparative and Cross-Border Analysis

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Links to other websites are the mainstay of the Internet and indispensable to its convenient access to the vast world of information. A website owner cannot be held responsible for all of the content of the sites to which it provides links.[1]

To the extent that defendants have linked to sites that automatically commence the process of downloading [content] upon a user being transferred by defendants' hyperlinks, ... [d]efendants are engaged in the functional equivalent of transferring the [content] to the user themselves.[2]

In recent years, at least three courts in the United Kingdom and the United States have enjoined parties from posting hyperlinks[3] to content that infringes copyright[4] or violates the anti-circumvention provisions of the Digital Millennium Copyright Act.[5] In the first case, a judge in England enjoined a website from linking to a county report that described alarming wrongdoing by county child welfare officials.[6]

Two years later, a United States court forbade a site from directing users to other sites that had posted a secret Mormon Church document.[7] Last summer, a judge in New York enjoined a site from linking to code that broke the encryption protecting DVD movies.[8] In all three cases, the enjoined party had previously posted the offending material on its site; in two of the cases, the party had responded to the threat of litigation by removing the material and replacing it with a link or URL.[9] Each of these decisions caused uproar in legal, academic, and Internet communities.[10]

From a legal perspective, critics argued that because links are merely footnotes or citations, those who create them do not infringe or "authorize" infringement by others, as required by US and UK law.[11]. From a practical perspective, they claimed that if parties could be liable for linking to infringement, the risk of liability would deter legitimate linking and inhibit development of the World Wide Web.[12]

From a speech perspective, opponents decried these particular complainants' attempts to use copyright law to prevent public access to *information* that they would prefer to keep secret.[13]

In each case, the aftermath of the injunction brought about another set of critiques, this time based on the futility of copyright enforcement in cyberspace. Following each injunction, unrelated parties posted the materials on mirror sites around the world, and still others added hyperlinks leading to those mirror sites. In light of those postings, some claimed that the law practicably could not prevent, and therefore should not attempt to prevent, dissemination of content through the Web. [14][10] The

argument had both technological and geographical dimensions. Technologically, parties contended that the decentralized nature of the Web makes it impracticable for copyright holders to locate and take legal action against every party that posts infringing content on the Web, and even more infeasible to shut down all linkers. [15] This impracticability is only compounded by the geographical dimensions of the problem, which suggests that an injunction against one party would simply encourage posting of the content by parties in jurisdictions less likely to halt the conduct. [16]

Each of these concerns is compelling and deserves attention. Yet it is not clear that they all point to the elimination of secondary liability for linking. Indeed, at least one of the concerns - purported "futility" - may suggest the contrary: that in certain limited instances, indirect liability for linking may be the only practicable way to inhibit - even if it does not eliminate - infringement on the Web. [17]

At the same time, these three cases - and the reaction to them - make clear the necessity of limiting linking liability to a narrow category of cases involving clear-cut attempts to induce or enable infringement and obvious threats to copyright incentives. Given the crucial, essentially informative role that links play in the architecture of the Web, courts must tread carefully in proscribing them to avoid chilling legitimate speech.

The cases also illustrate another point of more practical dimensions: that while legal institutions may succeed, however imperfectly, in stemming market-displacing reproductions on the Web, they can never accomplish perfect control over the dissemination of copyrighted works. As a result, the law is most likely to help those who seek to protect and exploit a reasonable market for their expression; it will almost certainly fail those who seek to use copyright wholly to suppress information or ideas. [18] This suggests, as a practical matter, that copyright should continue to do what it does best: to tolerate leakage in the system and to look for a fix only when the leakage threatens to become a flood of infringement. [19]

9[2]

This paper examines the case for liability for linking to infringing content under US and UK law. Section I begins by considering the doctrinal basis for such liability. Concluding that both US and UK law may support claims against linkers, in Section II, I review the recent cases that have imposed such liability. These cases are noteworthy for three reasons: first, that each involved a linker that was consciously helping others to infringe, second, that the plaintiff in each case sought to prevent "leaks" of the offending content, rather than to protect the general integrity of the market for its expression, and third, that the injunction in each case had the perverse effect of proliferating the offending content elsewhere on the Web. With this in mind, in Section III, I ask whether copyright claims against linkers make sense practically and in relation to the normative objectives of Anglo-American copyright law. I conclude that, in certain limited circumstances, liability may be appropriate, although in most cases, the balance of interests counsels against liability for linking. Section IV, in conclusion, proposes a framework for addressing the liability of linkers.

## **I. Introduction to the Technology and Legal Standards**

Others have explored the technology of hyperlinks and their many variations. [20] For present purposes, two facts are critical: first, that links allow users virtually immediate access to linked-to content; and second, that they do so without making a "copy" of that content on the linking party's [21] server. [22]

Linking parties therefore do not directly infringe any of the rights reserved to the copyright owner under US [23] or UK [24] law.

Their failure to qualify as direct infringers does not, however, mean that linkers are necessarily immune from liability in either country. Both US and UK law allow claims against parties who aid in others' infringement. In the US, the doctrine of "contributory infringement" contemplates liability against one who, "with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct" of another party. [25] UK law allows a claim against a party who "authorizes" another's infringement [26] or who "procure[s] an infringement by inducement, incitement or persuasion." [27] And while each of these theories requires an act of direct infringement to take place, [28] current law in both countries suggests that a user, by downloading infringing materials into the random access memory of her computer, violates the law each time she views a website's infringing content. [29]

The liability of those who link to infringement, then, will turn on how broadly courts interpret the standards for indirect liability - on whether courts view linkers as knowingly "induc[ing], caus[ing], or materially contribut[ing] to" a user's access to infringing material under US law, or "authoriz[ing]" or "procur[ing]" such access in the UK. Although the UK standards have generally been interpreted more strictly than those in the US, [30] the law of both countries is arguably broad enough to encompass at least some parties who link to infringement. A party who, for example, has actual knowledge of infringing content at a linked-to site, [31] describes that content on its Web site, provides a link leading directly to the content, [32] and has no plausible claim that those who follow her link are engaged in a protected use, [33] may well satisfy the standards of US and UK law.

## II. The Cases

Relying upon the above law, the courts in *Nottinghamshire County Council* and *Utah Lighthouse* enjoined links to sites that infringed copyright. [34]

In *Reimerdes*, which involved the Digital Millennium Copyright Act, [35] a US court held that a linker had "offered, provided, or otherwise trafficked in" content at linked-to sites. [36] These cases are noteworthy as much for their context and the reaction that they provoked as for the legal rules that they suggest.

### A. The Nottinghamshire Report

In the late 1980s, Nottinghamshire County, England, was stunned by the revelation of a satanic child abuse ring in its midst. [37] Child welfare authorities had removed a group of children from their homes on suspicion of abuse. During the ensuing investigation, the children described horrific stories of sacrifice, murder, and sexual abuse by their elders. Despite skepticism among police investigators, the child welfare authorities insisted that the children spoke the truth. A bitter rift arose between the police and the welfare authorities, and the County Council appointed an independent panel to investigate. [38]

In 1980, the panel issued its report: a scathing account of the welfare workers' use of suggestion to plant many of these fantastic stories in the children's minds. [39] The report went to the County Council and was apparently leaked to some members of the press, but was unavailable to the general public. [40]

It remained lurking in the county records until 1997, when three journalists decided to post it on the Web as a lesson on the dangers of psychological suggestion in investigations involving children. [41]

Nottinghamshire County responded almost immediately with a copyright suit to prevent the Web site from posting or linking to the report. [42] Without written opinion, the court granted the injunction in its entirety, [43] but to little avail. Before the defendants complied, a batch of mirror sites had sprouted, posting the

report on servers around the world. The County sent threatening letters to site operators in Australia, Germany, Canada, and the United States, [44] but while Canadian and German sites removed their postings, the others refused. Professor Peter Junger, a United States law professor, made public the reasons for his refusal: [45] that UK copyright law does not govern a Web posting on a server in the US, [46] that the UK court had no jurisdiction over him or over the server on which he had posted the report; [47] and that United States principles of fair use [48] would protect him against an injunction in that country. [49]

He also ridiculed the notion that the county could use copyright law to suppress publication of the report, pointing out that the strategy had backfired miserably. [50]

Because the judge offered no written explanation for his injunction against hyperlinks, the Nottinghamshire case offers little insight into the scope and limitations of UK copyright law as applied to linkers. Its outcome, however, suggests several interesting observations about Internet copyright law in general, and linking liability more specifically. As a general matter, the case highlights important, as-yet unresolved issues about what Jane Ginsburg has called "extraterritoriality and multiterritoriality" [51] in international copyright law. For example, although Professor Junger expressed confidence that UK law would not reach his behavior, recent caselaw and legal scholarship suggest that his immunity is not so clear. [52]

Professor Ginsburg, for example, suggests that website operators "initiate infringing contact with [a] forum" [53] each time they post material that a user in the forum can access and thereby infringe. And a recent UK decision held that a non-UK party could be liable for defamation in the UK as long as the defamatory content was distributed in the UK and the plaintiff had a reputation in the UK that could suffer from the distribution. [54] Together, these authorities suggest that UK law could, conceivably, stretch to cover the posting of material on non-UK websites, when viewing the content in the UK would constitute infringement.

Beyond these general questions, the case offers insights into some of the justifications and challenges of applying copyright law against linkers. The court apparently recognized, not unreasonably, that an injunction against posting infringing content would have little impact if the defendant could merely remove the content and replace it with a direct link to the same material on another party's site. For a party that has been adjudged an infringer, an injunction against linking arguably does no more than ensure the plaintiff effective relief. Imposing liability in such cases, moreover, is unlikely to chill legitimate linking on the Web, because the vast majority of links do not lead to content that was previously available on the defendant's own site and removed pursuant to court order.

More difficult questions would arise if the county had sued a linker that had not first posted the infringing content. While the legal requisites for authorizing or inducing UK infringements may well exist, such a linker could argue that her link had both infringing (in the UK) and non-infringing (in the US, where fair use may apply) applications, making a claim of indirect infringement inappropriate. [55]

Finally, the case raises concerns about the efficacy of enjoining links, particularly if the plaintiff's goal is to inhibit access to non-public information. With the report widely available on the Web, it bears asking whether the injunction against the British journalists would have any practical effect. Particularly when a Web posting is legal in the country of origin, [56] it may be virtually impossible to use copyright law to control access to the content in countries where such access constitutes infringement.

## **B. *Utah Lighthouse Ministry* [57]**

In July 1999, Jerald and Sandra Tanner, two longstanding critics of the Mormon Church, posted on their website seventeen pages of the Church's Handbook of Instructions.[58] The Tanners, who themselves had quit the Church in the 1960s, had posted sections of the Handbook governing discipline and name removal to help members who wanted their names deleted from the Church's membership rolls. [59]

Three months after the Tanners' posting, the Church's copyright enforcement arm [60] filed an infringement suit against them.[61]

The Tanners voluntarily removed the pages,[62] but subsequently posted an email from a reader announcing: "Church Handbook of Instructions is back on-line!" [63]and providing the Uniform Resource Locator (URL) addresses for three websites that allegedly contained copies of the Handbook.[64] The Church again moved for an injunction, this time claiming that by providing the URLs the Tanners were committing contributory infringement.

The court held the Tanners liable as contributory infringers for helping users to reach the infringing linked-to sites.[65] Because users who viewed the Handbook online were direct infringers, [66]and because the Tanners had guided those users to the infringing content,[67] the court held that the Tanners had knowingly facilitated or encouraged the direct infringing acts. It ordered the Tanners to "remove from and not post on [their] website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiff's copyright." [68]

Critics immediately assailed the court's ruling. [69]Copyright experts argued that the court never should have reached the contributory infringement claim, because any users who used the URLs to reach the Handbook were engaged in a protected fair use.[70]Others viewed the ruling on linking as a threat to the very foundation of the Web.[71]If merely providing citations can subject one to liability, they argued, anyone who links faces the risk of an infringement suit.[72]

While the first critics almost certainly had it right - the court should have considered whether fair use protected those who viewed the materials online - those who predicted the demise of all linking may have exaggerated the import of the opinion. Several factors made the *Utah Lighthouse* defendants - like those in the Nottinghamshire case - different from the run-of-the-mill linker. Most significantly, the defendants themselves had already been adjudged infringers and were enjoined from posting the very same materials that they were now helping users to reach. Their actions, moreover, went beyond merely providing URLs: they offered specific instructions for downloading the Handbook from the identified sites. In other words, if one accepts that downloading the Church materials constitutes infringement - an unpalatable assumption, but necessary to distinguish between the court's rulings on linking and on fair use - it is hard to argue that the Tanners' behavior added value in some way that was not directed toward advancing that infringement.

### ***C. Reimerdes***

In 1998, the United States Congress passed the Digital Millennium Copyright Act, [73] which, among other things,[74] created a new cause of action against the distribution of devices that circumvent technology that controls access to copyrighted works.[75] In *Universal City Studios v. Reimerdes*,[76] Judge Lewis Kaplan held that those who *link* to circumvention devices can, in certain circumstances, be found to have "distributed" the devices in violation of the DMCA. Although a full analysis of Judge Kaplan's DMCA interpretation is beyond the scope of this paper, his discussion of linking merits attention.

*Reimerdes* involved a dispute over technology known as "DeCSS," which was designed to circumvent CSS, an encryption device that protected access to, and copying of, movies stored on Digital Video Disks.[77] The defendant in *Reimerdes* initially posted the DeCSS on his website; when a lawsuit was filed, he removed the DeCSS code and posted links to "mirror sites" where users

could access the code.[78] The plaintiffs, members of the motion picture industry, sought an injunction against both the postings and the links.[79]

The court first found DeCSS the type of circumvention technology whose "offer[ing] to the public" or "provid[ing] or otherwise traffic[king]" was prohibited by the DMCA.[80] By posting DeCSS on its website, defendants had violated the statute.[81]

The court acknowledged, however, that *links* to the offending code presented somewhat different issues.[82] In particular, not all of the *Reimerdes* links involved direct links to DeCSS. While some links led to an automatic download of the code, others led to a destination page that contained other expressive content, and some required multiple additional "clicks" before the user reached the DeCSS code. The court recognized the troubling implications of holding a linker responsible for all of the content at a site to which she links.[83] Despite these misgivings, however, the court had no difficulty in finding violations by the *Reimerdes* defendants because of their specific intent to disseminate DeCSS:

Defendants urged others to post DeCSS in an effort to disseminate DeCSS and to inform defendants that they were doing so. Defendants then linked their site to those "mirror" sites, after first checking to ensure that the mirror sites in fact were posting DeCSS or something that looked like it, and proclaimed on their own site that DeCSS could be had by clicking on the hyperlinks on defendants' site. By doing so, they offered, provided or otherwise trafficked in DeCSS, and they continue to do so to this day. [84]

The court adopted a three-pronged test for DMCA liability for linking, requiring: (1) knowledge of the offending material on the linked-to site, (2) knowledge of the unlawfulness of the circumvention technology, and (3) creation or maintenance of the link for the purpose of disseminating the technology. [85]

Because it involved the DMCA, *Reimerdes* does not necessarily have direct implications for those who link to materials that infringe copyright (as distinguished from sites offering circumvention devices). [86]

Nonetheless, the court's analysis again offers worthwhile insights. First, Judge Kaplan adopted explicitly the reasoning that almost certainly influenced the *Utah Lighthouse* and *Nottinghamshire* courts: that defendants should not be able to circumvent an order against their *posting* of unlawful materials by removing the posting and offering a link. Second, the court acknowledged the speech concerns raised by links that lead to both infringing and non-infringing content. And third, like the Nottingham case, *Reimerdes* illustrates the limits of the law in *suppressing* information, as opposed to protecting a reasonable market value of expression. In *Reimerdes*, as in the Nottingham case, the injunction only multiplied the number of mirror sites, and links to those mirror sites, elsewhere on the Web.

### III. Links and the Normative Objectives of Copyright

The above analysis makes clear that links to infringement *can* fit into existing standards for indirect liability under US and UK law. It is not at all clear, however, that links to infringement *must* lead to liability, or, perhaps more significantly, that such liability comports with the philosophy underlying the Anglo-American copyright system. Because liability for links involves at least a new application (and arguably an expansion) of existing law, it is worth asking whether such liability would promote, or instead impair, those core values.[87] It is also worth contemplating the role, if any, that purported "futility" should play in framing the legal rules. Copyright, in the Anglo-American tradition, exists to induce creative expression for the ultimate benefit of the public.[88]

As such, copyright requires a careful balance between inducement - promising rights to provide an

incentive to create - and restraint - containing those rights to ensure that the public has access to the ensuing content. This public-oriented aspiration has important implications for the scope and limitations of copyright protection. Both UK and US law, for example, allow certain types of copying that will benefit the public while interfering little with copyright incentives.[89] Both countries provide for a limited copyright term,[90] after which works become the property of the public. Courts in both countries have carefully circumscribed the rules of liability against sellers of equipment that may be used to infringe.[91]

The copyright scheme of each country therefore deliberately contemplates some "leakage" [92] to the public of the expression induced by the grant. Such a system works fairly well as an economic framework that seeks to preserve financial incentives for expression creators. Incentives, after all, do not require airtight protection; they only require enough protection to ensure recovery of the costs to create.[93] Despite some leakage, moreover, the copyright laws have risen to the challenge of the digital era; indeed, some have argued that the digital age has seen an unwarranted expansion of content industries' rights.[94]

A system with leaks will inevitably work less well for those who seek to use it wholly to suppress their expression - particularly when others seek the expression for the unprotected facts and information that lie inside.[95] For one thing, the nature of the Internet makes it difficult entirely to prohibit the dissemination of content, especially content in the form of words. More fundamentally, as the above cases show, the collective moral rectitude of netizens seems to explode when a party attempts to use copyright on the Web to prevent access to *information*. One could view this as a validation of predictions that the Internet would grow to a new legal space with entirely different rules.[96] Alternatively, it could represent a collective endorsement of some baseline level of "fair use" in cyberspace.[97]

Either way, this reality suggests that injunctions against behavior that the public views as legitimate are likely to have little practical effect in the cyberspace arena.

That reality, together with the normative objectives of our copyright systems - the inducement-restraint balance, the deliberate leakage, and the ultimate goal of enriching the public - should inform decisions of whether to condemn links to infringement. More specifically, courts must evaluate whether enjoining a *link* - as distinguished from the infringing content at the linked-to site - is necessary to preserve copyright incentives; if not, there is little justification for liability.[98]

Even if a link might injure incentives, moreover, liability is inappropriate if enjoining the link - and thereby discouraging others like it - would cause even greater harm to the public.[99]

In the linking context, the potential harm from injunctions is substantial: an overly broad rule of liability could well deter legitimate linking[100] and partially dismantle the fundamental interconnectedness of the Web.[101]

At the same time, courts should be mindful of the possible negative effects of a rule exempting all links to infringement. In particular, exemption of all linking could create incentives for parties to find ways to achieve via links the practical (albeit not technological)[102] equivalent of posting infringing materials themselves.[103]

In certain circumstances, moreover, links - and particularly compilations of links - may have a substantial negative effect on copyright incentives beyond the effect caused by initial postings on various far-flung Web sites.[104]

Courts considering legal claims against linkers, therefore, should ask two primary questions: first, has the plaintiff identified a distinct harm from the link that is not better (or equally well) addressed through an action against the party that posted the content? Second, what kind of incentives would

judicial action (or inaction) promote? If the plaintiff identifies a harm that is uniquely redressable through a enjoining the link, and if an injunction would do little to chill non-infringing speech, the goals of copyright suggest that liability is appropriate.

#### IV. Conclusion

The general objectives laid out above suggest a basic framework for evaluating the liability of linkers. Courts should begin with a presumption against liability for linking.<sup>[105]</sup>

To overcome the presumption, the copyright holder must establish a distinct harm resulting from the link that cannot readily be redressed by a suit against the party that posted the allegedly infringing content. Such harm could result, for example, if the posting site is located in a "copyright haven," if the linking site holds itself out as a source for infringing content and links to an ever-changing panoply of infringing sites, or if the plaintiff can establish some relationship between the linking party and the direct infringer that suggests a scheme to elude copyright law.

If the plaintiff rebuts the initial presumption, liability is appropriate unless the defendant can establish that an injunction, under the circumstances, would deter legitimate linking. Here, courts should take into account possible privileges, including fair use. If the linking party establishes a plausible claim either that the posting site acted fairly in publishing the material, or that the context of the link suggests that users will follow it to engage in a fair use, a court should not enjoin the link.<sup>[106]</sup>

Finally, what role futility? As suggested above, futility of a sort - the inability to pursue a linked-to site for posting infringing content - should sometimes argue in favor of liability against linkers. The more general futility of preventing Web-based dissemination of content may play a more ambiguous role. In some cases, the public's appetite for particular expression - together with its confidence in the legitimacy of its access to such expression - may well make it impossible to limit diffusion of that content. In most cases, however, the tools set forth above, together with existing standards for infringement, should achieve the fundamental goals of copyright: to protect the integrity of copyright markets, in order to preserve the incentive to create.

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[1] DVD Copy Control Ass'n, Inc. v. McLaughlin, 2000 WL 48512, at \*4 (Cal. Super. Ct., Jan. 21, 2000).

[2] Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000); *see also* Scientology v. Dataweb B.V., No. 96-1048 (Dist. Ct., Hague, June 9, 1999) ("by having a link on their computer systems which when activated brings about a reproduction of the works that [the plaintiff] has the copyright to on the screen of the user, without the consent of the plaintiffs, the Service Providers are acting unlawfully if and insofar that they have been notified of this").

[3] A hyperlink is a signal (such as highlighted text) that, when selected by a user, allows the user to access content from a different location within the same document or elsewhere on the web. *See infra* notes [- and accompanying text.

[4] Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290 (D. Utah 1999); Nottinghamshire County Council v. Gwatkin, High Court of Justice, Chancery Div. (June 3, 1997), available at <http://www.users.globalnet.co.uk/~dlheb/legal1.htm> Reimerdes, 111 F. Supp. 2d 294. The defendants in *Utah Lighthouse* had posted Uniform Resource Locator (URL) addresses, rather than hyperlinks, but because every hyperlink includes a URL, the court's injunction against the posting of URLs would also prevent the defendants from linking.

[5] *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d at 325; *see* 17 U.S.C. § 512 (2000).

[6] *Nottinghamshire v. Gwatkin* (available at <http://www.users.globalnet.co.uk/~dlheb/legal1.htm>)

[7] *Intellectual Reserve v. Utah Lighthouse*, 75 F. Supp. 2d 1290.

[8] *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294.

[9] *See Utah Lighthouse*, 75 F. Supp. 2d at 1292; *Reimerdes*, 111 F. Supp. 2d at 325.

[10] Carl S. Kaplan, *Copyright Decision Threatens Freedom to Link*, N.Y. TIMES, Dec. 10, 1999, <http://www.nytimes.com/library/tech/99/12/cyber/cyberlaw/10law.html> (last visited Jan. 20, 2001) (discussing *Utah Lighthouse* decision); Janet Kornblum, *Britain Pursues Banned Report*, CNET NEWS.COM, June 13, 1997, <http://news.cnet.com/news/0-1005-200-319556.html> (last visited Mar. 27, 2001) (discussing *Nottinghamshire* case).

[11] *See* 17 U.S.C. § 106; Copyright Design & Patent Act 1988 §§ 16(1)(a), 17; *see* Brief of Amici Curiae American Civil Liberties Union et al., in Support of Appellants and Reversal of Decision Below, *Universal City Studios, Inc. v. Corley*, No. 00-9185, at 25 (2d Cir. filed Jan. 26, 2001), <http://www.aclu.org/court/corley.pdf> ("Mere links between sites do not establish a relationship sufficient for imposing either vicarious or contributory liability when a link references a site with circumvention technology."); *see also* Brief of Amici Curiae Journalists and Trade Associations in Support of Appellants, *Universal City Studios, Inc. v. Corley*, No. 00-9185, at 25 (2d Cir. filed Jan. 25, 2001), <http://www.politechbot.com/docs/linking-amicus.012601.html> ("The online journalist is at least one step removed; she does not 'republish' the allegedly harmful statement but merely indicates to the reader where it may be found.").

[12] Kaplan, *supra* note *See also* Lisa M. Bowman, *Free Speech Issues Underlie DVD-Code Appeal*, CNET NEWS.COM, Jan. 26, 2001, <http://news.cnet.com/news/0-1005-201-4616358-0.html?tag=bplst> (last visited Mar. 27, 2001).

[13] *See* Janet Kornblum, *UK Child Abuse Witch-Hunt Exposed*, CNET NEWS.COM, June 3, 1997, <http://news.cnet.com/news/0-1005-200-319427.html?tag=rldnws> (last visited Mar. 27, 2001).

[14] *See* Kornblum, *supra* note [. This argument hearkens to an ongoing debate over whether the challenges of Internet enforcement will make copyright an anachronism. Some hailed the Internet as the death knell for copyright, claiming that content creators would not manage to prevent digital copying and would have to find new business models to fund their creative endeavors. ]*See, e.g.*, John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at 84; Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136, 137. Thus far, however, the so-called "content industries," particularly in the United States, have had repeated success in their efforts to protect - and to extend - their copyrights in cyberspace. *See, e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) (upholding contributory and vicarious infringement claims against file-sharing service and remanding for entry of narrower injunction); *Teevee Toons, Inc. v. MP3.com, Inc.*, 2001 WL 290063 (S.D.N.Y. March 26, 2001) (finding MP3.com liable for allowing parties Internet access to songs that they had previously purchased on CD); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (same); *see also* *Universal City Studios, Inc. v. Reimerdes* 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (party who posted, and later linked to, device that circumvented access to copyrighted work violated Digital Millennium Copyright Act). *See generally* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 548-49 (1997) (contrasting views of those who predicted the death of copyright with the reality, in which "forces in government and industry ... seem hell-bent on expanding copyright at every opportunity").

[15] See, e.g., John Perry Barlow, *Jack In, Young Pioneer!*, COMPUTER WORLD, August 11, 1994, available at [ (last visited Mar. 27, 2001)] [http://www.eff.org/pub/Infrastructure/virtual\\_frontier\\_barlow\\_eff.article](http://www.eff.org/pub/Infrastructure/virtual_frontier_barlow_eff.article) (describing the Internet as "the largest functional anarchy the world has ever known and ... likely to stay that way").

[16] See generally Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1998) (discussing likelihood of "virtual exit" by content distributors from distribution-restrictive to less restrictive legal regimes); Paul E. Geller, *Conflicts of Law in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 20 COLUM.-VLA J.L. & ARTS 571, 578 (1996) ("It ... remains unclear how judicial relief, such as injunctions and damages, can be made effective in a digitally networked world, where works can be made virtually present almost everywhere at once."); *id.* at 595-96 "[L]egally, any rule tied to any country of origin or origination, for example, the country where the transmitting entity has business headquarters or where it organizes the transmission, would prompt pirates to establish their headquarters or `to upload works from the least protective country possible' as long as countries differed in their levels of protection.").

These predictions proved prescient. In the Nottinghamshire case, for example, individuals in the United States, Canada, and Australia posted the offending report after the injunction was entered in Britain. Although the Canadian poster removed the material after receiving a threatening letter from the county solicitors, see <http://jeremy.bc.ca/jetrep1.htm> [ (last visited March 27, 2001), the other two persevered, and the county ultimately relented. ] See *infra* notes [- and accompanying text; Kornblum, ] *supra* note [ (quoting Yaman Akdeniz, head of U.K. cyberliberties group Cyber-Rights & Cyber-Liberties: "The new technology is always ahead of the existing laws, and also the Internet's multinational environment makes it difficult to enforce national legislation."); Janet Kornblum, ] *British Relent on Banned Report*, CNET NEWS.COM, August 4, 1997, <http://news.cnet.com/news/0-1005-200-321095.html?tag=bpls> [ (last visited March 27, 2001); Ashley Craddock, ] *Game, Set, Match to Net*, WIRED NEWS, Aug. 4, 1997, <http://www.wired.com/news/politics/0,1283,5763,00.htm> [ (last visited Mar. 27, 2001); ] see also <http://www.users.globalnet.co.uk/~dlheb/jetrep.htm> [ (defendants' site).

[17] Linking liability will not eliminate infringement, but it may well reduce its impact. The Napster litigation illustrates a case in which, because of logistical and other challenges of identifying direct infringers, legal action against a particular indirect infringer, which played a central role in facilitating the infringement, provided the only avenue for meaningful relief. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001). As discussed below, websites with links differ from peer-to-peer file sharing systems, because the copyright holder can usually identify and pursue the party that posts the infringing content on its site. Nonetheless, in certain circumstances - when, for example, the copyright owner may not obtain effective relief against the party posting the content, or when the linking site uniquely impairs copyright incentives - it may be appropriate to enjoin links. See *infra* notes \_\_\_ and accompanying text; see also Richard Gilbert & Michael A. Katz, *When Good Value Chains Go Bad: Remarks on the Economics of Indirect Liability and Contributory Infringement of Copyright*, \_\_\_ HASTINGS L.J. \_\_\_ (forthcoming 2001).

[18] U.S., U.K., and international law all distinguish between uses of expression qua expression - i.e., in an exploitative sense - and uses of a work for its informational value. E.g., 17 U.S.C. § 107; *Sega v. Accolade*; CDPA 1988, 28-76; Berne Convention for the Protection of Literary and Artistic Works, art. 7 1886, as last revised July 24, 1971, amended Oct. 2, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention] (recognizing rights to reproduce portions of copyrighted work for educational purposes, or for other purposes when the work was of a scientific nature); *id.* art. 8 (limiting reproduction right against newspapers and periodicals); *id.* art. 9(2) (individual countries may determine exceptions to reproduction right, as long as they are limited to "certain special cases" and do not conflict with "a normal exploitation of the work" or "unreasonably

prejudice the legitimate interests of the author"). *See generally* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT. L. 75, 100 (2000) ("A common concern over public interest in the widest dissemination of *information* served as the rationale behind the exceptions in Article 9."). Nonetheless, most countries' laws forbid the copying of *expression*, even when that expression includes unprotected ideas. The cases discussed herein involved links to sites that had copied not merely unprotected information, but the plaintiff's particular expression of that information.

[19] *See infra* note [ and accompanying text.

[20] *See, e.g.*, Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SM. & EMERG. BUS. L. 57, 67-72 (2000); Maureen A. O'Rourke, *Fencing Cyberspace: Drawing Borders in a Virtual World*, 82 MINN. L. REV. 609, 631-644 (1998); Dan A. Burk, *Proprietary Rights in Hypertext Linkages*, 1998(2) J. INFO. L. & TECH. §§ 1, 3 (June 30, 1998) [http://elj.warwick.ac.uk/jilt/intprop/98\\_2burk/](http://elj.warwick.ac.uk/jilt/intprop/98_2burk/) (last visited Mar. 27, 2001).

This article focuses on remote, HREF links - i.e., links that lead a user to another site without "framing" that site in a border determined by the linking party. With HREF links, when the user activates the link, the user in effect "leaves" the linking site behind and sees on her screen only the content and URL of the linked-to site. ]*See* O'Rourke, *supra*, at 631-634 (contrasting HREF links and frames).

[21] By "linking party" or "linker," I mean a party that posts a hyperlink on its site. Parties that follow the link are referred to herein as "users."

[22] A hyperlink is merely computer code recognizable by Web browsers. It includes three essential features: (1) code indicating the beginning and end of the link, (2) code identifying a "pointer" or "source anchor" - the words or other content that a user will click or otherwise invoke in order to activate the link, and (3) the "destination anchor" - i.e., the URL of the linked-to site. *See* HTML 4.01 Specification § 12.01, at <http://www.w3.org/TR/html401/struct/links.html> (last visited Jan. 20, 2001); *see also* Dave Raggett, *Getting Started with HTML*, at <http://www.w3.org/MarkUp/Guide/> (last visited February 21, 2001); O'Rourke, *supra* note [, at 631-32. When a user invokes the link, her browser reads the URL and instructs her computer to initiate contact with the server on which the linked-to content is stored, requesting a download of the content. All of the "action" - i.e., any copies, distribution, etc. - therefore takes place between the user and the linked-to site; the linking party plays no direct role in delivering content. ]*See generally* O'Rourke, *supra* note [, at 632; Burk, ] *supra* note [, at 15.

[23] Under US law, direct infringement requires the commission of one of the acts enumerated in 17 U.S.C. § 106: reproduction, derivative work creation, distribution, public performance, or public display. *See* O'Rourke, *supra* note [, at 655-58 (discussing technology of linking and difference between direct and contributory infringement). Because the linking party merely provides the user's browser with the information necessary to retrieve content at the linked-to site, it does not directly commit any of the acts reserved to the copyright holder.

[24] The Copyright, Design and Patent Act of 1988 reserves to the copyright owner to right to copy the work, to issue copies to the public, to perform, show or play the work in public, to broadcast the work or include it in a cable programme service, and to make an adaptation of the work (or to copy, perform, distribute, or broadcast such an adaptation). CDPA 1988, §§ 16-21.

[25] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *see also* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-22 (9<sup>th</sup> Cir. 2001). US law also recognizes claims for vicarious infringement against parties who have the right and ability to control acts of direct infringement and receive direct financial benefit from the infringing activity. While

linkers may, in some circumstances, receive direct financial benefit from infringement (for example, through a "click-through" advertising agreement in which the linker receives a share of the proceeds from infringing sales made at the linked-to site), the existence of a link arguably does not alone give the linker the right and ability to control the direct infringement. While one can imagine relationships between linking and linked-to sites that would entail such control, the more common claim is likely to be one for contributory infringement. *See, e.g.*, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).

[26] CDPA 1988, § 16(2) ("Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorizes another to do, any of the acts restricted by the copyright."); *see* *CBS Songs Ltd. v. Amstrad Consumer Elec. PLC*, [1988] AC 1013, 1054 ("in the context of the Copyright Act 1956 an authorization means a grant or purported grant, which may be express or implied, of the right to do the act complained of").

[27] *CBS Songs v. Amstrad*, [1988] A.C. at 1058. In such circumstances, the defendant is viewed as a joint tortfeasor with shared responsibility for the harms resulting from infringement. *Id.*

[28] *See, e.g.*, *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9<sup>th</sup> Cir. 1992) ("a party cannot [unlawfully] authorize another party to infringe a copyright unless the authorized conduct would itself be unlawful"); *Subafilms, Ltd. v. MGM-Pathe Commun. Co.*, 24 F.3d 1088 (9<sup>th</sup> Cir. 1994) (en banc) (no contributory infringement without direct infringement); *Nelson v. Rye*, [1996] F.S.R. 313, 337 ("A person can only be liable for authorizing infringement if the primary actor could himself be guilty of infringement.").

[29] While web browsing does not generally involve making permanent copies on users' hard drives, the law in both the US and the UK views RAM copies as infringing if made without the copyright owner's permission. *See* CDPA 1988, § 17(6) ("Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work."); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9<sup>th</sup> Cir. 1993) (RAM copies constitute "reproductions" for purposes of US Copyright Act); *Stenograph LLC v. Bossard Assoc., Inc.*, 144 F.3d 96, 100 (D.C. Cir. 1998) (same). While not uncontroversial, *e.g.*, Michael E. Johnson, *Note: The Uncertain Future of Computer Software Users' Rights in the Aftermath of MAI Systems*, 44 DUKE L.J. 327 (1994); Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 550-53 (1997); Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 41-43 (1994), this conclusion now appears relatively well settled in both US and UK law.

The implied license theory, which many scholars have proposed to limit infringement claims against viewers of Web pages, is probably unavailable when users view material that a Web site posted without the copyright owner's permission. The implied license theory says that a publicly accessible web site should not have a copyright claim against a user who visits the site and, merely by visiting, makes RAM copies of the site's web page on her computer. By hosting a publicly available site, the site operator has implicitly authorized the making of such copies. *See, e.g.*, Burk, *supra* note [, at 7-8; Mark D. Janis], *A Tale of the Apocryphal Axe: Repair, Reconstruction, and the Implied License in Intellectual Property Law*, 58 MD. L. REV. 423, 500 n. 460 (1999); O'Rourke, *supra* note [, at 658-62 (discussing implied license theory); *cf.* Walter A. Effross, *Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking*, 49 S.C. L. REV. 651, 675-77 (1998) (pointing out flaws in implied license theory for unauthorized links). This theory cannot apply to a copyright claim brought by someone *other than* the visited site. When a copyright owner has not authorized a site to reproduce (or to publicly display or distribute) its copyrighted material, that copyright owner cannot be said to have authorized users to view that material at the infringing site. *Cf.* Jane Ginsburg, *Putting Cars on the Information Superhighway*, 95 COLUM. L. REV. 1466, 1478-79 (1995) (suggesting that fair use may justify browsing of documents made available freely on the Web, but not those made available through commercial online service).

[30] See, e.g., *CBS Songs Ltd. v. Amstrad Consumer Elec. PLC*, [1988] AC 1013, 1053 (distinguishing between those who "facilitate copying" and those who "authorize it", finding only the former liable under copyright law); see also Hector L. MacQueen, *Copyright and the Internet*, in Lilian Edwards & Charlotte Waelde, eds., *LAW & THE INTERNET: A FRAMEWORK FOR ELECTRONIC COMMERCE* 181, 200 (2000) (discussing cautious British approach to indirect copyright liability).

[31] Although the traditional US standard for contributory infringement looked to actual or constructive knowledge of infringement, e.g., *Gershwin Publ'g Co. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (standard satisfied if defendant had "knowledge, or reason to know, of the infringing nature" of the direct infringer's activities) (emphasis added), at least two recent decisions have adopted an actual knowledge standard in the Internet context. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021-22 (9<sup>th</sup> Cir. 2001); *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc.*, 907 F. Supp. 1361, 1373-75 (N.D. Cal. 1995).

[32] These two conditions - description of the content and a link directly to the content - distinguish such linkers from the defendants in *CBS Songs v. Amstrad* and other UK cases denying claims of indirect infringement. See *CBS Songs Ltd. v. Amstrad Consumer Elec. PLC*, [1988] AC 1013, 1053. In *Amstrad*, the House of Lords refused to impose liability against manufacturers of dual bay cassette recorders, despite the manufacturers' knowledge that some purchasers would use the recorders to infringe. The decision relied heavily on the potential non-infringing uses of the recorders and the fact that the manufacturers had not, by selling the machines, "sanction[ed], approve[d] or countenance[d]" the infringement of any particular content by their customers. *Id.* at 1057; see also *id.* at 1054 (noting that defendants had warned users against infringing copyright). See also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (no contributory infringement claim against manufacturer of technology with substantial non-infringing use).

[33] Both US and UK law provide certain exceptions from infringement for activities deemed to be in the public interest. See 17 U.S.C. § 107; Copyright, Design & Patents Act 1988 §§ 28-76. Certain links may facilitate such protected uses, even when they lead to sites containing infringing materials. A website for a copyright course, for example, might link to infringing materials in order to illustrate legal principles or examples of on-line infringement. The legal implications of such links are explored in more detail below.

[34] *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *Nottinghamshire County Council v. Gwatkin*, High Court of Justice, Chancery Div. (June 3, 1997), available at [<http://www.users.globalnet.co.uk/~dlheb/legal1.ht>

[35] Pub. L. No. 105-304, 112 Stat. 2877 (1998), *relevant portions codified at* 17 U.S.C. § 1201.

[36] *Universal City City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000).

[37] See *Nottingham County Council, Revised Joint Enquiry Report*, June 7, 1990, [<http://www.users.globalnet.co.uk/~dlheb/jetrep.htm>] (last visited Mar. 27, 2001).

[38] *Id.*

[39] *Id.*

[40] J.B. Gwatkin, *Introduction by the Author of the Revised Joint Enquiry Report*, May 16, 1997, [<http://www.users.globalnet.co.uk/~dlheb/introduc.htm>] (last visited March 27, 2001).

[41] See [<http://www.users.globalnet.co.uk/~dlheb/>] (last visited Mar. 29, 2001); see also J.B. Gwatkin, *supra* note [ ("It was the Nottingham experience that became the foundation stone for a

widespread belief by professionals in ritual satanic abuse and to this day Nottingham is still quoted as a proven case - which it most definitely was not.").

[42] Nottinghamshire County Council v. Gwatkin, High Court of Justice, Chancery Div. (June 3, 1997), available at <http://www.users.globalnet.co.uk/~dlheb/legal1.htm>; ]see Ashley Craddock, *Little Pig, I'll Blow Your Site Down*, WIRED, June 13, 1997, available at <http://insight.mcmaster.ca/org/efc/pages/media/wired-news.13jun.html> [ (last visited Mar. 27, 2001).

[43] Nottinghamshire v. Gwatkin, available at <http://www.users.globalnet.co.uk/~dlheb/legal1.htm>[]. While the language of the injunction did not specifically mention linking, it enjoined the defendants from "authorizing" the publication of the Report on the Web, and the County solicitor stated in a cover letter that the injunction was intended to apply to links. ]See *id.*

[44] See Janet Kornblum, *supra* note [. Correspondence regarding each of the cases is available at (last visited Mar. 27, 2001). <http://www.xs4all.nl/~yaman/jetrep.htm>

[45] Professor Junger posted his response on the Web, and several Web sites around the world published it along with the County letter addressed to him. See Letter from Peter D. Junger to C.P. McKay, County Solicitor, June 16, 1997, [ (hereinafter "Junger Letter") (last visited Mar. 27, 2001). <http://insight.mcmaster.ca/org/efc/pages/nottingham/junger-mckay.16jun97.htm>

[46] *Id.* (denouncing county's "misconception that the `Copyright, Designs and Patents Act 1988' of the United Kingdom applies to actions taken in the United States when, as I trust you know, that Act specifically provides that copyright holders' exclusive rights apply only to `acts in the United Kingdom").

[47] *Id.* (dismissing as "silliness ... the belief - or the pretense - that you could somehow persuade the Chancery Division of the High Court to issue an affirmative injunction requiring someone who was not within the Court's jurisdiction and who has had no contacts whatsoever with the United Kingdom to perform acts in Cleveland, Ohio.").

[48] 17 U.S.C. § 107 (2000).

[49] Junger Letter, *supra* note [ ("were you to seek an injunction from a court in the United States requiring me to remove the report from my web site because of your client's claim of copyright, even if it could establish that claim, my publication of the report on my web site is a `fair use' and is protected by the Constitution of the United States").

[50]

[N]o one would have mirrored the Broxtowe report at their sites on the World Wide Web had you not sought to enjoin its original publication. One would have thought that you would have learned that lesson by now. There are at least a dozen web sites where the report is mirrored, not one of which would have existed if you had not sought to suppress its original publication on the web. And at my site alone the report has already been retrieved more than 2,500 times. For those of us who are opposed to governmental censorship of information on the World Wide Web, this reaction is gratifying. I doubt that it is so for your client.

*Id.* The Australian party responded with a virtually identical letter in which he refused to remove the report. See at <http://www.xs4all.nl/~yaman/jetaust.htm> [ (last visited Mar. 27, 2001).

[51] See Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INTERN'L L. 587 (1997) (distinguishing between extraterritorial application of domestic copyright law - something forbidden under copyright - and adjudication of disputes involving the

law of multiple fora.

[52] Suppose, for example, that Professor Junger correctly determined that his posting was protected under U.S. fair use principles. Would those principles protect him against suit under UK law, if UK users viewed the report on his site? If UK libel law is any indication, British courts may well assert jurisdiction against defendants based on such improbable contacts with the forum. *See* Lilian Edwards, *Defamation and the Internet*, in Lilian Edwards & Charlotte Waelde, eds., *LAW & THE INTERNET: A FRAMEWORK FOR ELECTRONIC COMMERCE* 249, 258-59 (2000) ("Logically, the English courts ... are effectively saying they are prepared to exercise jurisdiction over every Internet published libel in the world, no matter if an English person is not involved, so long as the plaintiff can establish that he or she has some reputation in or other significant connection to England - not difficult in an era of rapid communications and globalised media.") (citing *Berezovsky v. Forbes*, [2000] 1 WLR 104 (HL), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000511/bere-1.htm>). Some scholars, moreover, have suggested that Web sites should be subject to personal jurisdiction - and potentially face liability - in each jurisdiction in which users access content on their sites to infringe. ]*See, e.g.*, Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 *CARDOZO ARTS & ENTER. L.J.* 153, 160 (1997) ("Where in-state users have viewed or downloaded ... a document from [a] foreign site, it should be clear that the out of state website operator has initiated infringing transactions within the forum."); *id.* at 162-63 (websites commit contributory infringement in forum when users download infringing material in forum). Professor Ginsburg has proposed that courts may extend jurisdiction over such actors, but that they should apply the substantive law of the physical location or "nerve center" of the posting party's site. *See id.* at 172-73 (proposing to apply law of country of origin as long as "the law designated by these points of attachment meets minimum standards of copyright protection, such as those set forth in the Berne Convention and the Agreement on Trade Related aspects of Intellectual Property"). Others propose that courts apply the law in the country or countries where the download takes place. *See, e.g.*, Geller, *supra* note 15 [, at 597 (proposing a "principle of preference: apply the law that most effectively protects the work at issue" in conflict of law cases). ]*Compare* William F. Patry, *Choice of Law and International Copyright*, 48 *AMER. J. COMPARATIVE L.* 383, 457 (2000) ("Placing an unauthorized copy of a work on a website outside the United States cannot give rise to liability in the United States even if an infringing copy is made in the United States by downloading from that foreign website. There is thus no choice of law problem because there is no cause of action. Conversely, placing an infringing copy on a website in the United States obviously subjects one to liability here, but cannot give rise to jurisdiction over infringements that occur extraterritorially by virtue of downloading from the United States.").

[53] *See* Ginsburg, *supra* note 52 [, at 162-63.

[54] *See* *Berezovsky v. Forbes*, [2000] 1 WLR 104 (HL).

[55] *See* *CBS Songs Ltd. v. Amstrad Consumer Elec. PLC*, [1988] AC 1013, 1053-57.

[56] Here, too, Professor Junger may have been somewhat optimistic. United States fair use law rarely protects the wholesale copying of entire works of authorship, even on matters of public importance.

[57] 75 F. Supp. 2d 1290 (D. Ut. 1999).

[58] The Handbook is a closely guarded Church document that instructs lay clergy on rules of church administration. *Id.* at 1290.

[59] *See* Sheila McCann, *Web Site Prompts Mormon Church to Sue Critics*, *SALT LAKE TRIB.*, Oct. 15, 1999, available at [http://www.sltrib.com/1999/oct/10151999/nation\\_w/37822.htm](http://www.sltrib.com/1999/oct/10151999/nation_w/37822.htm) (last

visited Jan. 20, 2001).

[60] Intellectual Reserve, the plaintiff in *Utah Lighthouse*, owns the copyright to works of the Church of Jesus Christ of Latter-Day Saints. Order of Jan. 23, 2000, No. 2:99-CV-808C (D. Ut.). For convenience, I refer to both entities as "the Church."

[61] The suit initially sought an injunction requiring the Tanners to post an acknowledgement that they had infringed the Church's copyright, to delete any remaining infringing materials, and to refrain from future copyright infringement. See McCann, *supra* note 59 [ (citing summary of claims as described by lawyer for the Church). The Tanners posted their own version of events at (last visited Mar. 27, 2001). <http://www.utlm.org/newsletters/no96.htm>

[62] The Tanners voluntarily removed the content after receiving a demand letter from the Church, without admitting liability. At the hearing on the Church's motion for a temporary restraining order, they further agreed not to distribute any material from the Handbook pending a preliminary injunction hearing. See Sheila R. McCann, *Critics Can't Distribute LDS Book on Internet*, SALT LAKE TRIB., Oct. 19, 1999, available at <http://www.sltrib.com/1999/oct/10191999/utah/39367.htm> (last visited Jan. 20, 2001). Subsequently, the Tanners filed a "Consent to Extension of Temporary Order & Response," in which they agreed to a continuation of the restraining order pending a full trial, purportedly because the Handbook was available elsewhere on the Internet. See *Consent to Extension of Temporary Order & Response, Intellectual Reserve v. Utah Lighthouse*, No. 2:99-CV-0808 C, Oct. 28, 1999, available at <http://www.utlm.org/images/courtcase/restrainingorderresponse2.gif> (last visited Jan. 20, 2001).

[63] Kaplan, *supra* note 10[;] see also *Utah Lighthouse*, 75 F. Supp. 2d at 1292.

[64] 75 F. Supp. 2d at 1292.

[65] The Church had made two distinct contributory infringement claims: first, that the Tanners materially assisted those who *posted* the infringing materials on the destination sites, and second, that they contributed to infringement by *users* who found the addresses on the Tanners' site and followed those addresses to view, print, and/or download the infringing materials. The court ruled in favor of the Tanners on the first claim, absent evidence of some "direct relationship between the defendants and the people who operate the three websites." *Id.* at 1293.

[66] *Id.* at 1294. The court noted that, because users who viewed the infringing materials made a copy of the infringing content in the random access memory (RAM) of their computers, such users committed direct infringement under the Copyright Act. *Id.* See *supra* note 29[ and accompanying text.

[67] *Id.* at 1295. In addition to providing the URLs, the Tanners gave instructions for downloading the Handbook material. *Id.*

[68] *Id.*

[69] See, e.g., Kaplan, *supra* note 10 [; Jessica Reaves, ]*Better Be Careful Whose Links You Click*, TIME, Dec. 10, 1999, <http://www.time.com/time/nation/article/0,8599,35814,00.html> (last visited Jan. 20, 2001); Stephen Lawson, *Copyright Ruling Targets Web Links*, CNN, Dec. 14, 1999, <http://www.cnn.com/1999/TECH/computing/12/13/illegal.links.idg> (last visited Jan. 20, 2001); *Web Links at Issue in LDS Lawsuit*, "The End of Linking?" ABOUT.COM, Dec. 10, 1999, <http://websearch.about.com/internet/websearch/library/weekly/aa121099.htm> (last visited Jan. 20, 2001). Links to additional press coverage of the case are posted at the Utah Lighthouse site, [http://www.utlm.org/underthecoveroflight\\_news.htm](http://www.utlm.org/underthecoveroflight_news.htm) (last visited Jan 20, 2000).

[70] Professor Jessica Litman, for example, contended that, because any user accessing the Church materials using the URLs provided by the defendants would be engaging in a non-infringing fair use, the defendants could not have contributed to any act of direct infringement. *See* Kaplan, *supra* note 10 [ (citing statement by Professor Litman). ]*See also* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PENN. L. REV. 469, 565-67 & n.308 (2000).

[71] An Atlanta copyright lawyer described linking as "dead" in the wake of the *Utah Lighthouse* opinion. "If that decision ultimately holds up, then linking is definitely dead," in the words of Jeffrey R. Keuster. "If you can't post an address without running into copyright infringement, how can you link? ... The Web is all about links .... Without linking, there is no Web." Kaplan, *supra* note 10 [.

[72] *See* Kaplan, *supra* note 10[.

[73] Pub. L. No. 105-304, 112 Stat. 2877 (1998).

[74] *See* 17 U.S.C. § 1201 (anticircumvention provision); *id.* § 1202 (rights management provision); *id.* § 512 (Online Liability Limitation Act), *id.* § 117 (software maintenance and repair provision).

[75] 17 U.S.C. § 1201(a)(2).

[76] 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

[77] *Id.* at 311.

[78] *Id.* at 312-13.

[79] *Id.* at 323.

[80] *Id.* at 325.

[81] The Reimerdes defendants raised a number of defenses to this claim, all of which the court rejected. *E.g., id.* at 319-324.

[82] *Id.* at 324.

[83] *Id.* at 325.

[84] *Id.* The court found that the defendants, by linking, committed an act - "providing" offending technologies - that the DMCA specifically proscribed. It thus found them responsible directly, rather than as "contributory" offenders. As discussed above, it is unlikely that a court would find a linker similarly responsible for committing any of the acts that the Copyright Act defines as direct infringement. *See supra* note 23 [ and accompanying text.

[85] *Id.* Because of the defendants' clear purpose of disseminating the technology in *Reimerdes*, the court did not address whether non-infringing material at a linked-to site might, in some circumstances, counsel against an injunction against a party with mixed motives.

[86] Several distinctions between the DMCA (particularly as interpreted by the *Reimerdes* court) and the copyright laws compel this conclusion. For one thing, the court found that the defendants in that case directly violated the statute, whereas in copyright law any liability would almost certainly arise from a finding of indirect infringement. *See supra* note 84 [. In addition, the DMCA, at least as interpreted by the court, does not contain a general fair use provision that internalizes First

Amendment considerations, as does the fair use protection of copyright law. This may explain the court's lengthy consideration - and attempted accommodation - of defendants' First Amendment defense.

[87] See David G. Post & David J. Johnson, *"Chaos Prevailing on Every Continent": Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1066 (1998) ("Deciding whether copyright law should permit [a type of copying] presupposes an ability to say something about the way in which different 'configurations' (of copying and no copying) within this system affect both the production of creative works and aggregate social well-being, something about the shape of a 'well-being landscape' that is defined over different configurations of copying and no copying.").

[88] U.S. Const. art. I, 8, cl. 8; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (US Constitution intends that copyright serve as an "engine of free expression"); see MacQueen, *supra* note 30 [ , at 182 ("Copyright is thus essentially a response to market failure, a means by which socially beneficial activities can be made worthwhile. It rests ultimately upon the general or public interest.").

[89] The two countries protect such behavior in somewhat different ways. While US law offers a general "fair use" provision that exempts behavior on a case-by-case basis, 17 U.S.C. § 107, UK law provides a precise list of acts that fall outside the scope of copyright. CDPA 1988, §§ 28-76.

[90] Both the US and the UK recently extended their copyright term to the life of the author plus seventy years, consistent with the term in Continental countries. While a party in the US challenged the extension, claiming that the copyright term was no longer "limited in times" as required by the Constitution, the courts have thus far rejected his claim. See *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. February 16, 2001).

[91] See *supra* note 32 [ .

[92] See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INTERN'L L. 369, 438-39 (1997) ("The right motto for the digital future may be: 'protect revenues, not bits'"); see generally Rochelle Cooper Dreyfuss, *Do You Want to Know a Trade Secret? How Article 2B Will Make Licensing Trade Secrets Easier (But Innovation More Difficult)*, 87 CALIF. L. REV. 191, 242-44 (1999) (pointing out ways in which copyright, patent and trade secret law are deliberately porous); Rochelle Cooper Dreyfuss, *Trade Secrets: How Well Should We Be Allowed to Hide Them? The Economic Espionage Act of 1996*, 9 FORD. INTELL. PROP., MED. & ENT. L.J. 1, 33-35 (1998) (discussing offsets quandary, spillover and deadweight social loss problems as justifications for "leaky" intellectual property regimes); Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 162 (2000) (noting leakiness of US law and predicting that "between countries, these leaks and gaps in the fabric of international copyright protection will serve to promote the operation of comparative advantage as industries maximize legal opportunities to create new works for international competition"); see also William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1226 (1998) (intellectual property law cannot prevent leakage, but should step in to prevent "leakage" from becoming a "flood").

[93] See, e.g., Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 119, 131 (1999) ("It is by no means clear that a property right which appropriates all the value of the work to the creator is necessary to induce creation of the work; presumably, the creator would be prompted to create if he received a right that ensured he could at least cover his costs."); see also Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 527 (1999) (describing "the concept of a restricted copyright - one that protects a copyrighted work to the extent necessary to induce creation, but no more").

[94] See Lemley, *supra* note 14 [, at 548-49.

[95] This was arguably the case in all three lawsuits discussed in this article.

[96] See David Post & David Johnson, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (contending that Cyberspace requires a system of rules distinct from those governing physical, geographically-defined territories).

[97] See Okediji, *supra* note 18 [, at 160 (proposing international fair use baseline standard "that would provide protection for the ]*normative value* that fair use represents, while reserving to national law the discretion to fashion its exceptions accordingly"); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FL. L. REV. 107 (2001); see generally Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PENN. L. REV. 469 (2000).

[98] See Gilbert & Katz, *supra* note 17[.

[99] As Professor MacQueen cautions, UK courts may be less inclined to adopt an "overtly policy-oriented approach to copyright questions" than US courts, given US copyright law's "express basis in the American constitution" and the more flexible fair use provision of the US statute. MacQueen, *supra* note 99 [, at 184. Nonetheless, particularly when deciding whether to extend existing law to new media, UK courts may well contemplate the effect that their decision may have on the balance of copyright.

[100] A rule that imposed constructive knowledge of content at linked-to sites, for example, would impose significant costs on linkers and would thus deter some linkers for whom such costs outweighed the benefit to them from the link. See generally Fisher, *supra* note 92 [, at 1223-24 (proposing heightened state of mind requirement for Web-based infringement, requiring intent or recklessness).

[101] See Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1872 (2000) (discussing potential chilling effect of broad contributory infringement laws).

[102] See *supra* notes 2023 [- and accompanying text.

[103] Those posting infringing content could, for example, remove the infringing materials to servers in "copyright havens" and reconfigure their sites to link directly to those servers. Alternatively, they could locate third parties willing to provide the content in such countries. See generally Ginsburg, *supra* note [, at 166 (pointing out difficulty of limiting claims against those posting infringing materials to the country where their server is located: "First, ... there may be more than one source country. Second, even assuming a single source, a rule that limits trial of the entire action to the source country or to defendant's domicile may well spawn opportunistic relocation of servers and corporate domiciles to the copyright equivalent of the Cayman Islands."); Burk, ]*supra* note [ (discussing likelihood of "virtual exit" by distributors from creation-promoting legal regimes to those that protect the right of distribution, possibly at the expense of intellectual property incentives).

[104] A site compiling links to sites offering downloads of pirated software, for example, makes it significantly easier for parties to locate such software. In such circumstances - particularly if the geographical dispersion of the linked-to sites makes enjoining them impracticable and/or if the traffic to the individual sites would not alone justify the expense of litigation - a claim against the linker may well provide the most effective means of minimizing the infringement.

[105] Doctrinally, this framework would fit readily into the inquiry into whether a party was materially assisting an infringement (for purposes of US contributory infringement law) or inducing or authorizing infringement (under UK law). *See supra* notes[- and accompanying text.

[106] *See Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) (plausible claim of fair use should defeat claim against internet service provider for failing to remove material posted by user).