

TOPIC 5:

LINKING AND COPYRIGHT LAW**Topic question**

Can a link from the library Web site to another Web site infringe on copyright?

Overview

One of hottest areas in Internet law is the issue of Web site linking. Since this area of law is still evolving, it is always best for libraries to take a cautious course of action. Although a link from one Web site to another does not appear to raise an issue of direct copyright infringement, liability—based on a theory of contributory infringement—might arise under certain circumstances when the link directs users to a site containing infringing material.

If one site links to another site that contains infringing material, the linking site can be held liable if the site's owners knew or had reason to know of the infringing nature of the material on the other site. The reason-to-know standard is not actual knowledge but is termed constructive knowledge.

For the library to be held liable as a contributory infringer in a linked scenario, it must also be shown to have induced, caused, or materially contributed to the infringement that its patrons committed when they visited the linked site. Whether the mere provision of a link is such inducement is not clear, but until the issue is settled by the courts, librarians should link or refer patrons only to Web sites for which the library can make an honest and reasonable good-faith statement that the site does not contain infringing material. In light of unsettled legal developments, a library should refrain from providing deep links to commercial Web sites without permission if that link bypasses product-oriented advertising on a home page. The claim made by site owners in the deep-link bypass scenario is not necessarily based in copyright but may lie in issues beyond the scope of this Report, such as tortious interference with contract or unfair trade practice.

What you need to know

Familiarity with the following is helpful to fully comprehend the discussion of this topic:

- Review the discussion on liability from Topic 1.

Why watch this topic?

The law of linking is unsettled. A Web site owner's right to control the uses of his or her site, including how others link to the site, is unclear. Advocates of open linking policies say the Web is the last frontier, and users should

The concept of constructive knowledge is one of common sense—the owner of the linking site must ask whether the linked Web site appears legitimate or suspicious.

A **deep link** is one that directs users to a page within a Web site, bypassing a site's home page.

be able to roam wherever they like, and that roaming extends in principle to the concept of linking—people should be able to link to any other site in any fashion without incurring any liability, copyright, trespass, trademark, and so on.

Web site owners, on the other hand, desire to control who links to their sites and how—especially in the case of deep links. By the same token, copyright owners want to hold linking Web sites designers and operators responsible for perpetuating infringement on their copyright by directing through links or referrals others to sources (other Web sites) where the infringing material resides. Taken to the extreme, this secondary liability might shut down the Web or at least curtail the practice of indiscriminate, free linking—taking the Web out of the Web. Fortunately, legal standards have been developed to determine when an intermediary is liable for its contribution to the infringement of another's copyright. Congress has also offered some limitation on the damages that certain intermediaries may suffer (see Topic 6).

Background: Trademark basics

A trademark is essentially a commercial recognition symbol that helps identify the source, quality, or content of a particular good or service. A valid trademark can take many different forms, so long as it is distinctive and functions to differentiate the source of goods or services from others. It can be a word, name, symbol, or device or any such combination. The realm of trademark has expanded over time such that “[t]oday, at least in principle, almost anything may be a trademark if it is capable of human perception and serves to identify the source of a product or service and carry the producer's good will.”¹⁴⁴ For example, when a motorist drives down the highway and the golden arches of a McDonald's appear on the horizon,¹⁴⁵ the motorist knows that hamburgers is sold there—not fried chicken. In another example, children recognize that the chewing gum in the small, thumb-sized rectangular red, blue, and white package is the original Bazooka product, which includes a corny comic joke or riddle on the inside wrapper.¹⁴⁶ Likewise when a product is tested and given the designation UL (Underwriters Laboratory), consumers can place a certain level of trust in the safety of the product.¹⁴⁷ These examples are all for the function of trade and service marks.

Trademarks act as an incentive for merchants to invest in goodwill.¹⁴⁸ “National protection of trademarks is desirable,” Congress concluded, “because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.”¹⁴⁹ Trademarks protection ensures consumers have adequate and accurate information about a product to make purchase decisions. In this way trademarks contribute to a more efficient marketplace by minimizing the problem of imperfect information, a cause of market failure.¹⁵⁰

In trademark law, imitation is known as palming off or passing off (such as attempting to pass off an inferior product as another's, such as selling fake Coca-Cola by using nearly identical can design). Likewise a competitor could not buy large quantities of a beverage (Coca-Cola) and empty them into containers labeled “ABC Drink in a Can” and market it as its own concoction. This example is known as reverse palming off. In this way, trademark functions as a sort of commercial integrity and paternity right, to borrow a concept from the nomenclature of moral rights.¹⁵¹ Only Coca-Cola can be sold in the red-and-white containers so labeled—consumers must be secure in the knowledge the liquid in the can is the “Real Thing.”

Again, to borrow from moral rights taxonomy, trademark also functions as a sort of commercial paternity right. Coca-Cola, when it is sold, must only be sold in officially designated containers such as the now classic green, fluted bottle—consumers need to know the true origin and nature of the product, known here as the product's paternity. Trademark discourages unscrupulous behavior, passing off (inferior product mislabeled as the original) or reverse passing off (the original sold under a false label), and the unjust enrichment to a competitor that results when consumers are fooled or misled by the mislabeled products or services. The trademark owner's right to control product presentation to prevent mislabeling or misidentification, or the right (license) to control the production, bottling, and distribution of the authentic Coca-Cola formula, for example, can be viewed as an integrity right under the trademark.

Main discussion

When the library links or deep-links portions of other Web sites, several liability issues are raised. The difficulty of sorting safe practices from risky ones is compounded by the dearth of case law on topic. Moreover, there is no case law involving linking and libraries. This topic suggests some likely legal results.

Links alone should not raise an issue of direct copyright infringement

A library should have no copyright liability for direct infringement when it links, even without permission, from its Web site to another site. "Although little case law on the subject exists, most commentators seem to agree that a pure text link, without more, would not be a direct copyright infringement of the linked site, as it does not reproduce any portion of the linked site. It is the user, not the linking site, that loads the site into its RAM when it clicks on the link and accesses the linked site."¹⁵² This statement is accurate as a link, a simple text URL, is not copyrightable.¹⁵³ Placing the text or a URL on your library's Web site is not an infringing act, as far as direct infringement is concerned. Using a logo link, however, raises an issue of trademark infringement.¹⁵⁴

In addition, developing legal thought (not yet tested in court) contends that by placing a site on the Web, the Web site owner has created an implied license for others to at least link to the site.¹⁵⁵ Whether this implied license includes the right to use material posted on the site is another question.

The issue of implied license becomes less clear when one Web site operator posts copyrighted material on his or her Web site without the authorization of the copyright owner, or the posting is found to be excess of fair use. In this case, no implied license exists to use the copyrighted material because no one can give a right (an implied license) to another (Web visitors) which that person does not have the right to give in the first instance.

One court has commented on the nature of a link from one site to another, observing that "hyperlinking does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved. The customer is automatically transferred to the particular genuine Web page of the original author. There is no deception in what is happening. This is analogous to using a library's card index to get reference to particular items, albeit faster and more efficiently."¹⁵⁶

Likewise in the library catalog, the library may reproduce the title, table of content information, and other basic factual content about a copyrighted work, but the catalog does not generally reproduce copyrightable content.

Linking and contributory infringement

A finding of direct infringement must first result before a court considers the contributory conduct of an intermediary, such as a library. In *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.* (see Topic 1), the court stated that “[w]hen a person browses a Web site, and by so doing displays the Handbook, a copy of the Handbook is made in the computer’s random access memory (RAM), to permit viewing of the material. And in making a copy, even a temporary one, the person who browsed infringes the copyright.”¹⁵⁷ Viewers who visit and view one of the three copies of the complete handbook located elsewhere (other than on the defendants Web site) perform direct infringement, because viewers must copy the handbook onto their computer’s RAM to view the handbook. The court concluded that the defendants’ Web activity established that they actively encouraged direct infringement of the plaintiff’s copyright. Note that not all courts agree that a RAM copy is a copy for purposes of establishing a direct copyright infringement.¹⁵⁸

Significant to the court’s conclusion was that the defendants indicated the infringing material was available online and provided three addresses (note that active links, hyperlinked text, were *not* included) for the material. The actions of the defendants went beyond any sense of passive unawareness or mere informational service and approached actual inducement of others to infringe on a copyright. The court referred to one incident in particular when “in response to an e-mail stating that the sender had unsuccessfully tried to browse a Web site that contained the Handbook, defendants gave further instructions on how to browse the material.”¹⁵⁹ The court concluded that the defendants materially contributed (contributory infringement) to the later direct infringement by subsequent visitors to the three other Web sites where the church’s work was posted.

The *Intellectual Reserve, Inc.* court focused on the active encouragement of the defendants in the infringing activities of visitors to their site by promoting the access, retrieval, and forwarding of the handbook from other sites where it was unlawfully posted.¹⁶⁰ What is most disturbing about this case is that the defendants did not have an active link between their site and the site where the infringing material resided.

The court granted a preliminary injunction ordering the defendants to remove the direction to infringing material on their sites.¹⁶¹ This case has serious implications for information and educational organizations. If employees such as librarians, through the reference or referral process direct patrons to known sources of infringing material in print or online and encourage patrons to engage in infringing conduct by viewing, downloading, or forwarding that infringing material, then a cause of action for contributory or vicarious (action of the employee imputed to the employer) liability may lie.

Assuming active encouragement is not present, the issue is whether a link in and of itself to an infringing site is a contributory infringement. The answer may depend on the context in which the link is provided. Consider the nature of a link in a public or school library setting. Is the link provided by the library with an implied “this sight is worth visiting, please visit this site”? The answer to this question would ultimately turn on whether the finder of fact (the

judge or the jury) would be convinced that a reasonable person could make that assumption. Plaintiffs might have an easier time demonstrating inducement on the part of the library than with a link from one site to another in the typical Internet site-to-site scenario, because of the special nature of the link on a library Web site, that is, the library intends readers to follow the instructions and directions and prompts listed on the material it distributes to its patrons. This is common library practice; it may work to the disadvantage of the library by increasing its exposure to liability. There is an old adage in law: the more you promise; the more you're liable. Placement of a simple statement on the library Web site disclaiming responsibility or endorsement of material on linked sites is suggested.¹⁶²

A link to another site, or a verbal referral from a librarian to use a particular Web site, could be more than casual, friendly advice—it's more like a directive to visit the site. In some sense, links, bookmarks, or referrals are an updated version of the reader's advisory and recommendation services libraries have been providing for years. In the digital age, by adding such links from their Web site or catalogs, libraries seem to be saying, "here is a good site," or "here is something you should check out." Some sense of endorsement or recommendation of the material in the eyes of the patron may exist, and a plaintiff might exploit the context of this referral or link to their advantage. A copyright plaintiff might argue that this sequence is sufficient inducement required by the contributory infringement standard. Combined with some sense of knowledge on the part of the library as to the infringing nature of the linked or referred material, the sequence satisfies the elements needed for a claim of contributory infringement.

This scenario also assumes direct infringement occurs when patrons visit the infringing site and make a copy in their computers' RAM. This consideration is moot if the library did not know or had no suspicion that the site to which it linked contained infringing material. Must the library check every page of every site to which it links? No, but the library should use common sense. Give the site to be linked a common-sense analysis and ask: Why you are linking to the site? What about the site do you want your patrons to observe or use? Is anything suspicious about the site? Does it otherwise appear to be legitimate?

What is the result if a library site contained direct links to a site of infringing material and library personnel knew the site contained infringing material? In a case similar to *Utah Lighthouse Ministry* litigation but involving a different provision of the copyright law, the Southern District of New York issued a preliminary injunction to prevent posting of prohibited decoding software. The defendant posted links to other sites with the same infringing software.¹⁶³ In *Universal Studios vs. Reimerdes*, the court assessing liability applied the antitrafficking provisions of the copyright law (discussed in Topic 7). The court observed that "the antitrafficking provision of the DMCA (Digital Millennium Copyright Act) is implicated where one presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it." The defendants linked to sites that contained de-encryption software and "urged others to post DeCSS in an effort to disseminate DeCSS and to inform defendants that they were doing so."¹⁶⁴ The court concluded that either by having a link to a Web site consisting solely of the infringing software that downloaded automatically when the link was activated or by linking to a site containing the software plus additional information when combined with the active encouragement satisfied the "offered, provided or otherwise trafficked in" requirement of the DMCA.

Cases have also arisen in other countries as well. A Dutch court ruled that Internet service providers (ISPs) that provide access or a link to a site displaying copyrighted work without consent are infringing the copyright of the owner of the posted work.¹⁶⁵ *Religious Technology Center vs. DataWeb B.V.* involved writings by L. Ron Hubbard, the founder of the Church of Scientology, which were posted without permission. The Dutch court explained that although the ISP was not a publisher of the infringing works, infringement results when an ISP has a link leading to the reproduction of the material with the ISP's awareness of the infringing material.

What is significant in *Intellectual Reserve, Inc.* case is that the defendant did not provide the locations of the infringing material through the use of active links. The defendant's directions still required users to manually cut and paste or enter URL location information. The message is clear: do not steer patrons or students to a source or site of infringing material and do not encourage patrons or students to visit and download information from infringing sites.

How does a library or educational institution know if the other site is infringing someone's copyright? Some commentators¹⁶⁶ suggest that in today's litigious Internet environment, becoming familiar with the nature and content of the site to which you link is prudent, if not necessary. The deciding factor for an information organization may be one of plain reasonableness.

Downstream linking

Downstream linking is the term used to describe to the situation of related linking that results when one site links to another and the linked site also contains links to sites that link to sites, and so on. What if the library links to another Web site that contained no infringing material, but that site linked to another site that linked to a site that did contain infringing material? Beginning at the library Web site, the library patron could eventually reach the infringing material. Could the library be held liable?

A court likely wouldn't conclude the library is a contributory infringer. Similar cases involving the liability of third-party linking have arisen. In *Bernstein vs. J.C. Penney*,¹⁶⁷ celebrity photographer Gary Bernstein filed suit against J.C. Penney and others. The photographer claimed that J.C. Penney's Web site contained links to other sites that displayed archived copies of some of his copyrighted photographs. The court never ruled on the merits of the case, only giving a motion to dismiss. But the initial complaint raised concerns about the ways in which complex linking arrangements could extend potential (contributory) liability for infringing material. The court rejected the notion that the acts of downstream linkers (those who subsequently link to a site that links to a site that links to a site, and so on, that contains infringing material) satisfy the requirements for claim of contributory infringement. With the motion to dismiss, the court concluded at subsequent viewers of the infringing material do not engage in a direct infringement (one of the requirements of contributory infringement) when they eventually visit the infringing Web site.

The court said that, as a device, linking is capable of substantial noninfringing uses. Finally, the defendant action failed to demonstrate any knowledge. The court commented it "cannot [be] infer[ed] from the facts alleged that Arden knew the photos had been posted and multiple linking does not constitute substantial participation in any infringement where the

linking Web site does not mention that Internet users could, by following the links, find infringing material on another Web site."¹⁶⁸

Another court also refused to enjoin third-party linking to a site containing information that violated a trade secret in *DVD Copy Control Association Inc. vs. McLaughlin, et al.*¹⁶⁹ The court stated that "[l]inks to other Web sites are the mainstay of the Internet and indispensable to its convenient access to the vast world of information. A Web site owner cannot be held responsible for all the content of the sites to which it provides links. Further, an order prohibiting linking to Web sites with prohibited information is not necessary since the Court has prohibited the posting of the information in the first place."

Linking in most library settings should not raise an issue of vicarious infringement

The two requirements for vicarious infringement are ability to control the infringing conduct, and some sort of direct financial benefit or interest as a result of the direct infringement. The library has the ability to control the behavior of its patrons and therefore any infringing conduct in which a patron might engage in the library context, but the library does not appear to have the financial gain that copyright law requires.

Knowledge of the infringing material residing on the other site is not a requirement for vicarious liability. As a result, there might be more potential exposure for secondary liability here than in contributory infringement models. Establishing a financial benefit, however, might be difficult.

Financial benefit is typically established in employer-employee infringement scenarios, because the employee's infringement usually saves the employer money. The employer benefits from the employee's infringement when it foregoes the purchase of extra site licenses for software the employee downloads onto multiple terminals without permission or purchase of additional site licenses.

Establishing vicarious liability in patron-library linking scenarios is more difficult. The required financial benefit nexus could be established if the library derives some sort of revenue stream. Suppose the library charged for Internet access and by having links to all sorts of infringing material, made it pay-for-use Internet access more attractive. If this situation were the case, the library would be a vicarious infringer because it has the ability to control links on its site, and it derives financial benefit from the links. Some courts are reluctant to view vicarious liability as a pure, strict liability standard¹⁷⁰ but add to the concept of direct financial benefit a requirement that the infringing material is an enticement to others. However, without any other evidence of the commercial nature of a site, a nonprofit school or public library site should be concerned about vicarious liability arising from acts of infringing patron conduct.

Knowledge is not a requirement of vicarious liability because "[t]here is no intent or knowledge requirement involved in a vicarious copyright infringement claim, and often, courts have found liability where the infringing individual acted in direct violation of the defendant's instructions."¹⁷¹ Most vicarious Internet cases involve a Web site that generates subscription revenue based on the number of hits its site receives; the more infringing material to which the site links, the more hits the site receives, and the more revenue the site generates. As a result, an infringement finding

under a theory of vicarious liability is unlikely when a library links to a site of infringing material because the required financial gain simply does not occur in the library.

Links and trespassing

Many site owners view their commercial Web space as a store that customers (individual browsers on the Web) are invited to enter. Like a traditional place of business, customer access (or in this case, Web site visitor or browser) is restricted to use of the front door, and not the loading dock, side door or employee entrance. In the traditional brick-and-mortar commercial setting, an implied license exists to enter, browse, and shop. Brick-and-mortar entrepreneurs can force patrons to walk past the bargain of week display on their way to the items the customer desires simply by design and layout of the store. So too proprietors may restrict visitor entry by way of signage above the employee entrance or the loading dock prohibiting ingress at that point. Likewise, the Web entrepreneur works hard to create an attractive commercial presence (albeit a virtual presence) on his or her home page through Web site layout, navigation, interaction, and other features.

Often the Web entrepreneur desires to limit or control the visitor's navigation of the site. This extension of the physical world into the virtual might appear logical, at least one commentator offers the following critique: "Despite the metaphoric pull, and the ease with which virtual spaces may be come to recognized as justifying action for virtual trespass, it seems unlikely doctrinally and inadvisable prudently to apply the law of trespass to cyberspace."¹⁷² Regardless of this caution, Web space entrepreneurs have sought legal remedy when others have attempted to bypass the commercial gateways (banner advertising on Web sites, for example) for site visitors.

Deep links may interfere with property rights

Consider the *Ticketmaster, Inc. vs. Microsoft, Inc.*¹⁷³ litigation in which the defendant, Microsoft, linked to the interior of the plaintiff's site, avoiding the introductory advertising contained on the Ticketmaster site and directing viewers to the ticket purchase information on the Ticketmaster site. The legal basis for an unauthorized deep link is typically not rooted in copyright theory,¹⁷⁴ but it is often based on some other property right such as trespass¹⁷⁵ or misappropriation.¹⁷⁶ Ticketmaster believed the integrity of its site was compromised if visitors could skip large portions of the site, as the overall appearance of the site is distorted by access via deep links. Once advertisers realized visitors bypassed their messages, they would no longer place banner advertisements, and Ticketmaster would lose revenue.

Ticketmaster made several legal claims in its complaint, including misappropriation, trademark infringement and dilution, competition, and copyright infringement. Although Ticketmaster and Microsoft settled their dispute in early 1999,¹⁷⁷ the case cast an ominous shadow on the practice of deep linking. Trespass was not an issue in the 1999 Ticketmaster case, but it would be only a matter of time until a Web plaintiff would argue a claim of virtual trespass to its Web site, resulting in a published decision by a court. This legal premonition was strengthened because many Web site operators were using technologies beyond the mere link, such as Web robots, crawlers, and spiders to access

the content of other Web site owners. Would a court apply the traditional concepts of trespass to real property to virtual space?

Virtual trespass cases involving automated functions

The answer was provided in *eBay, Inc. v. Bidder's Edge*.¹⁷⁸ Bidder's Edge used a software robot to gather auction information such as item and bidding price from the eBay site in contravention to eBay policy (stated on its Web site) of not allowing such information collection. The court accepted eBay's characterization of the unauthorized access to the eBay site as a trespass and granted a preliminary injunction.¹⁷⁹ In an extended discussion the court applied real-world (physical) legal concepts to virtual space stating that: "BE [Bidder's Edge] correctly observes that there is a dearth of authority supporting a preliminary injunction based on an ongoing trespass to chattels. In contrast, it is black letter law in California that an injunction is an appropriate remedy for a continuing trespass to real property. [citation omitted] If eBay were a brick-and-mortar auction house with limited seating capacity, eBay would appear to be entitled to reserve those seats for potential bidders, to refuse entrance to individuals (or robots) with no intention of bidding on any of the items, and to seek preliminary injunctive relief against noncustomer trespassers eBay was physically unable to exclude. The analytic difficulty is that a wrongdoer can commit an ongoing trespass of a computer system that is more akin to the traditional notion of a trespass to real property than the traditional notion of a trespass to chattels, because even though it is ongoing, it will probably never amount to a conversion.

The court concludes that under the circumstances present here, BE's ongoing violation of eBay's basic property right to exclude others from its computer system potentially causes sufficient irreparable harm to support a preliminary injunction."¹⁸¹ The court granted a preliminary injunction to preclude further trespass to the eBay site because if unchecked this trespass would lead to other Web site operators doing the same thing, ultimately causing "irreparable harm from reduced system performance, system unavailability, or data losses."¹⁸¹ The case is currently on appeal to the 9th Circuit Court of Appeals.¹⁸² Should the decision survive appeal, it will have far-reaching effect in all Internet applications, in both for-profit and nonprofit environments.¹⁸³

A similar result was reached in *Register.com vs. Verio, Inc.*,¹⁸⁴ where another court also recognized the harm that excessive repeated robots could cause to a Web site, stating that: "Although Register.com's evidence of any burden or harm to its computer system caused by the successive queries performed by search robots is imprecise, evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels."¹⁸⁵

The law is developing to recognize that certain forms of Web contact can be a virtual trespass. Thus far, trespass has been recognized in commercial-to-commercial web disputes. However, a trespass is a trespass and if a library used a Web robot or similar device to repeatedly collect information from a particular site, similar to *eBay, Inc.* or *Register.com* cases, the potential for litigation would exist and is sure to increase.

Deep links may impair Web site revenues

The eBay litigation can be compared with a case with an opposite but not inconsistent result, *Ticketmaster Corp. vs. Tickets.com*.¹⁸⁶ The *Tickets.com* case is similar to the earlier deep-link case involving Microsoft. In *Tickets.com*, however, the court was aware of and referred to the eBay decision in its denial of Ticketmaster's request for a preliminary injunction to halt the Tickets.com's deep link. The court squarely faced the trespass issue, because Ticketmaster's interim ability to technologically block Tickets.com deep link would soon be circumvented by Tickets.com. The difference between the trespass issue in the eBay and the *Tickets.com* litigation is that the *Tickets.com* court found the elements of a trespass to chattels claim (demonstrated physical harm and obstruction of basic function) lacking. In other words, traffic resulting from deep links into the Ticketmaster site was—compared to the number of hits to the Ticketmaster site—"very small and there is no showing that the use interferes with the regular business of TM [Ticketmaster]. If it did, an injunction might well issue."¹⁸⁷

The court made reference to the question of the loss of advertising revenue as support for a showing of harm and saw as much potential benefit as harm from the deep link, stating that: "While TM sees some detriment in T.Com's operation (possibly in the loss of advertising revenue), there is also a beneficial effect in the referral of customers looking for tickets to TM events directly to TM. (In fact, other companies, who presumably pay a fee, are allowed to refer customers directly to the internal Web pages of TM, presumably leading to sale of TM tickets despite hypothetical loss of advertising revenue by not going through the TM home Web page.) Accordingly, although the trespass theory has some merit, insufficient proof of its elements exists in this case to justify a preliminary injunction. Further, there appears to be a lack of irreparable injury (required for this theory)."¹⁸⁸

If such cases are any indication, given the proper evidence, courts would conclude a trespass has occurred when there is a finding of either monetary harm (loss of advertising revenue resulting from the bypassed pages) or functional harm (systems usability). In other words, the question for the site posting the deep link is whether the link causes economic and functional harm to the site owner's operation of his or her site. Owners must be able to demonstrate the harm to succeed at trial. In fall 2000, Ticketmaster filed an appeal in its litigation with Tickets.com with the 9th Circuit Court of Appeals.¹⁸⁹

The issue of harm in the form of lost sales or commission revenue from the bypass of peripheral advertising pages remains unresolved. Suppose a library Web site contained a link to the site of this publisher. Instead of linking to the publisher's home page, the link bypasses the introductory material and advertisements, moving patron-viewers directly to the interior informational portion (the exercises, Q&A, directory information, and so on) of the site. Could the publisher make a reasonable argument based on Microsoft, Ticketmaster Corp. vs. Tickets.com, Register.com, and eBay cases that the library's deep link interferes with its right to market its wares in its specific literary or publishing marketplace, that is, library patrons or educators including other libraries, museums, archives and educational institutions? As observed, the Ticketmaster Corp. vs. Tickets.com court found that such a link could do as much good for a site (promotion) as it does harm (loss of home page views).

Library deep links are unlikely trespasses

The concept of control over a virtual space is not that farfetched, depending on the circumstances, so be aware of potential downside. One link from a library Web site does not seem to rise to the level of the repeated deep linking performed by the Bidder's Edge robots in the *eBay* or *Register.com* case, neither in terms of monetary nor functional harm.

Furthermore, Netiquette might imply that whenever the library deep links past advertising on a commercial site that the library patron might legitimately patronize, then permission to deep link should be sought.

When in doubt, determine the existence of any legal page on the linked site, because this page may contain the terms and conditions of use that the owner of the linked site requires of its visitors, such as a prohibition against deep linking without permission. The terms and conditions of the Ticketmaster site in the *Ticketmaster Corp. vs. Tickets.com* case only forbade linking for commercial purposes; the existence of similar link proviso on a site your library would like to link to would support the nonprofit school or public library's ability to deep link. Linking of any kind is generally a concern when it occurs for commercial purposes.¹⁹⁰

Under the developing precedent, courts will consider a claim of virtual trespass when system operability or some other harm results from a link. This sort of harm was present in the *eBay* and *Register.com* cases, but the single deep link of the *Ticketmaster Corp. vs. Tickets.com* case. Since the deep link from a library to another site would appear to be akin to the *Ticketmaster Corp. vs. Tickets.com* case, the library's liability for unauthorized deep links would be unlikely. Developing precedent could continue to expand the rights of Web site proprietors to someday require permission for all deep links, but that day is not yet here.

Any deep linker, whether commercial or noncommercial, is not likely bound to terms and conditions that are merely posted (that is, not requiring a click of assent before proceeding) and not read. But this wisdom is yet to be tested squarely in court. Denying a motion to dismiss in an earlier phase of the *Tickets.com* litigation, the court commented that: "Many Web sites make you click on 'agree' to the terms and conditions before going on, but Ticketmaster does not. Further, the terms and conditions are set forth so the customer needs to scroll down the home page to find and read them."

Many customers instead are likely to proceed to the event page of interest rather than reading the small print. Merely listing the terms and conditions in this fashion does not necessarily create a contract with anyone using the Web site. The motion is granted with leave to amend in case facts show Tickets' knowledge of them plus facts show implied agreement to them."¹⁹¹ The point is that a contract can override copyright, so can it override other property use rights, such as a library's freedom to link. The question is whether the library as a linking site has waived those rights. If the library staff member clicks the "I agree" button on a Web site and one of the terms and conditions was "no deep linking," then courts under the developing precedent would consider enforcing those terms and conditions and the library would be forbidden from deep linking.

Even if the library did not make this contract but still determined that the linked site did not allow deep linking, the most severe consequence is probably that the offended site might request the library to refrain from deep linking. The library could choose whether to retain the link and face a possible

court challenge (which might be resolved in its favor), or withdraw the deep link at that time or offer a compromise of maintaining the link but only to the home page of the linked site. Keep a record of the permission to link on file with the appropriate staff member.

Logo linking may raise trademark concerns

One form of trademark fair use was developed by the courts.¹⁹² It is known as nominative fair use. In nominative fair use, the defendant (the library) is allowed to use the plaintiff's trademark to identify the plaintiff's products and services and the relationship of the product or service to the defendant's products or service if three factors are present. Unlike "world beat" in this case the library wants to use the trademark precisely for the mark's ability to function as a recognition symbol of the trademark owner's products or services. This recognition serves to make customers, in this case library patrons, aware that although the library is not associated in a formal way to the trademark owner's business, the library has a logical relationship to the trademarked services, such as having Disney video products available in its collections. This case is where the Disney logo could be used on the library or school Web site to identify Disney holdings in the collections or catalog of the library, museum, archive, or educational institution.

Use this defense, the library's use of the trademark must meet three criteria as established by the court in *New Kids on the Block vs. News America Publishing*.¹⁹³ First, the product must not be readily identifiable without the use of the trademark. Is there some other way to identify the Disney videos in the library collections without use of the Disney logo? Second, the defendant library must use no more of the trademark than is reasonably necessary to identify the product. Must the library use the Disney Mickey Mouse ears logo, or could it simply use the word Disney? Finally, the defendant must not act in a way that suggests sponsorship or endorsement by the plaintiff.

Unresolved points or issues

- Is a link from one Web site to another Web site in any way a display or distribution of that site onto the linking site?
- When the library makes reference to another source of infringing material (such as a Web site) by a link, bookmark, or verbal referral, is this referral sufficient to meet the legal standard of inducing, causing, or materially contributing to the infringement of copyright?
- Can Web site owners can assert other property rights such as trespass to prevent other Web sites, including a library Web site, from deep linking onto their sites?

Resources

Helpful URLs

www.bitlaw.com BitLaw is a comprehensive Internet resource on technology law, containing more than 1,800 pages on patent, copyright, trade-

mark, and Internet legal issues. BitLaw was created by Daniel A. Tysver, a partner with the intellectual property law firm of Beck & Tysver.

From the library literature

Gretchen McCord Hoffmann. *Copyright in Cyberspace: Questions and Answers for Libraries* (2001) (Chapter 6: Hyperlinking and Framing).

C. Ebbinghouse. (1998) "Webmaster Liability: look before you link, and other admonitions for today's Webmaster." *Searcher*, 6(2), 19-27. (discusses a variety of legal issue including trademark, copyright, defamation, and so on).

C. Ebbinghouse. (2000) "Disclaiming liability." *Searcher*, 8(3), 66-71. (discusses use of disclaimers and other language to include on the library Web site).

C. Ward. (1997) "License to link." *Net*, 37, 68-72 (discusses critically the legal copyright and other concerns which are emerging from five case studies involving Web sites hypertext linking to other Web sites with or without the owners' consent).

From the legal literature

Jonathan B. Ko. "Para-Sites: The Case for Hyperlinking as Copyright Infringement," 18 *Loyola of Los Angeles Entertainment Law Journal* 361 (1998).

Richard Raysman and Peter Brown, "Recent Linking Issues," *New York Law Journal*, Feb. 8, 2000, at 3.

Lisa T. Oratz and Matt Wagner, "Copyright and the Internet," *E-Commerce Law Report*, June 2001, at 2.

Tomas A. Lipinski. "Designing and Using Web-Based Materials in Education: A Web Page Legal Audit—Part I, Intellectual Property Issues," 137 *Education Law Reporter* [9] (Oct. 14, 1999) (contains list of issues and sample language for inclusion on the school library Web site).

Tomas A. Lipinski. "Designing and Using Web-Based Materials in Education: A Web Page Legal Audit—Part II, Information Liability Issues," 137 *Education Law Reporter* [21] (Oct. 14, 1999) (contains list of issues and sample language for inclusion on the school library Web site).

ENDNOTES

¹⁴⁴ Jay Dratler Jr., *Intellectual Property Law: Commercial, Creative and Industrial Property*, § 9.01[1], at 9-7 (2000).

¹⁴⁵ See, for example, trademark registration # 74-079029, a yellow arch; registration # 72-152597, a pair of yellow arches flanking parallel sides of a building; trademark registration # 72-152604, yellow arch supporting a sign.

¹⁴⁶ See, for example, trademark registration # 72-383488, "the drawing is lined for the colors red and blue," the words Bazooka on a rectangle; registration # 72-074347, "Bazooka Joe and his gang" stylized children, including children depicted in caricature form."

¹⁴⁷ See, for example, trademark registration # 75-673083, "the certification mark as used by persons authorized by applicant certifies that representative samplings of the goods conform to the requirements of the applicant."

¹⁴⁸ See, *Two Pesos, Inc. vs. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992).

¹⁴⁹ *Park 'N Fly, Inc. vs. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198 (1985) (citation to Senate Report No. 1333 omitted).

¹⁵⁰ See, for example, Francis Bator, *The Anatomy of Market Failure*, 72 *Quarterly Journal of Economics* 351,

351 (1958). See also, Harris & Carman, Public Regulation of Marketing Activity: Part I: Institutional Typologies of Market Failure, *Journal of Macromarketing*, Spring, 1983, at 49, 53 (discussing eight types of market failure: imperfect competition, excessive competition, anticompetitive conduct, imperfect information, side effects, public goods, merit goods, and income maldistribution).

¹⁵¹ Rights of integrity and paternity are part of penumbra of rights know as moral rights. In the United States these take the form of a quasi-copyright. See, 17 U.S.C. §106A (1998). A moral right is “[a] right protecting a visual artist’s work beyond the ordinary protections of copyright.” *Black’s Law Dictionary* 1025-1026 (7th ed. 1999) (“Moral rights include both integrity rights, which protect the work from changes that damage the artist’s or the work’s reputation, and attribution [paternity] rights, which allow the artist to claim authorship of the work and to prevent the unlawful use of the author’s name in reference to a modified version of the work.” Id.). Moral rights are discussed in a subsequent section of this paper.

¹⁵² Lisa T. Oratz and Matt Wagner, “Copyright and the Internet,” *E-Commerce Law Report*, June 2001, at 2.

¹⁵³ Richard Raysman and Peter Brown, “Dangerous Liaisons: The Legal Risks of Linking Web Sites,” *New York Law Journal*, April 8, 1997, at 3.

¹⁵⁴ Tomas A. Lipinski, “Legal Issues in Accessing and Managing the Metadata of Digital Objects,” *Technicalities*, May/June, 2000, at 1.

¹⁵⁵ Kenneth Freeling and Joseph E. Levi, “Frame Liability Clouds the Internet’s Future,” *New York Law Journal*, May 19, 1997, at S5; Richard Raysman and Peter Brown, “Dangerous Liaisons: The Legal Risks of Linking Web Sites,” *New York Law Journal*, April 8, 1997, at 3.

¹⁵⁶ *Ticketmaster Corp. vs. Tickets.com*, 2000 U.S. Dist. LEXIS 4553, *6 (C.D. Cal. 2000).

¹⁵⁷ *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. at 1294 (Dist. Utah 1999) (citing *Marobie-F vs. National Association of Firefighter Equipment Distributor* among others).

¹⁵⁸ *Bernstein vs. J.C. Penney*, 1998 U.S. Dist. Lexis 19048, 50 USPQ 2d (BNA) 1063 (C.D. Cal. 1998).

¹⁵⁹ *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1295 (Dist. Utah 1999).

¹⁶⁰ *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294 - 1295 (D. Utah 1999).

¹⁶¹ *Intellectual Reserve, Inc. vs. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1295 (D. Utah 1999)

¹⁶² Tomas A. Lipinski, “Designing and Using Web-Based Materials in Education: A Web Page Legal Audit—Part II, Information Liability Issues,” 137 *Education Law Reporter* [21] (Oct. 14, 1999) (includes a discussion of other legal issues and sample language to use on the library or school Web site).

¹⁶³ *Universal City Studios vs. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000); 111 F. Supp. 2d 294, 325 (SDNY 2000) (permanent injunction); aff’d sub nom *Universal Studios, Inc. v. Corley*, 2001 U.S. App. LEXIS 25330 (2d Cir. 2001).

¹⁶⁴ *Universal City Studios vs. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000) (permanent injunction).

¹⁶⁵ *Religious Technology Center vs. DataWeb B.V.*, No. 96/1048 (Dist. Ct. of the Hague, Civil Law Sector, June 9, 1999).

¹⁶⁶ Richard Raysman and Peter Brown, “Recent Linking Issues,” *New York Law Journal*, Feb. 8, 2000, at 3.

¹⁶⁷ *Bernstein vs. J.C. Penney*, 1998 U.S. Dist. Lexis 19048, 50 U.S.P.Q. 2d (BNA) 1063 (C.D. Cal. 1998).

¹⁶⁸ *Bernstein vs. J.C. Penney*, 1998 U.S. Dist. Lexis 19048, at *3, 50 U.S.P.Q. 2d (BNA) 1063 (C.D. Cal. 1998).

¹⁶⁹ *DVD Copy Control Association Inc. vs. McLaughlin, et al*, No. CV 786804 (Cal. Super. Ct., Santa Clara County, Jan. 20, 2000).

¹⁷⁰ *Adobe Sys. vs. Canus Prods.*, 2001 U.S. Dist. LEXIS 17713, *13 (C.D. Cal. 2001); *Polygram Int’l Publishing vs. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1324 (D. Mass. 1994).

¹⁷¹ Scott K. Pomeroy, “Comment: Promoting the Progress of Science and the Useful Arts in the Digital Domain: Copyright, Computer Bulletin Boards, and Liability for Infringement by Others,” 45 *Emory Law Journal* 1035, 1055 (1996).

¹⁷² Yochai Benkler, Rules of the Road for the Information Superhighway: Electronic Communications and the Law § 24.2, at 496 (1996).

¹⁷³ *Ticketmaster Corp. vs. Microsoft Corp.*, 97 Civ. 3055 (C.D. Ca., filed April 28, 1997).

¹⁷⁴ Matt Jackson, Linking Copyright to Homepages, 49 *Federal Communications Law Journal* 731, 749 (1997) (“Since A merely provides a link to the server where B is located, the author of A should not be liable for direct infringement. A useful analogy is a telephone answering system. One can program a number into speed dial and then call the number to reach a business’s answering machine and listen to their outgoing message. B’s server is like an answering machine. When B’s author places B on the server, it is akin to placing an outgoing message on the answering machine. The URL that designates B’s location is the phone number used to reach the answering machine. When the author of A creates a link to B, she has essentially put B’s phone number (the URL) into a speed dial memory. When the user selects the link, the user’s Web browser “calls” B’s server. B’s answering machine (the server) then transmits the outgoing message (B) to the user’s Web browser for the user to view. The crucial point is that A does not control the distribution of B. If B’s author no longer wants to distribute B, she can take the document off the server or restrict access with encryption or passwords. So even if a copy of B has been distributed, the distribution is being made by the author of B, not A.”).

¹⁷⁵ I. Trotter Hardy, “The Ancient Doctrine of Trespass to Web Sites,” 1996 *Journal of Online Law* article 7, October 1996 (available in the LEXIS-NEXIS Legnew Library); Mark D. Robbins, “Electronic Trespass: An Old Theory in a New Context,” *The Computer Lawyer*, July, 1998, at 1.

¹⁷⁶ Bruce P. Keller, “Condemned to Repeat the past; The Reemergence of Misappropriation and Other Common

Law Theories of Protection for Intellectual Property,” in *Legal and Business Aspects of the Internet* 1997, at 339 (PLI Course Handbook Series No. 217 1997); Richard Raysman and Peter Brown, “Dangerous Liaisons: The Legal Risks of Linking Web Sites,” *New York Law Journal*, April 8, 1997, at 3.

¹⁷⁷ See, Bob Tedeschi, “Ticketmaster and Microsoft Settle Suit on Internet Linking,” *New York Times*, Feb. 15, 1999, at C8.

¹⁷⁸ *eBay, Inc. vs. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

¹⁷⁹ Jeffrey D. Neuberger and Stefania R. Geraci, “Web Site Metabrowsers,” *The National Law Journal*, July 24, 2000, at B9

¹⁸⁰ *eBay, Inc. vs. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058,1067 (N.D. Cal. 2000).

¹⁸¹ *eBay, Inc. vs. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000).

¹⁸² *Bidder’s Edge vs. eBay*, No. 00-15995 (9th Cir. 2000).

¹⁸³ Lisa M. Ferri and Robert C. Gibbons, Public or Private Property?, *Intellectual Property Today*, September 2000, at 7 (available in the LEXIS*NEXIS Legnew Library).

¹⁸⁴ *Register.com vs. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D.N.Y. 2000).

¹⁸⁵ *Register.com vs. Verio, Inc.*, 126 F. Supp. 2d 238, 250 (S.D.N.Y. 2000).

¹⁸⁶ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000).

¹⁸⁷ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987. at *17 (C.D. Cal. 2000).

¹⁸⁸ *Ticketmaster Corp. v. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 12987. at *17 and *18 (C.D. Cal. 2000).

¹⁸⁹ “Judge Denies Preliminary Injunction in Deep-Linking Case,” *The Entertainment Litigation Reporter*, Oct. 31, 2000 (available in the LEXIS*NEXIS Legnew Library).

¹⁹⁰ Barry J. Brett and Gilbert C. Hoover IV, “Exploring the Brave New World of Internet Litigation,” *New York Law Journal*, August 29, 2000, at 1.

¹⁹¹ *Ticketmaster Corp. vs. Tickets.Com, Inc.*, 2000 U.S. Dist. LEXIS 4553 at *8 (C.D. Cal. 2000).

¹⁹² *New Kids on the Block vs. News America Publishing*, 971 F.2d 302, (9th Cir. 1991).

¹⁹³ *New Kids on the Block vs. News America Publishing*, 971 F.2d 302, 308 (9th Cir. 1991).