Links and copyright law☆

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A B S T R A C T

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For at least 15 years, there have been question marks over the legal permissibility of connecting one web resource to another by means of links. The purpose of this paper is to assess where we stand in terms of the legal state on the threshold of the new decade. The substantive argument in this paper is that, fundamentally, there are only two sorts of links. 'Normal' links facilitate access to subject matter that has been made available to the public and are visible to users as 'activatable' references. 'Embedding' links, by contrast, automatically incorporate online material and cause it to become a part of the embedding document. On the grounds of the cumulative judicial custom in the member states of the European Union, this paper proposes that normal links as such should invariably be deemed not to create a state of interference with copyright law. Embedding links, however, may constitute an infringement of the exclusive right of alteration, communication or reproduction enjoyed by the copyright holder, depending on the facts and circumstances.

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1.　　Introduction

The WWW is a system of interlinked hypertext documents. Such documents constitute text that is not constrained to a linear manner of representation but may contain links to other texts instead, providing a connection from one resource to another. Linking is the key factor that distinguishes hypertext from conventional types of publishing. Without links, the web would only be an enormous pile of independent text documents that may be read through a screen one at a time but offer no means for making "activatable" references and incorporating other material.

There are various ways of controlling access to substance contained in the web. However, insofar as access to a web page has not been restricted in any way, anyone is able to create a link thereto which they may then follow. From a user's point of view, activating a link brings forth the reproduction of the contents of the target page at least in the random-access memory of the data terminal equipment

(computer, mobile phone etc.) he is using, but possibly also in the caches of proxy servers through which the requests and responses are transmitted.

In accordance with Article 5(1) of the Information Society Directive 2001/29,[1] however, such temporary acts of reproduction are typically exempted from the exclusive rights of the right holder. In contrast, the question of whether the acts of *creating* linkage carry relevance related to the law of copyright lacks an authoritative stand in the legislation. The issue has been the subject of a whole range of commentary.

Pursuant to the traditional view, primary acts of infringement require four aspects: (a) copyright in an original work, (b) sufficient taking thereof and (c) doing of an act restricted by copyright (d) in an appropriate jurisdiction. What they do not require is proof of intention or likely damage, which is not relevant until in respect of the appropriateness of particular remedies. Surely impending damage may have circumstantial relevance to the finding of substantiality, but detriment incurred to the right holder is essentially a factor argued in

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[1] Directive 2001/29 of the European Parliament and of the Council, 2001 OJ (L 167) 10 (EC).

a different context, as a part of the redress assessment. Under the system established by the Berne Convention, as amended by the WCT, the exclusive rights of right holders in literary and artistic works include the right to do or authorise reproduction, distribution, rental, communication to the public, translation and any alteration of their works.[2]

In discussing the legal problems surrounding hypertext linking, various categories have been separated. Such instances as 'deep links', 'frame links', 'in-line links', 'order links' and 'surface links' have been said to possess different effects with regard to copyright law.[3] Nonetheless, the analysis hereunder will demonstrate that copyright law, as distinct from trade marks for example, is an area in which superfluous classification of links is unnecessary. Functionally speaking, there are only two forms connections from one web resource to another: normal and embedding links.[4]

Within these two categories, architectural and connotational subcategories may indeed be perceived, but this paper will show that in terms of legal effects pertaining to copyright law, links are either normal, visible references, which may be selected so as to load another resource, or a means of embedding material into the present one. Normal links instruct a user agent to *move* from a web page to another. In contrast, an embedding link causes something to become a *part* of the linking document.[5] Whereas the former are visible to human users as a traversal between two documents, it is not necessarily straightforward to perceive that embedded material does not come from the same source as the text.

2. Normal links

2.1. Mark-up fundamentals

Web pages are written in the HyperText Markup Language (HTML). Mark-up differs from programming in that the former is, in brief, information whereas the latter consists of instructions. Mark-up languages are data formats that contain coded notations for describing data and representing information. Unlike programming languages, mark-up languages such as HTML have no mechanisms to express behaviour or to perform computations; rather, HTML can be used to specify the structure of a document, which then can be given a desired layout using so-called style sheets.

It is common practice to generate web pages dynamically using server-side scripting and to enable on-the-fly interaction on a specific web page using client-side scripts. As regards the final output, however, there is no object code but a description of the structure and presentation of the contents, according to which a web browser renders the page. Such features are represented with so-called elements, which are described in three parts: a start tag, content and an end tag. For example, the 'html' element, which is the base element of each HTML document, is started by annotation <html> and ended by annotation </html>. Elements may be associated with attributes, whose values define the more detailed properties of the element.

Normal links to another web resource are specified with an 'a' element. Such resource would normally be another HTML document, but it may refer to any file format whatsoever. The 'href' attribute defines the destination of the link. In essence, therefore, normal links comprise the material delimited by the start and end tags of the 'a' element (whether textual, graphical and/or audio-visual) and the address of the file to which they refer. Visual web browsers usually display hyperlinks in some distinguishing way, and the appearance of a mouse cursor may change into a hand motif to indicate a link.

2.2. Permissibility of normal linking

Different approaches in the case law emerging from member states have resulted in legal uncertainty as to the permissibility of normal links in the EU. In the first linking case within the Union, *Shetland Times*,[6] the Court of Session granted an interim injunction on the grounds of an arguable case of infringement by inclusion in a cable programme service, what we would now call communication to the public.[7] The Court held the claimant's argument that a website was a cable programme within meaning of section 7(1) of the Copyright, Designs and Patents Act 1988 (CDPA) *fumus boni juris*. Because links that take users to an individual article within the claimant's website by bypassing its homepage might have a negative effect on its speculative advertising revenue, the balance of convenience favoured interim injunction.[8] An out-of-court settlement was reached prior to a decision on the merits of the case.[9]

In the Netherlands, the District Court of Rotterdam, in the case concerning *Kranten.com* website, dismissed a somewhat similar line of argument. The claimant argued that the making of a link from the defendant's website to that of the claimant would constitute an infringement of copyright by reproducing the destination anchor. The court rejected the argument holding that hyperlinks cannot be regarded as reproductions

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[2] Berne Convention for the Protection of Literary and Artistic Works, arts 8–9, 12, 24 July 1971, 1161 UNTS 3; WIPO Copyright Treaty, arts 6–8, 20 Dec 1996, 36 ILM 65.

[3] Mads Bryde Andersen, *Linking og robottering på Internet*, 2000 UfR B311, B313; Komiteanmietintö [KM] 2002:5, at 22–24 [committee report] (Fin); Steven De Schrijver & Alexandre Geulette, *Information Location Tools: Liability Issues Raised in Belgian Law*, 9 CTLR 4, 5–6 (2003); Matthias Leistner, *Creating Cyberspace: Intellectual Property Law and Competition Law Protection of the Web Designer*, 34 IIC 132, 154 (2003); Susanne Klein, *Search Engines and Copyright: An Analysis of the Belgian Copiepresse Decision in Consideration of British and German Copyright Law*, 39 IIC 451, 453–54 (2008).

[4] Tim Berners-Lee, Director, World Wide Web Consortium, The Implications of Links: Axioms of Web Architecture (Apr, 1997), http://www.w3.org/DesignIssues/LinkLaw.

[5] Tanushree Sangal, *IP Issues in Linking, Framing and Keyword Linked Advertising*, 16 CTLR 64, 64 (2010).

[6] Shetland Times Ltd v Wills, 1997 SC 316.

[7] Copyright, Designs and Patents Act [CDPA], 1988, c 48, § 20 (UK).

[8] *Shetland Times*, 1997 SC at 318. *See* American Cyanamid Co v Ethicon Ltd, [1975] AC 396, 399 (HL).

[9] Andersen, *supra* note 3, at 315.