

# LINKS (INCLUDING EMBEDDED LINKS) – IN GENERAL

Updated from the forthcoming 2022 updates to Chapter 9 (Unique Intellectual Property Issues in Search Engine Marketing, Optimization and Related Indexing, Information Location Tools and Internet and Social Media Advertising Practices)

*E-Commerce and Internet Law: Legal Treatise with Forms 2d Edition*

A 5-volume legal treatise by Ian C. Ballon (Thomson/West Publishing, [www.IanBallon.net](http://www.IanBallon.net))

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## BALLON'S ANNUAL ACC BRIEFING ON INTERNET AND MOBILE LAW AND LITIGATION TRENDS

ASSOCIATION OF CORPORATE COUNSEL

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# **E-COMMERCE & INTERNET LAW**

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lows that he also knowingly received them.”<sup>11</sup>

On the other hand, in *United States v. Navrestad*,<sup>12</sup> the Court of Appeals for the Armed Forces held that a defendant could not be convicted of possessing or distributing child pornography under the CPPA where, instead of using his own computer, the defendant accessed child pornography sites on a public computer at an Internet cafe, and thus cached copies were made on a hard drive owned by the Internet cafe, not the defendant. In addition, the government failed to present any evidence that the defendant even knew those temporary copies had been made. Although the defendant sent an email to a third party containing a link to the location online where the images could be accessed, the court held that emailing a link did not amount to distribution under the CPPA.

Child pornography laws are analyzed more extensively in section 40.01.

### 9.03 Hypertext Links

#### 9.03[1] Links and Liability for Linking—In General

Links (also known as *hypertext links* or *hyperlinks*) allow visitors to a site to easily and quickly connect to another location on the World Wide Web or to view content located on another site. Site owners may use links, among other reasons, to show users material from third party locations on the Internet without actually copying it. A link is created by inserting the URL of the site to be linked into some HTML code, which then allows visitors to the website to point and click on a particular icon or portion of highlighted text and automatically access the linked location. A link is merely an instruction to a browser to go from one location to another. A link therefore does not create a “copy” within the meaning of *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>1</sup> on the server of the party creating a link and therefore, subject to some exceptions discussed in this section, generally will not sup-

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<sup>11</sup>*U.S. v. Romm*, 455 F.3d 990, 1002 (9th Cir. 2006), *citing U.S. v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (holding that downloading child pornography constitutes both the act of possession and receipt).

<sup>12</sup>*U.S. v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008).

#### [Section 9.03[1]]

<sup>1</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); *see generally supra* § 9.01.

port a claim for direct infringement (although it may create a cached “copy” on a user’s screen memory<sup>2</sup> and therefore potentially facilitate a claim for secondary liability even where direct liability may not be imposed). Linking *per se* likewise generally is not actionable under the *Lanham Act*. In particular cases, however, in narrow circumstances, linking may support certain claims.

Linking is a central component of the World Wide Web. The very name *World Wide Web* conjures up an image of multiple locations linked together like a spider’s web. Nonetheless, at the dawn of the Internet era, linking led to consternation on the part of companies that were astonished to learn that strangers could link to their sites. Businesses that were accustomed to making deliberate decisions about how to promote their goods and services and corporate images felt seemingly powerless to control their brand image and messaging when they came to understand that people and entities with whom they had no desire to affiliate could encourage their customers or visitors to obtain free content (via links), disrupt the appearance of a page (with frames), alter the order in which content was presented (through *content links*, also known as *deep links*) or seemingly copy material from their sites via *in-line links*.<sup>3</sup> This early sense that people were getting something for nothing or misappropriating a company’s content or image led to a number of lawsuits, which in turn have left the lasting perception that linking can lead to liability. While certain forms of links may be actionable, much of the linking that takes place online is not.

Liability for linking under the Copyright Act typically is limited to claims for secondary liability where the link encourages or induces infringement. Copyright liability also potentially could be imposed where a link displays a live performance or streamed transmission that constitutes a public performance. Liability alternatively potentially could be imposed where a link is created in violation of a copyright license or contract, such as website Terms of Use, where copyright liability was premised on exceeding the scope of the license. In general, however, it is difficult to impose liability under the Copyright Act for most types of links.

Copyright law also may not be helpful by analogy when a

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<sup>2</sup>See *supra* § 9.02.

<sup>3</sup>See *infra* § 9.04 (frames and in-line and embedded links).

breach of contract dispute turns on links.<sup>4</sup>

In contrast to regular links, in-line or embedded links or frames, while generally viewed in the same way as other links in most jurisdictions, may be directly actionable in some venues.

Even where a *prima facie* case may be made for copyright infringement, a potential defendant may be able to avoid liability under the information location tools safe harbor of the Digital Millennium Copyright Act, the *Sony* safe harbor or the defenses of fair use, *de minimis* infringement, or implied license.<sup>5</sup>

Under the Lanham Act, a link could lead to liability to the extent that it falsely suggests sponsorship, affiliation or endorsement. The risk of consumer confusion may be greatest when content is framed or made accessible through in-line links, depending on how they are structured and what notices or disclaimers may be prominently posted. A confusing link potentially could be actionable based on traditional likelihood of confusion analysis and, even more so, initial interest confusion, where recognized.<sup>6</sup>

The significance of a simple link should not be overstated. A link facilitates navigation from one location to another, but usually does not lead people to places they could not otherwise go.

Links also generally are favored by most site owners. Among other things, the more links that are established to a site, the higher the site will be ranked in response to search engine queries.

A link often does little more than make it easy for a user to point and click to quickly go to a site that otherwise could be accessed by typing out a URL or finding the location using a search engine. Few people would dispute that a site

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<sup>4</sup>See *Panda Paws Rescue v. Walters*, Case No. C20-5700JLR, 2021 WL 22591, at \*6 (W.D. Wash. Jan. 4, 2021) (denying defendant's motion to dismiss plaintiff's breach of contract claim, alleging that by linking to a video the defendant breached his settlement agreement obligation to not "display" certain images, because even though a link does not display an image for purposes of copyright law under *Perfect 10*, what the parties intended by the term in their contract is a disputed issue that could not be resolved on a motion to dismiss).

<sup>5</sup>See *infra* §§ 9.03[3][B], 9.03[3][C].

<sup>6</sup>See *supra* § 7.08[2].

owner generally<sup>7</sup> could display a URL prominently for users to copy (or cut and paste into their browsers).

Viewed in context, an ordinary site link typically is merely the interactive analogue to an address or telephone listing publicized by a third-party in a newspaper or magazine.<sup>8</sup> The acts of embedding code (which instructs a browser to go to a specific URL) and displaying the typed address in a different color (or placing an icon on top of it), therefore, should not in and of themselves be deemed actionable (and typically do not absent additional facts such as active encouragement to access infringing material, a link used to create a public performance in a frame, in-line link or embedded link, or use in ways that under the Lanham Act would be viewed as likely to cause confusion or dilution).

Hypertext links may be established as either *site links* or *content links*. A site link connects a visitor to the first page of a website, where website owners typically include introductory information intended to promote the site and any goods or services they sell, and include links to the terms and conditions for visiting the location. While some site owners sought to establish legal precedent restricting content links in the early days of the commercialization of the Internet, they were largely unsuccessful in doing so.

Similarly, efforts to restrict content links (also known as *deep links*), as compared to site links, were also largely unsuccessful. A content or deep link connects a visitor directly to specific material posted beyond the homepage. A content link therefore allows a user to bypass whatever introductory promotional material (or legal notices) the owner of the site may have intended visitors to review before gaining access to the linked content. In some cases, a content link connects to more desirable material that may have been posted solely as an inducement for people to visit the site and review promotional information or advertisements on

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<sup>7</sup>A list of addresses to otherwise unknown or difficult to locate sites, where infringing content or information on how to find infringing content or how to disable anti-piracy devices is posted, could potentially give rise to a claim for contributory copyright infringement if the list in fact was used by people to make infringing copies. *See supra* § 4.11.

<sup>8</sup>Creating an ordinary site link is not substantially different from including a company's telephone number in a magazine (except that on *terra firma* the magazine will not automatically dial the number in the same way that a browser will call up a website in response to a link and a user's click of a mouse).



the homepage. Content links, unlike site links, therefore were perceived as unfair by some site owners in the early days of the Internet (although not necessarily unlawful). Unless restricted by an enforceable contract or license or likely to cause confusion under the Lanham Act, an ordinary content link *per se* is not actionable, even if it may be viewed as more objectionable than a link to a site's homepage.

Today, there are other, more effective means available to grab someone's attention or make sure they assent to Terms and Conditions before using a site, than forcing users to click through other pages first. Indeed, as a practical matter, a site or service cannot easily restrict access to internal pages on a website without running the risk that users will lose patience and never click through to material made available only after a user takes multiple intermediary steps.

In the early days of the commercial Internet, when objections to deep links were first raised, some site owners sought to force visitors through a series of screens before allowing them to access particular content. Even then, however, an owner's homepage often could be easily by-passed if a user bookmarked an internal page (albeit usually after having visited the owner's homepage at least one time) or accessed the content via a search engine query.

In addition to potential exposure for the link itself, copyright or trademark liability could potentially arise if a site owner, in conjunction with establishing an otherwise permissible link to another site, uses a protected work as an icon (such as a copyrighted cartoon character or the company logo of the linked site), or a trademark or service mark as underlined text or an icon from which the link may be accessed. Uses of a company's name in a non-trademark sense or as a fair use, by contrast, generally would be permissible.<sup>9</sup> Use of logos or protected images in particular are less likely to be deemed a fair use under the Lanham Act if the court determines that more of the mark was used than necessary in connection with any plausibly fair use. Where plain text would suffice, more substantial uses may not be found fair.

In contrast to ordinary links, companies may face somewhat greater risks in connection with embedded links, inline links or links that display linked content in frames,

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<sup>9</sup>*See supra* § 6.14.



which are separately addressed in sections 9.03 and 9.04.

Sponsored links, which are links used in connection with advertising, are separately analyzed in section 9.11.

### 9.03[2] Linking Compared to Caching

To a user, there may be no practical difference between pointing and clicking on an icon that will connect to genuine content on an authorized website via a link, and pointing and clicking on an icon that will call up the same material that had been cached. The legal difference between caching and linking, however, may be more pronounced. Although it could constitute copyright infringement to copy the graphic representations found on a given website to a different location, a link merely is an instruction to a browser to go from one location to another and therefore generally does not create a “copy” within the meaning of *MAI Systems Corp. v. Peak Computer, Inc.*<sup>1</sup> As the Ninth Circuit observed, “[w]hile in-line linking and framing may cause some computer users to believe they are viewing a single . . . webpage, the Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion.”<sup>2</sup>

Caching occurs for multiple reasons over the internet—both legitimate and (in the case of spoofers) nefarious. Caching relieves congestion over the Internet and allows for faster user access to specific content, but may deny a site owner valuable user data and advertising revenue. Hyperlinks, by contrast, increase traffic to a website and may benefit both the company that establishes the link, and the linked site, by increasing visits to both locations. On the other hand, if the linked site is already popular, the linking site may simply be trying to increase traffic to its own site by establishing links to popular third party locations. Links may also be troubling to companies to the extent that they could be construed as suggesting sponsorship, affiliation or endorsement.

Except where visitors or linking sites mask their identity,

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#### [Section 9.03[2]]

<sup>1</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); *see generally supra* §§ 4.03, 9.01.

<sup>2</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007).

a website owner (or its host) generally knows the last page viewed before a user accessed its site<sup>3</sup> and in those instances can determine the source of links to its site (at least those links that actually point to the correct address and are used to access it). By comparison, the owner of a website may be unaware that its site has been cached unless it stumbles upon the cached location or a customer complains directly to it.

Indeed, in one case, Judge Margaret Morrow of the Central District of California even cited linking as a permissible non-infringing alternative to copying content from another site, which effectively undermined the defendant's fair use and First Amendment defenses in a copyright infringement suit. In that case—*Los Angeles Times v. Free Republic*<sup>4</sup>—defendant's racist website included verbatim copies of newspaper articles that had originally appeared in *The L.A. Times* and *Washington Post*. The defendants had argued that linking was impractical because the plaintiffs' articles appeared online free of charge for only a brief period of time before they were archived and made available for a fee. Judge Morrow wrote: "That this is so does not make linking plaintiffs' websites to the Free Republic site 'impractical.' It merely requires that Free Republic visitors pay a fee for viewing plaintiffs' articles just as other members of the public do."<sup>5</sup>

The court also rejected the argument that linking was impractical because unsophisticated users would be confused by the link. In a statement that contradicts the view of more conservative lawyers who believe that content (or "deep") linking generally violates the Lanham Act, Judge Morrow wrote (in the context of copyright fair use) that "defendant's assertion that unsophisticated Internet users would be confused by links is unpersuasive. Linking is familiar to most Internet users, even those who are new to the web."<sup>6</sup>

Unlike a typical link, which remains accessible for a defined period of time, the *Free Republic* case involved

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<sup>3</sup>See *infra* §§ 26.01 to 26.03, 37.02.

<sup>4</sup>*Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 2000 WL 565200 (C.D. Cal. Mar. 31, 2000).

<sup>5</sup>*Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 2000 WL 565200 (C.D. Cal. Mar. 31, 2000).

<sup>6</sup>*Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d 1453, 2000 WL 565200 (C.D. Cal. Mar. 31, 2000).

content links that were frequently rotated because the plaintiffs' news stories remained online only briefly.

### **9.03[3] Potential Copyright Liability for Creating Hyperlinks**

#### **9.03[3][A] Grounds for Liability**

##### **9.03[3][A][i] In general**

A link is merely an instruction to a browser to go from one location to another. Accordingly, most courts that have considered the issue have held that a link, by itself, does not implicate "copying." The leading case is *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>1</sup> in which the Ninth Circuit adopted the "server test" in evaluating a claim asserting that links to photographs on other internet locations constituted unauthorized reproduction, distribution and public display under the Copyright Act. Under this test, merely creating a link to content on another server would not lead to direct liability, although it potentially could result in secondary liability for inducing copyright infringement or contributory or vicarious liability (based on direct infringement by a user, if any).<sup>2</sup> The only other circuit to consider the issue as of this writing is the Seventh Circuit, which held in *Flava Works, Inc. v. Gunter*,<sup>3</sup> that a claim for contributory copyright infringement could not be based on creating bookmark links to infringing videos. The Seventh Circuit further suggested in *dicta* that direct liability similarly could not be imposed. Because of these two precedential circuit court opinions and the recognition that the entire structure of the World Wide Web is premised on establishing links between sites (and from search engines), ordinary links have rarely resulted in liability for copyright infringement except where links are obviously used to promote infringement (such as when a site creates numerous links to pirated content, or links to unauthorized material previously displayed on the defendant's

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#### **[Section 9.03[3][A][i]]**

<sup>1</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>2</sup>The grounds for establishing liability for direct, contributory, and vicarious liability, and for inducement, are analyzed extensively in section 4.11.

<sup>3</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

own site, in lieu of hosting the material directly)<sup>4</sup> or when linking occurs in conjunction with other acts of infringement<sup>5</sup> (although linking has been included in boilerplate lists of activities to be enjoined in cases where other acts of infringement have been established, especially where the orders are entered as default judgments or as part of a stipulated settlement). There also should be no difference in most cases whether a link is established to the homepage of another site or is a content link (or “deep link”), which leads directly to information on an interior page of a website, despite several highly publicized efforts in the 1990s and thereafter to prevent this form of linking.<sup>6</sup> While merely establishing a link to otherwise noninfringing content rarely has led to direct liability, some district courts—in decisions that disagree with or seek to distinguish *Perfect 10*—have held that a prima facie case for direct liability potentially may be made (subject to potential defenses) where in-line or embedded links or frames create public displays<sup>7</sup> of photographs.<sup>8</sup> From

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<sup>4</sup>See, e.g., *Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02–CV–01011–DFH–TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004) (holding that a triable issue of fact existed on the issue of defendant’s potential direct liability for creating links to unauthorized photographs of plaintiff’s products, after having been warned to stop displaying the pictures itself on its own website); *Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002) (denying cross-motions for summary judgment in a suit brought against a service that aggregated links to infringing music files, finding that a reasonable trier of fact could determine that MP3Board “engaged in an overall course of conduct which materially contributed” to copyright infringement by offering a search engine that collected and organized links to third-party sites that included audio files, solicited third-party links to such sites, offered a tutorial for new users that provided instructions on how to locate and download audio files and used one of plaintiffs’ protected works as an example in the tutorial).

<sup>5</sup>See, e.g., *Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02–CV–01011–DFH–TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004) (holding that a triable issue of fact existed on the issue of defendant’s potential direct or contributory liability for creating links to unauthorized photographs of plaintiff’s products, and for designing, creating and paying for the pages that it linked to, after having been warned to stop displaying the pictures itself on its own website); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (enjoining defendants from creating links to third-party sites that contained infringing material and encouraging users to visit those locations).

<sup>6</sup>See *infra* §§ 9.03[3][A][ii], 9.03[6], 9.03[7].

<sup>7</sup>The exclusive rights of a copyright owner—distribution, reproduction, public performance, public display, digital transmission and adapta-

a copyright perspective, embedded, in-line or framed links to static content should not be actionable because—like all links—they are set up merely as instructions to a browser to view material posted on a third party location and do not create a separate “fixed” copy on the website or the social media post that frames or establishes the in-line or embedded link to the third-party material, as discussed in section 9.03[3]. Nevertheless, some district courts, which consider an embedded link to a photograph to create a public display, would distinguish embedded or in-line links and frames from regular links in cases involving the display of a photograph from a third party website because the photo could be seen automatically via the embedded or inline link or frame (rather than after clicking on the link and being transferred to a third party website).

A *prima facie* case also was found for in-line linking live performances of streamed content,<sup>9</sup> which may be accounted for because, unlike the other exclusive rights of a copyright

tion—are analyzed extensively in section 4.04[1].

<sup>8</sup>See, e.g., *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*3-5 (S.D.N.Y. 2021) (denying defendant’s motion to dismiss plaintiff’s copyright infringement claim, holding that plaintiff stated a claim that Sinclair’s placement of an embedded link to plaintiff’s video of a starving polar bear (which plaintiff had uploaded to Instagram and Facebook), in an article describing how the video “went ‘viral,’” constituted an unauthorized public display, and that Sinclair’s fair use defense could not be resolved on a motion to dismiss); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018) (holding that an image displayed via embedded links in various publications, from the Twitter feed where it had been posted, constituted a public display under the Copyright Act; granting partial summary judgment to the plaintiff); *The Leader’s Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at \*10 (N.D. Tex. Nov. 22, 2017) (denying plaintiff’s motion for summary judgment on defendant’s counterclaim for copyright infringement, holding that plaintiff publicly displayed copyrighted content from defendant’s website by framing it on its own website; distinguishing framing from ordinary linking). *But see Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012) (holding that creating an in-line link to videos via frames from the defendant’s website did not amount to a public performance); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007) (holding that Google did not violate plaintiff’s public display right in its photographs by creating in-line links to them in frames).

<sup>9</sup>See *Live Nation Motor Sports, Inc. v. Davis*, 81 U.S.P.Q.2d 1826, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007) (holding that a link to a stream of a live webcast of motor races that were shown in real time constituted a public performance or display because those terms encompass “each step in the process by which a protected work wends its way to the audience”). *But see Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012)

owner, a public performance is “fixed” simultaneously with its transmission.<sup>10</sup>

Frames and in-line and embedded links are links that modify a user’s screen, displaying content from one location via a different site. These types of links are also addressed in section 9.04.

Aside from links to streamed content that may constitute public performances, ordinary links that lead to static material should not form the basis for a claim for direct infringement. Needless to say, even where a *prima facie* case may be established, substantial defenses, including the Digital Millennium Copyright Act safe harbor for “information location tools,” fair use,<sup>11</sup> and implied license<sup>12</sup> may

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(holding that creating an in-line link to videos via frames from the defendant’s website did not amount to a public performance).

<sup>10</sup>A work that is reproduced, distributed, adapted or publicly displayed is fixed in a tangible medium of expression “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C.A. § 101. By contrast, a work “consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.” *Id.*

<sup>11</sup>*See, e.g., Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing, as fair use, the copyright infringement claim of a photographer against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki’s career, which also quoted the text of the Instagram post); *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (entering judgment on the pleadings, based on fair use, in a Paparazzi photographer’s copyright infringement claim, brought against the publisher of *XXL* magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled *Cardi B Partners with Tom Ford for New Lipstick Shade*, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph); *see also Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020) (denying reconsideration). *Cf. Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*5-7 (S.D.N.Y. 2021) (denying defendant’s motion to dismiss plaintiff’s copyright infringement claim, premised on Sinclair’s placement of an embedded link to plaintiff’s video of a starving polar bear in an article describing how the video “went ‘viral,’” because Sinclair’s fair use defense could not be resolved on a mo-



tion to dismiss based solely on the allegations of the complaint, despite finding that the use was transformative); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 604-09 (S.D.N.Y. 2020) (holding, in an opinion decided before *Boesen* and *Walsh*, that, on the facts of that case, fair use could not be established as a matter of law at the pleadings stage, in a case where plaintiff posted a photograph of an ephemeral lake on March 13, 2019, and the very next day Newsweek allegedly published an article about the ephemeral lake, embedding plaintiff's Instagram post about the lake, as part of the article); see generally *supra* § 4.10[1] (analyzing fair use).

<sup>12</sup>An implied license generally may not be inferred where there is an express license agreement between the parties for the same subject matter. See, e.g., *Baer v. Chase*, 392 F.3d 609, 616-17 (3d Cir. 2004) ("There cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter.").

District court judges in New York have held that Instagram receives an express license from users who upload images to its platform, to allow other users to embed those images, but whether Instagram in turn grants its users a license to imbed images posted by other users, when they use Instagram's API (application programming interface) to embed a link to an image posted on Instagram's servers, is a question that could not be resolved through a motion to dismiss because additional evidence was required. See *McGucken v. Newsweek LLC*, 19 Civ. 9617 (KPF), 2020 WL 6135733, at \*1-3 (S.D.N.Y. Oct. 19, 2020) (affirming, in denying reconsideration, that "while Instagram's Terms of Use clearly granted Instagram a license to sublicense Plaintiff's publicly posted content, there was insufficiently clear language to support, in the context of a Rule 12(b)(6) motion, the existence of a sublicense between Instagram and Defendant."); *Sinclair v. Ziff Davis, LLC*, 18-CV-790 (KMW), 2020 WL 3450136, at \*1-2 (S.D.N.Y. June 24, 2020) (adhering to its previous holding that, "by agreeing to Instagram's Terms of Use, Plaintiff authorized Instagram to grant API users, such as Mashable, a sublicense to embed her public Instagram content, as set forth in Instagram's Platform Policy" but granting reconsideration, and revising its previous decision, by holding "that the pleadings contain insufficient evidence to find that Instagram granted Mashable a sublicense to embed Plaintiff's Photograph on its website."); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 603-04 (S.D.N.Y. 2020) (denying Newsweek's motion to dismiss, holding that while Instagram's Terms of Use "unequivocally grant Instagram a license to sublicense Plaintiff's publicly posted content . . . , and the Privacy Policy clearly states that 'other Users may search for, see, use, or share any of your User Content that you make publicly available through' Instagram . . . , " the court could not dismiss plaintiff's claims; "Although Instagram's various terms and policies clearly foresee the possibility of entities such as Defendant using web embeds to share other users' content . . . , none of them expressly grants a sublicense to those who embed publicly posted content. Nor can the Court find, on the pleadings, evidence of a possible implied sublicense. . . . While the Court acknowledges that it may be possible to read Instagram's various terms and policies to grant a sublicense to embedders, the Court's role on a Rule 12(b)(6) motion is to 'draw all reasonable inferences in Plaintiff's favor.' ").



insulate a party from liability.<sup>13</sup>

### 9.03[3][A][ii] Case Law Analysis

The leading copyright case on links is *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>1</sup> in which the Ninth Circuit adopted the “server test” to evaluate whether a given online use violated plaintiff’s public display or distribution rights. Under this test, “a computer owner that stores an image as electronic information and serves that electronic information directly to the user . . . is displaying the electronic information in violation of a copyright holder’s exclusive display right. Conversely, the owner of a computer that does not store and

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In *Ziff Davis*, Judge Wood previously had granted Ziff Davis’s motion, dismissing Sinclair’s copyright infringement claim, based on the finding that Mashable had used plaintiff’s photograph pursuant to a valid sublicense from Instagram. *See Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 342, 344-47 (S.D.N.Y. 2020). She explained:

The Terms of Use state that, by posting content to Instagram, the user “grant[s] to Instagram a non-exclusive, fully paid and royalty-free, transferable, sublicensable, worldwide license to the Content that you post on or through [Instagram], subject to [Instagram’s] Privacy Policy.” (Terms of Use, Rights § 1.) Pursuant to Instagram’s Privacy Policy (“Privacy Policy”), Instagram users designate their accounts as “private” or “public,” and can change these privacy settings whenever they wish. (Privacy Policy, Parties With Whom You May Choose to Share Your User Content § 1.). All content that users upload and designate as “public” is searchable by the public and subject to use by others via Instagram’s API. (*Id.* § 2.) The API enables its users to embed publicly-posted content in their websites. (Platform Policy, Preamble.). Thus, because Plaintiff uploaded the Photograph to Instagram and designated it as “public,” she agreed to allow Mashable, as Instagram’s sublicensee, to embed the Photograph in its website.

*Id.* at 345. On reconsideration, however, the court concluded that Instagram’s Platform Policy could be construed as granting Instagram API users the right to use the API to embed the public content of other Instagram users, but that was not the only interpretation to which it was susceptible (and accordingly construction of the license was not an issue that could be resolved on a motion to dismiss, which assumes as true the well pleaded facts in a plaintiff’s Complaint). *See Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136, at \*1.

<sup>13</sup>*See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018) (suggesting in *dicta* the potential availability of these defenses). Licenses and implied licenses are addressed in section 4.05[7]. The DMCA safe harbor for information location tools is addressed in section 4.12[7]. Fair use is analyzed in section 4.10[1]. *De minimis* infringement is addressed in section 4.08[1]. The *Sony* safe harbor is analyzed in sections 4.10[5] and 4.11[3]. Defenses to claims based on linking are addressed in summary form in sections 9.03[3][B] and 9.03[3][C].

#### [Section 9.03[3][A][ii]]

<sup>1</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

serve the electronic information to a user is not displaying that information, even if such owner in-line links to or frames the electronic information.”<sup>2</sup> Applying this test, a link to content housed on a third party site would not result in a finding of direct liability, at least in the Ninth Circuit.

In *Perfect 10 v. Amazon.com*, the Ninth Circuit ruled that Google potentially could be held directly liable for photos stored on its own servers,<sup>3</sup> but could not be held directly liable for links created to photos stored on third party websites. In the words of the court, “Google transmits or communicates only an address which directs a user’s browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself.”<sup>4</sup> Stated differently, “it is the website publisher’s computer, rather than Google’s computer, that stores and displays the infringing image.”<sup>5</sup> Multiple other courts have likewise agreed that a link, *per se*, does not create a copy.<sup>6</sup>

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<sup>2</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007).

<sup>3</sup>As discussed later in section 9.03[3][B], the court ultimately found the practice to be a fair use.

<sup>4</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 n.7 (9th Cir. 2007).

<sup>5</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (ultimately finding Google’s use to be a fair use).

<sup>6</sup>*See, e.g., Microsoft Corp. v. Softicle.com*, Civil Action No. 16–2762, 2017 WL 5517379, at \*2 (D.N.J. Sept. 29, 2017) (dismissing a claim for direct copyright infringement based on a link to infringing material; “Providing a link to a website containing infringing material does not, as a matter of law, constitute direct copyright infringement.”); *Pearson Education, Inc. v. Ishayev*, 963 F. Supp. 2d 239, 251 (S.D.N.Y. 2013) (holding that the defendant was not liable for distributing infringing content by merely linking to it on a different site; “A hyperlink does not itself contain any substantive content; in that important sense, a hyperlink differs from a zip file. Because hyperlinks do not themselves contain the copyrighted or protected derivative works, forwarding them does not infringe on any of a copyright owner’s five exclusive rights under § 106.”); *MyPlayCity, Inc. v. Conduit Ltd.*, No. 10 Civ. 1615(CM), 2012 WL 1107648, at \*12–14 (S.D.N.Y. Mar. 30, 2012) (granting summary judgment for the defendant on plaintiff’s claim for direct copyright infringement for distribution of plaintiff’s videogames by including a link on a toolbar it distributed following the termination of a license; “Because the actual transfer of a file between computers must occur, merely providing a ‘link’ to a site containing copyrighted material does not constitute direct infringement of a holder’s distribution right.”); *see also Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760 (7th Cir. 2012) (holding that a video bookmarking site could not

The Seventh Circuit considered links, in the context of in-line links, in *Flava Works, Inc. v. Gunter*,<sup>7</sup> in which the appellate panel in that case held that a claim for contributory copyright infringement could not be based on creating bookmark links to infringing videos. The Seventh Circuit further suggested in *dicta* in *Flava Works* that direct liability similarly could not be imposed.

While most forms of linking may not be actionable at all under the Ninth Circuit's server test, some district courts in other parts of the country have allowed claims for direct liability to proceed. Two of those cases pre-date *Perfect 10: Live Nation Motor Sports, Inc. v. Davis*,<sup>8</sup> which involved a live transmission, and *Batesville Services, Inc. v. Funeral Depot, Inc.*,<sup>9</sup> in which the court denied defendant's motion to dismiss a case where plaintiff had not simply linked to third party content, but linked to pages that he had allegedly helped create, to host content which previously had been on his own website until the copyright owner forced him to remove it.

In *Live Nation Motor Sports, Inc. v. Davis*,<sup>10</sup> which pre-dates *Perfect 10*, Judge Sam Lindsay of the Northern District of Texas held that a link to a stream of a live webcast of motor races that was shown in real time constituted a public performance or display because those terms encompass "each step in the process by which a protected work wends its way

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be held liable for contributory copyright infringement; "The direct infringers in this case are the uploaders; myVidster is neither a direct nor a contributory infringer—at least of Flava's exclusive right to copy and distribute copies of its copyrighted videos."); *Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004) (explaining that hyperlinking "does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved."); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1202 n.12 (N.D. Cal. 2004) (stating in *dicta* that "[a]lthough hyperlinking *per se* does not constitute direct copyright infringement because there is no copying . . . in some instances there may be a tenable claim of contributory infringement or vicarious liability.").

<sup>7</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

<sup>8</sup>*Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 81 U.S.P.Q.2d 1826 (N.D. Tex. Jan. 9, 2007).

<sup>9</sup>*Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004).

<sup>10</sup>*Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 81 U.S.P.Q.2d 1826 (N.D. Tex. Jan. 9, 2007).

to the audience.”<sup>11</sup> This outcome potentially may be justified because the definition of *fixation* for public performances is broader than for other uses. The Copyright Act provides that a “work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”<sup>12</sup> A work otherwise is only deemed fixed if it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” Under *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>13</sup> this means that a work is fixed when perceived on a user’s computer (and under *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*,<sup>14</sup> depending on the nature of the work, it may or may not be fixed for a sufficient duration to be deemed a *copy* under the Copyright Act). For a live performance or other streamed transmission,<sup>15</sup> however, the work is deemed *fixed* at the moment of transmission, arguably meaning that the link itself could be deemed to create the copy.<sup>16</sup>

<sup>11</sup>*Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 81 U.S.P.Q.2d 1826 (N.D. Tex. Jan. 9, 2007), citing *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10, 12 (2d Cir.2000), cert. denied, 532 U.S. 941 (2001); see also *United States v. American Society of Composers, Authors & Publishers*, 627 F.3d 64, 74-75 (2d Cir. 2010), cert. denied, 565 U.S. 929 (2011) (explaining *NFL v. PrimeTime*; “In holding the transmission in *Cartoon Network* not to be a public performance, we distinguished *NFL* on the basis that in that case the final act in the sequence of transmissions was a public performance.”).

<sup>12</sup>17 U.S.C.A. § 101.

<sup>13</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994); *supra* § 9.01.

<sup>14</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), cert. denied, 557 U.S. 946 (2009); *supra* § 9.01.

<sup>15</sup>For example, in *Warner Bros. Entertainment Inc. v. WTV Systems, Inc.*, 824 F. Supp. 2d 1003 (C.D. Cal. 2011), the court preliminarily enjoined operation of a DVD rental service that allowed users to stream videos over the Internet. While not a linking case, *WTV Systems* illustrates that when a website streams material to users it may be found to involve a public performance. See *id.*; see also *Aereo Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014) (holding that Aereo’s Internet-based streaming service involved public performances); see generally *supra* § 4.04[3] (analyzing *Aereo* and the right of public performance).

<sup>16</sup>The Second Circuit, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134-39 (2d Cir. 2008), cert. denied, 557 U.S. 946 (2009), also analyzed whether Cablevision could be held liable for a public performance, in a different portion of the opinion. The appellate panel held that

In the other case pre-dating *Perfect 10, Batesville Services, Inc. v. Funeral Depot, Inc.*,<sup>17</sup> a court in Indiana denied defendant's motion to dismiss, allowing plaintiff to proceed with claims for both direct and contributory copyright infringement arising out of links. In that case, the defendant not only created links to unauthorized photographs of plaintiff's products, but it had designed, created and paid for the pages that it linked to, after having been warned to stop displaying the pictures itself on its own website. The court acknowledged that hyperlinking "does not itself involve a violation of the Copyright Act (whatever it may do for other claims) since no copying is involved." It nonetheless found the facts "unusual enough to take th[e] case out of the general principle that linking does not amount to copying." *Batesville* therefore may be understood as a case where the defendant not only created a link but also created at least some of the infringing linked content. Alternatively, it perhaps should be seen as a case where a court was reluctant

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because the RS-DVR system, as designed, only made transmissions to a single subscriber using a single copy made by that subscriber, the universe of people capable of receiving an RS-DVR transmission was the single subscriber whose self-made copy was used to create that transmission, and therefore the transmission did not constitute a public performance. Hence, in contrast to *Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 81 U.S.P.Q.2d 1826 (N.D. Tex. Jan. 9, 2007), if a link merely allowed a single individual to access a single copy of an audiovisual work stored by that user in the cloud or copied by that user to a remote DVR, under *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 134-39 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009), the subsequent performance might not be deemed actionable as a *public performance* in the Second Circuit (although a link that allowed multiple users to simultaneously or even separately access the same copy likely would be found a public performance), to the extent this aspect of *Cartoon Network* remains valid after *American Broadcasting Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014). In *Aereo*, the Supreme Court held that a streaming service that allowed individuals to separately access individual transmissions of over-the-air television broadcasts using remote antennas constituted a public performance because of the service's similarity to a CATV cable service, which Congress sought to protect by the 1976 Copyright Act. The Court also rejected the notion that a public performance must be seen or heard by all recipients at the same time to be deemed a public performance. The majority did not expressly overrule *Cartoon Network*, however, and made clear that its limited holding was not necessarily intended to apply generally to cloud storage or in situations where the material accessed was licensed. *Aereo* and its longer term implications are analyzed in section 4.04[3] in chapter 4.

<sup>17</sup>*Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011-DFH-TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004).



to dismiss plaintiff's claim at the outset of the case.

More recently, some district court opinions have held that plaintiffs could state a claim for direct infringement based on embedded links to photos posted on Twitter<sup>18</sup> or Instagram and Facebook,<sup>19</sup> and a photo displayed using frames.<sup>20</sup>

In *The Leader's Institute, LLC v. Jackson*,<sup>21</sup> the court, in denying plaintiff's motion for summary judgment on defendant's counterclaim for copyright infringement, held that the plaintiff publicly displayed content from the defendant's website by framing it on its own website. The parties in that case were competitors in the team building industry. In accepting the argument that TLI committed copyright infringement by framing Magnovo's copyrighted content, Judge Jane Boyle of the Northern District of Texas, held, in an unreported opinion, that *Perfect 10* was factually distinguishable because, in that case, Google did not actually display infringing images but instead provided links for users to access sites that displayed infringing images.<sup>22</sup> The court explained:

Although the infringing content appeared under a Google banner, the user was essentially navigating to an infringing website to view Perfect 10's photos. The same is not true of users who visited the accused TLI websites. Upon visiting one of the TLI sites, a user would necessarily see Magnovo's content. Unlike Google, TLI did not merely provide a link by which users could access Magnovo content but instead displayed Magnovo's content as if it were its own.<sup>23</sup>

In other words, she distinguished ordinary links from framed links that (like in-line and embedded links) display the image in another location, rather than merely providing

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<sup>18</sup>See *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

<sup>19</sup>See *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510 (S.D.N.Y. 2021).

<sup>20</sup>See *The Leader's Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at \*10 (N.D. Tex. Nov. 22, 2017) (denying plaintiff's motion for summary judgment on defendant's counterclaim for copyright infringement, holding that plaintiff publicly displayed copyrighted content from defendant's website by framing it on its own website; distinguishing framing from ordinary linking).

<sup>21</sup>*The Leader's Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).

<sup>22</sup>*The Leader's Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at \*11 (N.D. Tex. Nov. 22, 2017).

<sup>23</sup>*The Leader's Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at \*11 (N.D. Tex. Nov. 22, 2017).

a connection to the source location.

Judge Boyle also rejected plaintiffs' argument that they could not have committed copyright infringement because they had not made any copies of Magnovo's work. She opined that, "to the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copyright owner's exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit."<sup>24</sup>

In *Goldman v. Breitbart News Network, LLC*,<sup>25</sup> the court granted partial summary judgment to the owner of the copyright to a photograph of NFL quarterback Tom Brady, which had been embedded in articles published by the defendants from Twitter, where the photo had been posted. Southern District of New York Judge Katherine Forrest conceded that "none of the defendant websites copied and saved the Photo onto their own servers. Rather, they made the photo visible in their articles . . ." through embedded links.<sup>26</sup> She nevertheless held that the embedded links violated plaintiff's public display right in the photo based on the broad meaning given to *display* in the legislative history of the Copyright Act.<sup>27</sup> Among other things, the court concluded that "possession of an image" was not necessary, under the Copyright Act, to display it.<sup>28</sup>

In so ruling, Judge Forrest expressly rejected the Ninth Circuit's server test,<sup>29</sup> explaining that "[t]he plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence [*Aereo*] provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the

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<sup>24</sup>*The Leader's Institute, LLC v. Jackson*, Civil Action No. 3:14-CV-3572-B, 2017 WL 5629514, at \*11 (N.D. Tex. Nov. 22, 2017).

<sup>25</sup>*Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

<sup>26</sup>*Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 587 (S.D.N.Y. 2018).

<sup>27</sup>*Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 588-89 (S.D.N.Y. 2018).

<sup>28</sup>*See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018).

<sup>29</sup>*Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 590-93 (S.D.N.Y. 2018). Judge Forrest argued that the Ninth Circuit had conflated the display right in section 106(5) with the reproduction right in section 106(1). *See id.* at 595.



Copyright Act.”<sup>30</sup>

In the alternative, the court held that if the Second Circuit were to adopt the server test, it would be inapplicable in this case because *Perfect 10* involved a search engine where users clicked on a link before an image was displayed. By contrast, Judge Forrest considered it significant that in *Breitbart* the defendants created the link that was made visible to users who accessed the articles in which the photo was visible without requesting it.<sup>31</sup> This distinction—between whether an image is directly viewable or not—doesn’t get at the underlying legal issue of whether a link creates a *copy*.

Despite her holding on the issue of public display, Judge Forrest conceded that several defenses could apply. She explained that “there are genuine questions about whether plaintiff effectively released his image into the public domain when he posted it to his Snapchat account. Indeed, in many cases there are likely to be factual questions as to licensing and authorization. There is also a very serious and strong fair use defense, a defense under the Digital Millennium Copyright Act, and limitations on damages from innocent infringement.”<sup>32</sup> Indeed, subsequent cases in the Southern and Eastern Districts of New York have dismissed claims or

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<sup>30</sup>*Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 593 (S.D.N.Y. 2018).

<sup>31</sup>*See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595-96 (S.D.N.Y. 2018). In *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019), the court, in denying the motion of the owner and operator of InfoWars to dismiss counterclaims brought against it, cited *Goldman v. Breitbart* and *The Leader’s Institute v. Jackson* for the proposition that the server test might be inapplicable to a case where in-line links to defendant’s copyrighted photographs were created by InfoWars, where the defendant could not cite to a Ninth Circuit case applying the server test “outside the search engine context.” This opinion, which involved only a cursory analysis of the issue, should be best understood in the context of a ruling on a motion to dismiss where InfoWars had sought unsuccessfully to have the court take judicial notice of an array of facts. Whether a work is displayed by creating a link to a third party website is not a function of whether the party creating the link is a search engine or a controversial political conspiracy news site. What constitutes a *display* is a matter of copyright law, not a function of a given business model.

<sup>32</sup>*See Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 596 (S.D.N.Y. 2018). Licenses and implied licenses are addressed in section 4.05[7]. The DMCA safe harbor for information location tools is addressed in section 4.12[7]. Fair use is analyzed in section 4.10[1]. Other potential defenses to a claim for copyright infringement based on linking

granted judgment on the pleadings in cases involving embedded links to Instagram posts, finding the practice a fair use.<sup>33</sup> Likewise, licensing questions have been analyzed in district court opinions that have held that Instagram receives an express license from users for images they upload to its platform to allow other users to embed those images (although whether Instagram, in turn, granted its users a license to embed those images when they use Instagram's API (application programming interface) could not be determined at the outset of a case on a motion to dismiss because additional evidence was required).<sup>34</sup>

include *de minimis* infringement and the *Sony* safe harbor. See *infra* §§ 9.03[3][B], 9.03[3][C].

<sup>33</sup>See *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing, as fair use, the copyright infringement claim of a photographer against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki's career, which also quoted the text of the Instagram post); *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (entering judgment on the pleadings, based on fair use, in a Paparazzi photographer's copyright infringement claim, brought against the publisher of *XXL* magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled *Cardi B Partners with Tom Ford for New Lipstick Shade*, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph); see also *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020) (denying reconsideration). Cf. *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*5-7 (S.D.N.Y. 2021) (denying defendant's motion to dismiss plaintiff's copyright infringement claim, premised on Sinclair's placement of an embedded link to plaintiff's video of a starving polar bear in an article describing how the video "went 'viral,'" because Sinclair's fair use defense could not be resolved on a motion to dismiss based solely on the allegations of the complaint, despite finding that the use was transformative); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 604-09 (S.D.N.Y. 2020) (holding, in an opinion decided before *Boesen* and *Walsh*, that, on the facts of that case, fair use could not be established as a matter of law at the pleadings stage, in a case where plaintiff posted a photograph of an ephemeral lake on March 13, 2019, and the very next day Newsweek allegedly published an article about the ephemeral lake, embedding plaintiff's Instagram post about the lake, as part of the article).

<sup>34</sup>See *McGucken v. Newsweek LLC*, 19 Civ. 9617 (KPF), 2020 WL 6135733, at \*1-3 (S.D.N.Y. Oct. 19, 2020) (affirming, in denying reconsideration, that "while Instagram's Terms of Use clearly granted Instagram a

In *Nicklen v. Sinclair Broadcast Group, Inc.*,<sup>35</sup> which like *Breitbart* was brought in the Southern District of New York, Judge Jed Rakoff denied Sinclair’s motion to dismiss plaintiff’s copyright infringement claim, holding that plaintiff stated a claim that Sinclair’s placement of an embedded link to plaintiff’s video of a starving polar bear, in an article describing how the video “went ‘viral,’” constituted an unauthorized public display, and that Sinclair’s fair use defense could not be resolved on a motion to dismiss. Judge Rakoff acknowledged that Sinclair’s use may well be a fair use, noting that the original purpose and meaning of the video was likely to highlight the cruel effects of climate change, whereas Sinclair’s article focused on the video’s popularity, which thus was transformative and weighed in favor of a finding of fair use.<sup>36</sup> He concluded, however, that fair use could not be resolved with finality in that case on a motion to dismiss, noting, for example, that a news article about a viral video was unlikely to threaten the market for the genu-

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license to sublicense Plaintiff’s publicly posted content, there was insufficiently clear language to support, in the context of a Rule 12(b)(6) motion, the existence of a sublicense between Instagram and Defendant.”); *Sinclair v. Ziff Davis, LLC*, 18-CV-790 (KMW), 2020 WL 3450136, at \*1-2 (S.D.N.Y. June 24, 2020) (adhering to its previous holding that, “by agreeing to Instagram’s Terms of Use, Plaintiff authorized Instagram to grant API users, such as Mashable, a sublicense to embed her public Instagram content, as set forth in Instagram’s Platform Policy” but granting reconsideration, and revising its previous decision, by holding “that the pleadings contain insufficient evidence to find that Instagram granted Mashable a sublicense to embed Plaintiff’s Photograph on its website.”); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 603-04 (S.D.N.Y. 2020) (denying Newsweek’s motion to dismiss, holding that while Instagram’s Terms of Use “unequivocally grant Instagram a license to sublicense Plaintiff’s publicly posted content . . . , and the Privacy Policy clearly states that ‘other Users may search for, see, use, or share any of your User Content that you make publicly available through’ Instagram . . . ,” the court could not dismiss plaintiff’s claims; “Although Instagram’s various terms and policies clearly foresee the possibility of entities such as Defendant using web embeds to share other users’ content . . . , none of them expressly grants a sublicense to those who embed publicly posted content. Nor can the Court find, on the pleadings, evidence of a possible implied sublicense. . . . While the Court acknowledges that it may be possible to read Instagram’s various terms and policies to grant a sublicense to embedders, the Court’s role on a Rule 12(b)(6) motion is to ‘draw all reasonable inferences in Plaintiff’s favor.’”).

<sup>35</sup>*Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510 (S.D.N.Y. 2021).

<sup>36</sup>*See Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*5 (S.D.N.Y. 2021).

ine work, but could do so if Sinclair’s use was widespread.<sup>37</sup>

In ruling on whether embedding a link to an image in social media constitutes a public display, Judge Rakoff, like Judge Forrest, criticized the Ninth Circuit’s server test, writing that “[t]he Ninth Circuit’s approach, under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer’s computer, makes the display right merely a subset of the reproduction right.”<sup>38</sup>

Judge Rakoff also argued that the server test distinguishes between “showing a copy possessed by the infringer and showing a copy possessed by someone else[.]”<sup>39</sup> which the Copyright Act does not. But this analogy is inapt because the Copyright Act in fact makes numerous distinctions between infringement and permitted use in considering identical copies, depending on whether the copyrighted work is licensed or subject to the First Sale doctrine, for example.<sup>40</sup> In addition, in digital media, a single copy may amount to a reproduction, distribution and/or public display—or none of the above—depending on how it has been placed online, and by whom, and the distribution system used.<sup>41</sup> Judge Rakoff’s underlying assumption about the nature of copyrighted works in digital media, in holding that embedding a link constitutes a public display, is thus flawed.

Judge Rakoff relied on a dictionary definition of *display*,

<sup>37</sup>See *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*6-7 (S.D.N.Y. 2021) (noting that while “the pleadings alone could establish fair use in an appropriate case . . . this is not the rare case in which the Court can make a fair use determination simply by comparing the two works, such that ‘discovery would not provide additional relevant information.’”) (quoting *Arrow Productions, Ltd. v. Weinstein Co.*, 44 F. Supp. 3d. 359, 368 (S.D.N.Y. 2014)).

<sup>38</sup>*Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*4 (S.D.N.Y. 2021), citing Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 32 Colum. J. L. & Arts 417, 430 (2019) (arguing that the server test “convert[s] the display right into an atrophied appendage of the reproduction right” and thereby “ignores Congress’s endeavor to ensure that the full ‘bundle’ of exclusive rights will address evolving modes of exploitation of works”).

<sup>39</sup>*Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*4 (S.D.N.Y. 2021).

<sup>40</sup>See generally *infra* § 16.02[1] (distinguishing a true license from a transaction subject to the First Sale doctrine).

<sup>41</sup>See generally *supra* § 4.04[3] (analyzing overlapping rights when copyrighted works are uploaded, downloaded or placed online).

rather than exclusively on Copyright Act definitions and case law, to conclude that “under the plain meaning of the Copyright Act, a defendant violates an author’s exclusive right to display an audiovisual work publicly when the defendant without authorization causes a copy of the work, or individual images of the work, to be seen — whether directly or by means of any device or process known in 1976 or developed thereafter.”<sup>42</sup>

The focus in *Breitbart* and *Sinclair* on whether a photograph is displayed because it is seen blurs the distinction over whether the image is linked from another location or actually copied by the party that creates an embedded link—in other words whether there is causation. A public display occurs on the server where it is *displayed*, not everywhere it is *seen*. Indeed, were the rule otherwise, a single act of display on a website server could result in almost limitless liability.

One of the problems with judge-made tests like the “server test” is that the simplicity it affords may obscure the underlying legal issue, which in the case of links (including embedded links, in-line links and frames) is the question of *where* has a copy been made (*i.e.*, fixed in a tangible medium of expression) and, if that copy is actionable, who is legally responsible. Except in cases involving a public performance where the copy is made simultaneous with its transmission, this is the proper question to ask: has a *copy* been made, within the meaning of the Copyright Act’s fixation requirement (consistent with cases such as *MAI v. Peak*) and, if so, is there a legal basis to impose either direct or secondary liability for the creation of that copy. *Copies* are defined under the Copyright Act as “material objects, other than phonorecords, [1] in which a work is fixed by any method now known or later developed, *and* [2] from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>43</sup> *Leaders Institute v. Jackson*, *Goldman v. Breitbart* and *Nicklen v. Sinclair* effectively focus on the second prong of this definition—perception (or display)—but overlook the requirement for fixation. When an in-line or embedded link is created by inserting a simple line of code to instruct a browser to view

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<sup>42</sup>*Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*3 (S.D.N.Y. 2021).

<sup>43</sup>17 U.S.C.A. § 101 (emphasis added).

an image located elsewhere, that image is not *fixed* by the act of linking. The fixed copies exist on the host server where the link directs a browser to go, and then on a user's screen RAM.

Likewise, the public display of the photo is by the party that posted it, not a party who links to it. To *display* a work means "to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."<sup>44</sup> The party that shows the image is the one that hosts it. A link may point a user to a location where the image is displayed, but it does not separately display the image. The displayed image exists only on the server to which the link directs a browser. Indeed, if the owner of the location where the image is displayed removes it or changes the address, the image would no longer be accessible by the embedded or in-line link (or in a frame). It is the place where the image is stored, where the image is displayed.

Because a link merely is an instruction to a browser to go from one location to another, aside from recent district court cases involving the public display of photographs accessed via an in-line or embedded link, copyright liability for creating a link typically would have to arise, if at all, based on claims for secondary liability, such as contributory infringement or potentially vicarious liability or inducement, where the underlying act of direct infringement<sup>45</sup> is the unauthorized cached copy made on a user's computer<sup>46</sup> when he or she accesses the link. As explained in *dicta* by one court, "[a]lthough hyperlinking *per se* does not constitute direct copyright infringement because there is no copying . . . in some instances there may be a tenable claim of contributory infringement or vicarious liability."<sup>47</sup>

In *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*<sup>48</sup>—the first U.S. case in which a court enjoined a defendant from establishing links to another website under

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<sup>44</sup>17 U.S.C.A. § 101.

<sup>45</sup>To state a claim for secondary liability, there must be an underlying act of direct infringement by a third party. See *supra* § 4.11.

<sup>46</sup>See *supra* § 9.02.

<sup>47</sup>*Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1202 n.12 (N.D. Cal. 2004) (*dicta*; citations omitted).

<sup>48</sup>*Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F.



copyright law—Judge Tena Campbell of the District of Utah entered an injunction prohibiting linking where defendants encouraged visitors to their website—via links—to access infringing content located on other sites. The case involved more than mere linking, however. Defendants—after being ordered to remove unauthorized copies of plaintiff’s protected “Church Handbook of Instructions” from their website—created links to three other locations where infringing copies of the book could be accessed. They also posted messages on their site encouraging visitors to browse the linked locations, print copies of the handbook, and email them to third-parties. Although the court concluded that plaintiffs had not shown that defendants contributed to the third-party acts of infringement by the owners of the linked sites, it ruled that defendants actively encouraged individual users to infringe plaintiff’s copyright by browsing the infringing sites (causing unauthorized temporary copies to be cached in users’ screen RAM) and printing or re-posting unauthorized copies on other websites.

Ultimately, it was the acts of encouragement by defendants, who already had been ordered to cease their acts of direct infringement—not the mere fact of linking—that was determinative in the *Utah Lighthouse Ministry* case. Indeed, the court likely would have entered the same order if the defendants had merely provided the URLs to visitors (rather than established links).

Similarly, in *Arista Records, Inc. v. MP3Board, Inc.*,<sup>49</sup> the court denied the defendant’s motion for summary judgment, finding that a reasonable trier of fact could determine that MP3Board “engaged in an overall course of conduct which materially contributed” to copyright infringement by offering a search engine that aggregated and organized links to third party sites that included audio files, solicited third party links to such sites, offered a tutorial for new users that provided instructions on how to locate and download audio files and used one of plaintiffs’ protected works as an example in the tutorial. The site also included a message board where users could post and answer questions. In response to user questions, MP3Board personnel personally searched for links to requested copyrighted songs, solicited

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Supp. 2d 1290 (D. Utah 1999).

<sup>49</sup>*Arista Records, Inc. v. Mp3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002).



users to provide the work directly when links could not be found, and obtained and posted passwords to enable users to access certain music files free of charge. According to the court, “[n]ot only could a jury find that MP3Board provided the facilities to promote infringing activity, but also that it directly assisted users in locating and downloading infringing files.” Thus, as in *Utah Lighthouse*, it was active encouragement, rather than links *per se*, that justified the court’s order.

Indeed, in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>50</sup> itself, although the Ninth Circuit had ruled that Google could not be held directly liable for creating links to photographs on third party sites, the panel remanded for further consideration the issue of whether Google and Amazon.com could be held contributorily liable for providing links to infringing websites as part of the operation of their search engines. The court held that “a computer system operator can be held contributorily liable if it ‘has *actual* knowledge that *specific* infringing material is available using its system,’ . . . and can ‘take simple measures to prevent further damage’ to copyrighted works, . . . yet continues to provide access to infringing works.”<sup>51</sup> While the Ninth Circuit panel in *Perfect 10 v. Amazon.com* cautioned that liability could not automatically be established (and indeed, based on the test articulated, it seemed unlikely that it would be, on remand, in *Perfect 10 v. Amazon.com*), the court made clear that contributory liability potentially could be imposed for creating links to third party content, at least where that content was infringing.<sup>52</sup>

This theory of imposing secondary liability for links was perhaps first articulated twelve years earlier in *Adobe Systems, Inc. v. Community Connexion, Inc.*,<sup>53</sup> *Adobe Systems, Inc. v. Geocities, Inc.*,<sup>54</sup> and *Adobe Systems, Inc. v. Tripod*,

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<sup>50</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>51</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (emphasis in original; citations omitted).

<sup>52</sup>Although ultimately never decided on the merits, four years later, the Ninth Circuit affirmed the district court’s denial of Perfect 10’s motion for a preliminary injunction where Perfect 10 could not establish that Google’s search engine operations would cause it irreparable harm. See *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011).

<sup>53</sup>*Adobe Systems, Inc. v. Community Connexion, Inc.*, Case No. C-96 20833 SW EAI (N.D. Cal. filed Oct. 7, 1996).

<sup>54</sup>*Adobe Systems, Inc. v. Geocities, Inc.*, Case No. 96-7035 TJH (ANx)

*Inc.*<sup>55</sup> In those cases, plaintiffs, software publishers Adobe Systems, Inc., Claris Corp. and Travelling Software, Inc., brought suit against ISPs that allegedly established links to websites where visitors could obtain infringing copies of plaintiffs' software or cracker tools. Plaintiffs alleged that the ISPs were notified of their customers' alleged acts, but continued to maintain the links, facilitating third-party acts of infringement. In addition to alleging contributory copyright infringement by the ISPs for maintaining the links even after having received notice, plaintiffs sued the ISPs' individual owners for vicarious copyright infringement<sup>56</sup> on the theory that (1) they had the right and ability to control the conduct of the direct infringer by establishing (or disabling) the links and (2) they benefited financially from the third-party acts of copyright infringement.<sup>57</sup>

These suits, which ultimately settled, were premised on the theory that liability could be imposed for facilitating infringement by creating links to sites that provided cracker tools. Whether contributory liability could be found (and, in turn, vicarious liability on the part of the owners of the sites) for establishing links to cracker tools or infringing content would have depended in part on the factual question of whether the link *materially* contributed to the underlying infringing conduct (such as—for example—if the infringing sites were not indexed and therefore were otherwise difficult to locate), or induced it (by, for example, providing detailed information in addition to the links), or merely facilitated access to locations that could just as easily have been found by the direct infringer with a search engine and a few extra clicks of a mouse.

Although a *prima facie* case for imposing third-party liability may be made (under appropriate circumstances) for knowingly<sup>58</sup> creating direct links to infringing content or tools that facilitate infringement, not all links should be

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(C.D. Cal. filed Oct. 7, 1996).

<sup>55</sup>*Adobe Systems, Inc. v. Tripod, Inc.*, Case No. 96-30189-MAP (D. Mass. filed Oct. 8, 1996).

<sup>56</sup>*See, e.g., Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996); *see generally, supra* § 4.11.

<sup>57</sup>A copy of one of the Adobe Systems, Inc. complaints is included in Appendix 1 at the end of this chapter. These lawsuits are discussed in greater detail in section 4.11[10].

<sup>58</sup>The standard for imposing contributory liability presupposes knowledge, although specific knowledge about particular acts of infringement

viewed the same way. Links generated by a neutral search engine are different from links on a page dedicated to finding hacker tools or infringing media.

While it had generally been assumed among Internet lawyers prior to 2008 that claims for secondary liability for linking theoretically could be stated based on contributory or vicarious liability (or possibly inducement), the question of whether there is an underlying act of direct infringement is more complicated after *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*<sup>59</sup>

To state a claim for secondary liability, there must be an underlying act of infringement by a third party. Absent an act of direct infringement, there is no basis for holding third-parties contributorily or vicariously liable or liable for inducement.<sup>60</sup> Unless a cached copy is retained for more than merely a transitory duration, however, the copy created in a

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need not be proven. *See, e.g., A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449 (C.D. Cal. 1996) (holding defendant liable for contributory infringement for selling time-loaded blank cassette tapes for making counterfeit tape recordings, even though the defendant may not have had specific knowledge about any particular infringing recording made); *see generally supra* § 4.11. Imputed, not actual knowledge, may be sufficient in appropriate cases where the surrounding circumstances would justify it (such as where all of the links on a given page direct visitors to sites dedicated to cracking anti-piracy devices).

A greater showing of knowledge, however, may be required in cases where contributory liability is sought to be imposed based solely on creating a link where, for example, the contributory act (establishing a link) is several steps removed from the act of direct infringement or the connection between the contributory and underlying acts otherwise is more attenuated. Absent knowledge or intent, the mere act of establishing a link generally would be viewed as a permissible and legitimate, noninfringing use of Internet resources.

<sup>59</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009); *see generally supra* § 9.01 (discussing the opinion and its significance in caching, linking and framing cases).

<sup>60</sup>*See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (inducement); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1092 (9th Cir.) (*en banc*), *cert. denied*, U.S. 1001 (1994); *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660 (SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002); *see generally supra* § 4.11[1].

In *Arista Records, Inc. v. MP3Board, Inc.*, the court acknowledged that although the plaintiffs had presented sufficient evidence to give rise to a “strong statistical inference” that MP3Board users downloaded copyrighted music, plaintiffs had failed to eliminate all genuine issues of fact, as required to obtain summary judgment.

user's screen RAM in fact would not be deemed actionable under *Cartoon Network*, at least in the Second Circuit.<sup>61</sup> Thus, while claims such as the ones asserted in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*<sup>62</sup> could still be raised in circuits that follow *MAI Systems Corp. v. Peak Computer, Inc.*<sup>63</sup> but not *Cartoon Network*, in a court applying *Cartoon Network*, a plaintiff would need to show that the copy created in screen RAM was fixed for more than merely a transitory duration or that, as in *MP3Board*, copies were actually downloaded (or otherwise copied in a more traditional sense), rather than merely viewed on a user's screen. Presumably, streaming material to the public also would qualify as creating an underlying infringing copy. As a result of *Cartoon Network*, however, the infringement analysis has become more complex (and jurisdiction-specific), at least in cases involving reproduction or distribution.

The premise that a user's act of accessing material via a link constitutes direct infringement also potentially may be challenged in some cases based on the absence of volitional conduct by the user. Even assuming that merely accessing a website is deemed to cause a "copy" of the site to be created in the user's temporary screen memory under *MAI*, the user may not have undertaken volitional conduct sufficient to rise to a level that would justify the imposition of direct copy-right liability.<sup>64</sup> While some users may volitionally access a link to obtain infringing material, others may not realize

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<sup>61</sup>See *supra* § 9.02.

<sup>62</sup>*Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999).

<sup>63</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); see generally *supra* § 9.01 (explaining the significance of MAI and its impact on caching, linking and framing).

<sup>64</sup>See *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (Usenet postings; in order to find direct liability, "there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."); see also, e.g., *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008) (holding that a cable service provider could not be held directly liable for its provision of a DVR service because "the operator . . . , the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine."), *cert. denied*, 557 U.S. 946 (2009); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004) (holding an ISP not liable for direct infringement where it was "simply the owner and

manager of a system used by others who [we]re violating [plaintiffs] copyrights and [wa]s not an actual duplicator itself . . . .”); *BWP Media USA, Inc. v. T&S Software Associates, Inc.*, 852 F.3d 436, 438-44 (5th Cir.) (affirming summary judgment for T&S Software Associates, an internet service provider, holding that it was not directly liable for hosting an internet forum on which third-party users posted images that allegedly infringed copyrights owned by plaintiffs), *cert. denied*, 138 S. Ct. 236 (2017); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666-67 (9th Cir. 2017) (affirming dismissal and summary judgment for defendants on plaintiff’s direct infringement claims brought against ISPs that provided access to the USENET and a software program to be able to view USENET content, which, among many other things, plaintiffs claimed included infringing copies of its photos); *Fox Broadcasting Co. v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014) (following *Cartoon Network* in holding that a cable company that provided technology to its subscribers that they could use to make copies was not likely to be held directly liable because Dish itself did not make the copies; direct liability requires a showing of “copying by the defendant”); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006) (“Google’s automatic archiving of USENET postings and excerpting of websites in its results to users’ search queries do not include the necessary volitional element to constitute direct copyright infringement.”), *aff’d*, 242 F. App’x 833 (3d Cir. 2007), *cert. denied*, 552 U.S. 1156 (2008); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (holding Google not liable for caching plaintiff’s website articles as part of its automatic caching of the Internet, where the plaintiff had indicated in the metatags of his website that he wanted to be crawled by Google; “Google is passive in this process . . . . Without the user’s request the copy would not be created and sent to the user, and the alleged infringement at issue in this case would not occur. The automated, non-volitional conduct by Google in response to a user’s request does not constitute direct infringement . . . .”); *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1057 (C.D. Cal. 2002) (following *Netcom* in holding that “AOL’s role in the infringement as a passive provider of USENET access to AOL users cannot support direct copyright infringement liability” in a case involving an eBook posted to a newsgroup), *aff’d in part and rev’d in part*, 357 F.3d 1072 (9th Cir. 2004); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1168 (C.D. Cal. 2002) (following *Netcom* for the proposition that “defendants must actively engage in one of the activities recognized in the Copyright Act” before direct liability could be imposed on a site or service); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167, 1172 (N.D. Ill. 1997) (holding a company which hosted a website on which infringing material was posted not liable for direct infringement because, even though it “provide[d] a service somewhat broader than the . . . Internet access provider in Religious Technology Center . . . [it] only provided the means to copy, distribute or display plaintiff’s works, much like the owner of a public copy machine used by a third-party to copy protected material.”); *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512 (N.D. Ohio 1997) (“some element of direct action or participation” is required); *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (finding no evidence that BBS operator caused infringing copies to be made merely by operating a



that the act of linking is purportedly unauthorized (for example, where the violation arises from allegedly exceeding the scope of a license rather than because the accessed material is pirated).

Without analyzing any of these questions, the Seventh Circuit, in *Flava Works, Inc. v. Gunter*,<sup>65</sup> vacated a preliminary injunction entered against myVidster, a social bookmarking site, finding that the plaintiff, the owner of copyrights to gay porn videos, was not likely to prevail on its claim of contributory copyright infringement based on myVidster's use of in-line links to display infringing copies of videos that had been "bookmarked" by users (in a case where the DMCA safe harbors were inapplicable).

myVidster allowed users to "bookmark" videos stored elsewhere on the Internet for other users to access via frames from its site.<sup>66</sup> Judge Posner, writing for himself and Judges Flaum and Wood, held that the plaintiff had not shown "personal conduct that encourages or assists the infringement" sufficient to establish contributory infringement, where myVidster allowed users to post bookmarks related to any topic (not just plaintiff's works or infringing material),

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BBS where third-parties posted infringing software). *But see Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding a BBS operator liable for infringing photographs potentially posted by a third-party because the Copyright Act is a strict liability statute); *see generally supra* § 4.11[2].

<sup>65</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012).

<sup>66</sup>When a user bookmarked a video, myVidster would automatically request the video's embed code from the host server, which included the URL for the video with instructions on how to display it. myVidster would then create a page on its site where the video could be viewed in a frame containing ads placed by myVidster. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 756 (7th Cir. 2012); *see generally infra* § 9.04[1] (analyzing framing). An image of the opening shot of the video would then be displayed as a thumbnail image on the myVidster site. Users who clicked on an image would be shown the video in a frame on the myVidster page for the video, via an in-line link to the host server. As explained by Judge Posner, a user "may think, therefore, that he's seeing the video on myVidster's website. But actually the video is being transmitted directly from the server on which the video is stored to the user's computer." *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 756 (7th Cir. 2012).

Flava operated a service that made its videos available to subscribers behind a paywall. Flava's Terms of Use allowed its subscribers to download videos for personal use but not upload them to other Internet sites. Flava had alleged that 300 bookmarks on myVidster linked to infringing copies of its works.

the infringing videos represented merely 300 out of over 1.2 million bookmarks available on its site, the allegedly infringing videos were available elsewhere on the Internet, myVidster was not providing a market for pirated works, and the losses identified by the plaintiff could not be ascribed entirely to myVidster. In so ruling, the court emphasized that myVidster could have been enjoined for backing up copies of bookmarked videos on its servers (which it had done, prior to being sued by Flava Works, for users who purchased premium memberships)<sup>67</sup> and suggested in *dicta* that Flava Works could be held liable for inducing copyright infringement if myVidster had *invited* people to post copyrighted videos on the Internet without authorization or bookmark them on its site.<sup>68</sup>

The outcome in *Flava Works* was influenced (perhaps unduly so) by the fact that users viewed, rather than downloaded, copies of videos from myVidster (although the court did not analyze whether streaming, under either the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*<sup>69</sup> or the Ninth Circuit's opinion in *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>70</sup> amounted to unauthorized reproduction) and by Judge Posner's conclusion that creating an in-line link did not amount to a public performance.<sup>71</sup>

In focusing on materiality and largely dismissing plaintiff's knowledge as immaterial, Judge Posner also took a different approach to evaluating links in *Flava Works* than the Ninth Circuit had in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>72</sup>

Whether and to what extent a claim may be stated for sec-

<sup>67</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754, 762–63 (7th Cir. 2012).

<sup>68</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758–59 (7th Cir. 2012); see generally *supra* § 4.11[6] (analyzing inducement).

<sup>69</sup>*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 557 U.S. 946 (2009); *supra* § 9.01; see generally *supra* § 4.03 (analyzing the fixation requirement under the Copyright Act in greater detail).

<sup>70</sup>*MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994); *supra* § 9.01; see generally *supra* § 4.03.

<sup>71</sup>*Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760–61 (7th Cir. 2012); see generally *supra* § 4.04[3] (analyzing what constitutes a reproduction and public performance in digital media).

<sup>72</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007) (reversing the entry of summary judgment on the issue of contributory infringement for providing links to allegedly infringing copies of



ondary copyright infringement based on links thus depends in part on which circuit's law is to be applied.

Even where a *prima facie* case of infringement may be shown, defendants may be able to avoid liability for copyright infringement for establishing links to unauthorized material by virtue of the fair use defense, implied license,

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plaintiffs' photographs because liability could be imposed where a defendant had knowledge of specific infringing images coupled with the failure to take "simple measures to prevent further damage."). In *Flava Works*, the plaintiff had sent myVidster takedown notices for specific videos, which the plaintiff allegedly had ignored, which arguably could have created a factual question about whether the defendant could be held liable for continuing to make the videos accessible via in-line links. See *supra* § 4.11[3] (analyzing liability for contributory copyright infringement based on notice and a failure to take corrective action). Focusing on the DMCA, rather than notice for purposes of contributory infringement, Judge Posner explained that failing to respond to notices was irrelevant unless myVidster was contributing to infringement. He wrote that "[t]he infringers are the uploaders of copyrighted work. There is no evidence that myVidster is encouraging them, which would make it a contributory infringement." *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 758 (7th Cir. 2012). While it is true that the DMCA creates a safe harbor, and that failing to comply with the requirements for safe harbor protection may not provide grounds for imposing liability for infringement (17 U.S.C.A. § 512; *supra* § 4.12), Judge Posner did not address *Perfect 10 v. Amazon.com* or other contributory infringement cases, including his own prior opinion in *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), that have held that liability for contributory infringement potentially could be imposed based on notice and a subsequent failure to take remedial action. Given that Judge Posner cited the *Perfect 10 v. Amazon.com* case in three different places in the *Flava Works* opinion but did not discuss its contributory infringement analysis or any similarity between that case and *Flava Works*, it seems likely that Judge Posner disagreed with the Ninth Circuit's conclusion that contributory liability for linking could be imposed merely based on notice and a subsequent failure to take simple measures to prevent further damage. See *supra* § 4.11[3] (analyzing the case in greater detail).

In focusing on materiality, Judge Posner's analysis was consistent with another Ninth Circuit case brought by Perfect 10 that also reached a different conclusion about contributory liability than the court in *Perfect 10 v. Amazon.com*. See *Perfect 10, Inc. v. Visa Int'l Service Ass'n*, 494 F.3d 788, 799–800 (9th Cir. 2007) (holding that defendants did not materially contribute to the underlying acts of infringement by providing payment processing services to websites that sold access to infringing images because they did "not operate the servers" on which the infringing images resided), *cert. denied*, 553 U.S. 1079 (2008); see also *Perfect 10, Inc. v. Visa Int'l Service Ass'n*, 494 F.3d at 810–18 (9th Cir. 2007) (Kozinski, C.J. dissenting) (arguing that the majority's finding in *Visa* was inconsistent with *Perfect 10 v. Amazon.com*); see generally *supra* §§ 4.11[3] (contributory infringement), 4.11[5][C] (analyzing *Perfect 10 v. Visa Int'l*).

the *Sony* safe harbor or the information location tools safe harbor created by the Digital Millennium Copyright Act,<sup>73</sup> which are addressed later in sections 9.03[3][B] and 9.03[3][C]. As discussed at greater length in those sections, implied license may provide a strong basis for establishing links to most publicly accessible, noninfringing locations, but may be easily negated in most instances where there was not detrimental reliance by the linking party if the owner of the linked material objects to the practice, such as in a letter, notice or email message.<sup>74</sup> Where available, fair use provides an absolute defense, but it must be proven by a multi-part balancing test, and therefore may be more difficult to establish except through litigation and a ruling on the merits<sup>75</sup> (although it been relied upon as the basis to grant preliminary relief, based solely on the pleadings, in at least two embedded link cases involving links to Instagram posts).<sup>76</sup> Where links have been generated by legitimate service providers, the Digital Millennium Copyright Act

<sup>73</sup>17 U.S.C.A. § 512(d); see generally *supra* § 4.12[7].

<sup>74</sup>See *infra* § 9.03[3][B].

<sup>75</sup>See *infra* § 9.03[3][B].

<sup>76</sup>See *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing, as fair use, the copyright infringement claim of a photographer against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki's career, which also quoted the text of the Instagram post); *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (entering judgment on the pleadings, based on fair use, in a Paparazzi photographer's copyright infringement claim, brought against the publisher of *XXL* magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled *Cardi B Partners with Tom Ford for New Lipstick Shade*, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph); see also *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020) (denying reconsideration). Cf. *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*5-7 (S.D.N.Y. 2021) (denying defendant's motion to dismiss plaintiff's copyright infringement claim, premised on Sinclair's placement of an embedded link to plaintiff's video of a starving polar bear in an article describing how the video "went 'viral,'" because Sinclair's fair use defense could not be resolved on a motion to dismiss based solely on the allegations of the complaint, despite finding that the use was transformative); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 604-09 (S.D.N.Y. 2020) (holding, in an opinion decided before *Boesen* and *Walsh*, that, on the facts

(DMCA) safe harbor for information location tools may insulate a service provider from liability for damages and attorneys' fees if it disables access to or removes a link upon receipt of a substantially compliant DMCA notification.<sup>77</sup> Likewise, where the links lead to both infringing and noninfringing locations, the *Sony* safe harbor may provide a defense based on substantial noninfringing use. In appropriate circumstances, linking also potentially may be justified as *de minimis* infringement.<sup>78</sup>

Just as the DMCA provides a strong defense for legitimate service providers, it provides an easy mechanism for copyright owners to have links disabled, regardless of whether linking *in fact* constitutes infringement, so long as the link established leads to infringing material.<sup>79</sup>

**9.03[3][A][iii] Liability for unwanted links to genuine material on a copyright owner's own site**

While linking to infringing material is actionable in appropriate circumstances, parties have had less success using copyright law to restrict links to genuine material on a copyright owner's own site where the claim of infringement is based on a link arguably created in violation of a license term (such as a deep link to otherwise noninfringing material).

Linking potentially may be restricted by contract or license, such as website Terms of Use. Where an enforceable copyright license has been agreed upon, a defendant's use of a site in ways that violate the license (such as linking) potentially could be deemed copyright infringement.<sup>1</sup> In practice, courts may be uncomfortable enforcing contractual

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of that case, fair use could not be established as a matter of law at the pleadings stage, in a case where plaintiff posted a photograph of an ephemeral lake on March 13, 2019, and the very next day Newsweek allegedly published an article about the ephemeral lake, embedding plaintiff's Instagram post about the lake, as part of the article).

<sup>77</sup>See *infra* § 9.03[3][C].

<sup>78</sup>See *infra* § 9.03[3][B].

<sup>79</sup>See *infra* § 9.03[3][D].

**[Section 9.03[3][A][iii]]**

<sup>1</sup>*E.g., Ticketmaster LLC v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096 (C.D. Cal. 2007) (holding that the defendant was bound by posted Terms that formed a non-exclusive license to access Ticketmaster's website where the defendant acknowledged that it was on notice that its access to

restrictions that limit otherwise permissible conduct.<sup>2</sup> Where asserted, claims over unwanted links to otherwise noninfringing material may turn on the enforceability of the alleged license. To date, few cases have been brought involving ostensibly unauthorized links to otherwise noninfringing content.

In *Ticketmaster Corp. v. Tickets.com, Inc.*,<sup>3</sup> Judge Harry L. Hupp of the Central District of California granted the defendant's motion to dismiss Ticketmaster's claim for contributory copyright infringement, ruling in part that Ticketmaster's purported license restrictions prohibiting deep linking were unenforceable because they were contained in Terms and Conditions which users were not actually required to review in order to access the Ticketmaster site and therefore were not part of a binding contract.<sup>4</sup>

In a subsequent decision,<sup>5</sup> the court denied the defendant's motion for summary judgment on Ticketmaster's breach of contract claim, finding that a contract could have been formed when Tickets.com proceeded into the interior of the Ticketmaster site after knowing of the conditions imposed by Ticketmaster for doing so. The *Ticketmaster* case, which also raised Lanham Act issues, is considered in greater detail in section 9.03[7].

In both theory and practice, it may be difficult to state a claim over unwanted links (other than in limited circumstances in a few district court opinions involving embedded links to photographs, as discussed in section 9.03[3][A][ii]). A plaintiff would have to establish that visiting its website was a licensed activity, that the license prohibited linking and that a site that established an unwanted link facilitated a third-party's act of infringement (i.e., a user's unauthorized visit, via a link, which created a copy of the website to be cached—or created—in the temporary memory of the visi-

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the site was subject to Terms); see generally *supra* § 5.03[2]; *infra* § 21.02[7].

<sup>2</sup>See *supra* § 5.02 (restrictions in database contacts); *infra* § 16.04 (misuse).

<sup>3</sup>*Ticketmaster Corp. v. Tickets.com, Inc.*, 54 U.S.P.Q.2d 1344, 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

<sup>4</sup>See *infra* § 21.03 (discussing Tickets.com and enforceable unilateral contracts).

<sup>5</sup>*Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 Copr. L. Dec. P 28607, 2003 WL 21406289 (C.D. Cal. Mar. 7, 2003).

tor's computer). Otherwise, a plaintiff would have difficulty explaining how creating a temporary copy via a link constituted infringement while creating the same temporary copy through direct access would not. To establish a copyright violation merely for the act of creating an unauthorized link, a plaintiff therefore would have to prove the existence of a valid license (express or implied) restricting the rights of visitors to link to the site<sup>6</sup> (which, in turn, may depend on how its website Terms and Conditions are structured,<sup>7</sup> unless the site is otherwise accessible only to subscribers) and establish that the party creating the link knew or should have known that it was creating an unauthorized link (to show contributory infringement), which could be difficult to do.

To make out such a claim in the case of a publicly accessible website, a plaintiff would have to ensure that there was a notice on its website purporting to prohibit unauthorized links or that visitors had to click their assent to a formal agreement before gaining access to the site. However, to the extent an infringement claim may be dependent on proving that the defendant exceeded the scope of a unilateral website license, the claim could be difficult to establish because the purported license restrictions would not necessarily run to a user who accessed the linked site without prior knowledge of the terms and conditions or the linking site's failure to obtain a formal license. The limitation, if enforceable, potentially could be construed as binding only on the party that created the link. Absent a direct copyright violation by users accessing a site via an unauthorized link, there would be no basis for holding a defendant contributorily liable (or the owner such party if it had a direct financial interest in the site).

A claim over unwanted site links to otherwise noninfringing content generally suffers from the same potential obstacles as one involving links to infringing materials—*Cartoon Network*, the DMCA, fair use, implied license, the

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<sup>6</sup>*See, e.g., S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087–89 (9th Cir. 1989) (exceeding the scope of a license constitutes copyright infringement); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995) (same).

<sup>7</sup>For an analysis of the enforceability of website licenses and terms and conditions, *see infra* §§ 21.03, 21.04 & chapter 22.

*Sony* safe harbor<sup>8</sup> and even whether the basic elements to establish secondary liability may be established—with the added burden of requiring a showing of infringement based on exceeding the scope of a license (since the material is not inherently infringing) and the practical problem of convincing a court to take action in a case that does not involve piracy (and where both damages and irreparable injury may be difficult to show). Ultimately, a theory of liability that depends upon a court finding users of the World Wide Web directly liable for copyright infringement—in order to provide the necessary underlying act of infringement to impose secondary liability on the business entity that created the link—may be too difficult to successfully advance in court in many cases. Suits over unwanted links to genuine (as opposed to pirated) material may be better framed as interference with contract claims, assuming damages can be shown, or on other grounds besides copyright infringement.

#### 9.03[3][A][iv] Multiple links

To the extent that liability may be premised on facilitating or encouraging an act of infringement through the creation of a link, the connection between the linking site and location of infringing content would have to be direct, rather than more attenuated. For example, in *Bernstein v. J.C. Penney, Inc.*,<sup>1</sup> celebrity photographer Gary Bernstein filed suit against the J.C. Penney department store and cosmetics company Elizabeth Arden alleging copyright infringement based on a link from a J.C. Penney site created in November 1997 to advertise Passion, an Elizabeth Arden perfume promoted by actress Elizabeth Taylor. A link from a portion of the site that featured online chat with Ms. Taylor led to a site hosted by Internet Movie Database that contained biographical information about her. That site, in turn, contained links to several other locations—including a site run by Swedish University Network (SUNET) where unauthorized reproductions of two photographs that Mr. Bernstein had taken of Ms. Taylor were posted.

In dismissing plaintiff's suit in September 1998, Judge Manuel Real of the Central District of California implicitly

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<sup>8</sup>See *infra* §§ 9.03[3][B], 9.03[3][C].

[Section 9.03[3][A][iv]]

<sup>1</sup>*Bernstein v. JC Penney, Inc.*, 26 Media L. Rep. (BNA) 2471, 50 U.S.P. Q.2d 1063, 1998 WL 906644 (C.D. Cal. 1998).



ruled that the connection between defendant's site and the infringing photographs were too far removed to be actionable under the Copyright Act.<sup>2</sup> Even where a link is one click away from infringing content, a plaintiff likely would need to show more than merely the establishment of a link in order to state a claim for contributory infringement.<sup>3</sup>

### **9.03[3][B] General Defenses to Liability for Linking: Implied License, Fair Use, *De Minimis* Infringement and the *Sony* Safe Harbors**

#### **9.03[3][B][i] Linking Defenses—In General**

Even where copyright liability potentially may be shown, a number of defenses may apply to permit linking in different contexts on the World Wide Web, including implied license, fair use and *de minimis* infringement and the Digital Millennium Copyright Act (DMCA) and *Sony* safe harbors. The DMCA liability limitation for information location tools is separately considered in sections 9.03[3][D] (as a defense) and 9.03[3][E] (as a potential remedy for copyright owners).

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<sup>2</sup>*Bernstein v. JC Penney, Inc.*, 26 Media L. Rep. (BNA) 2471, 50 U.S.P. Q.2d 1063, 1998 WL 906644 (C.D. Cal. 1998); *see also* John Borland, "Court Dismisses Web Copyright Case," TechWeb, CMPnet, Sept. 22, 1998. Judge Real did not specifically state the basis for his ruling, although his characterization of plaintiff's claim as being "for copyright infringement based on multiple linking . . ." suggests in part his view of the principal issue in the case. He also re-stated defendants' arguments in his brief ruling:

Arden contends that plaintiff's theory of infringement by multiple linking would have a devastating impact on the Internet and argues the claim should be dismissed for three reasons: (1) a company whose product is merely displayed on another entity's website cannot be held liable for any infringement by the author of that website; (2) linking cannot constitute direct infringement because the computer server of the linking website does not copy or otherwise process the content of the linked-to site; and (3) multiple linking cannot constitute contributory infringement because (a) Internet users viewing of the material at issue is not infringing and thus there was no direct infringement in the United States to which Arden could contribute, . . . (b) linking "is capable of substantial noninfringing uses" and thus cannot support a claim for contributory infringement, . . . and (c) the Court cannot infer from the facts alleged that Arden knew the photos had been posted to SUNET and multiple linking does not constitute substantial participation in any infringement where the linking website does not mention the fact that Internet users could, by following the links, find infringing material on another website . . . .

1998 WL 906644, at \*1 (citations omitted).

<sup>3</sup>*See infra* §§ 9.03[3][A][ii], 9.03[3][B].

**9.03[3][B][ii] Implied License**

Linking on the Internet is pervasive. As its name implies, the World Wide Web is little more than a series of links, interconnected like a spider's web. For this reason, a strong argument may be advanced in most instances that, by placing a publicly accessible site or publicly accessible material on the World Wide Web, a party impliedly licenses others to link to it.<sup>1</sup> If a site owner did not want third-parties to link to its site, it arguably would have required users to register and prevented unauthorized access. A publicly accessible website, by inference (and based on both netiquette and the technology underlying the World Wide Web), is one that may be linked to by third-parties, at least to the extent that the link is not deceptive or confusing and provided the site owner has not taken steps to negate any inference of implied license.

The implied license defense, however, usually does not assure a potential defendant of the right to continue linking to a site in the future, even if it was permissible to do so in the past. Except where consideration has been paid, an implied license generally may be revoked.<sup>2</sup> If a website owner learns of an unwanted link and sends the linking party a cease and desist letter demanding that the link be disabled, the defense of implied license should cease to provide ongoing protection.<sup>3</sup> The linking party, however, may still assert other defenses.

Rather than wait until a party establishes a link to send notice negating any inference of implied license, some website owners incorporate provisions in their terms and conditions (or the legal notices section of a website) purporting to prohibit or condition a third-party's right to establish links to the site.<sup>4</sup> Whether website terms and conditions constitute binding contractual restrictions on visitors to a site will depend on the way they are presented to users, whether

**[Section 9.03[3][B][ii]]**

<sup>1</sup>*See, e.g., Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991); *see generally supra* §§ 4.05[7], 9.02[2].

<sup>2</sup>*See supra* § 4.05[7].

<sup>3</sup>A linking party theoretically could potentially assert ongoing rights in derivative works when an implied license is terminated, but this copyright law principle may not apply to links, which may be easily disabled. *See supra* § 4.05[7].

<sup>4</sup>For sample provisions, *see infra* chapter 20.

users may avoid them and still gain access to the site and ultimately whether assent was obtained either expressly or by implication.<sup>5</sup> Where there is an express license, an implied license generally may not be inferred between the same parties for the same subject matter.<sup>6</sup>

Even where purported restrictions on linking contained in website terms and conditions are found not to be binding under contract law (and therefore may not support a claim for breach of contract or copyright infringement based on exceeding the scope of a license), they may be sufficient to negate an inference of an implied license. It therefore may be advisable to check the terms and conditions before linking to a site that may be likely to object to links.

Although the issue of implied license has not been litigated extensively in connection with links, district court judges in New York have held that Instagram receives an express license from users who upload images to its platform, to allow other users to embed those images, but whether Instagram in turn grants its users a license to imbed images posted by other users, when they use Instagram's API (application programming interface) to embed a link to an image posted on Instagram's servers, is a question that could not be resolved through a motion to dismiss because additional evidence was required.<sup>7</sup>

Implied licenses are analyzed further in section 4.05[7] in

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<sup>5</sup>See *infra* chapters 21, 22 (especially sections 21.03 and 21.04).

<sup>6</sup>See, e.g., *Baer v. Chase*, 392 F.3d 609, 616-17 (3d Cir. 2004) ("There cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter.").

<sup>7</sup>See *McGucken v. Newsweek LLC*, 19 Civ. 9617 (KPF), 2020 WL 6135733, at \*1-3 (S.D.N.Y. Oct. 19, 2020) (affirming, in denying reconsideration, that "while Instagram's Terms of Use clearly granted Instagram a license to sublicense Plaintiff's publicly posted content, there was insufficiently clear language to support, in the context of a Rule 12(b)(6) motion, the existence of a sublicense between Instagram and Defendant."); *Sinclair v. Ziff Davis, LLC*, 18-CV-790 (KMW), 2020 WL 3450136, at \*1-2 (S.D.N.Y. June 24, 2020) (adhering to its previous holding that, "by agreeing to Instagram's Terms of Use, Plaintiff authorized Instagram to grant API users, such as Mashable, a sublicense to embed her public Instagram content, as set forth in Instagram's Platform Policy" but granting reconsideration, and revising its previous decision, by holding "that the pleadings contain insufficient evidence to find that Instagram granted Mashable a sublicense to embed Plaintiff's Photograph on its website."); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 603-04 (S.D.N.Y. 2020) (denying Newsweek's motion to dismiss, holding that while Instagram's Terms of Use "unequivocally grant Instagram a license to sublicense

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### 9.03[3][B][iii] Linking as a Fair Use

Fair use, unlike implied license, does not depend on a copyright owner's tacit consent and therefore cannot be easily negated by a copyright owner. The fair use defense presupposes that any copying done is not authorized by the copyright owner.<sup>1</sup> Thus, even where website terms and conditions purport to prohibit links to a site, a party may avoid li-

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Plaintiff's publicly posted content . . . , and the Privacy Policy clearly states that 'other Users may search for, see, use, or share any of your User Content that you make publicly available through' Instagram . . . ,” the court could not dismiss plaintiff's claims; “Although Instagram's various terms and policies clearly foresee the possibility of entities such as Defendant using web embeds to share other users' content . . . , none of them expressly grants a sublicense to those who embed publicly posted content. Nor can the Court find, on the pleadings, evidence of a possible implied sublicense. . . . While the Court acknowledges that it may be possible to read Instagram's various terms and policies to grant a sublicense to embedders, the Court's role on a Rule 12(b)(6) motion is to ‘draw all reasonable inferences in Plaintiff's favor.’ ”).

In *Ziff Davis*, Judge Wood previously had granted Ziff Davis's motion, dismissing Sinclair's copyright infringement claim, based on the finding that Mashable had used plaintiff's photograph pursuant to a valid sublicense from Instagram. *See Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 342, 344-47 (S.D.N.Y. 2020). She explained:

The Terms of Use state that, by posting content to Instagram, the user “grant[s] to Instagram a non-exclusive, fully paid and royalty-free, transferable, sublicensable, worldwide license to the Content that you post on or through [Instagram], subject to [Instagram's] Privacy Policy.” (Terms of Use, Rights § 1.) Pursuant to Instagram's Privacy Policy (“Privacy Policy”), Instagram users designate their accounts as “private” or “public,” and can change these privacy settings whenever they wish. (Privacy Policy, Parties With Whom You May Choose to Share Your User Content § 1.). All content that users upload and designate as “public” is searchable by the public and subject to use by others via Instagram's API. (*Id.* § 2.) The API enables its users to embed publicly-posted content in their websites. (Platform Policy, Preamble.). Thus, because Plaintiff uploaded the Photograph to Instagram and designated it as “public,” she agreed to allow Mashable, as Instagram's sublicensee, to embed the Photograph in its website.

*Id.* at 345. On reconsideration, however, the court concluded that Instagram's Platform Policy could be construed as granting Instagram API users the right to use the API to embed the public content of other Instagram users, but that was not the only interpretation to which it was susceptible (and accordingly construction of the license was not an issue that could be resolved on a motion to dismiss, which assumes as true the well pleaded facts in a plaintiff's Complaint). *See Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136, at \*1.

#### [Section 9.03[3][B][iii]]

<sup>1</sup>*See supra* § 4.10.

ability for linking to it if any acts of unauthorized copying occurring in connection with the link are deemed a fair use.

In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,<sup>2</sup> Judge Whyte suggested that a user's act of browsing both created a protectable copy and (if the copy were infringing) would inevitably be viewed as fair use. While many people believe that linking should be deemed a fair use as a matter of policy, fair use is determined by a multi-part balancing test, and therefore the outcome may vary in a given case depending on its unique facts.<sup>3</sup> At a minimum, if the underlying act of viewing a website were viewed as a fair use, there would be no grounds for imposing secondary liability for copyright infringement on the party that created the link (since secondary liability must be premised on an underlying act of direct infringement by a third party).<sup>4</sup> The fair use defense in connection is considered more extensively in section 9.02[4] in connection with caching and more generally in section 4.10[1] in chapter 4 (on copyright law).

In *Online Policy Group v. Diebold Election Systems, Inc.*,<sup>5</sup> the court found that links to a database company's internal emails explaining technical flaws in its electronic voting machines were a fair use (for purposes of evaluating an award of fees for knowingly and materially misrepresenting information in a DMCA Notification pursuant to 17 U.S.C.A. § 512(f)),<sup>6</sup> where at least some of the emails were not entitled to copyright protection, even though the links directed users to the defendant's entire proprietary database.

The Ninth Circuit analyzed fair use in connection with links generated by search engines in two separate cases. In *Kelly v. Arriba Software Corp.*,<sup>7</sup> Ditto.com (previously Arriba Software Corp.) operated a visual search engine that allowed

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<sup>2</sup>*Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1378 n.25 (N.D. Cal. 1995).

<sup>3</sup>The fair use defense of a user would likely be stronger than the fair use defense of a commercial entity seeking to establish an unauthorized link to another site, especially if there were a commercial market for links to the site.

<sup>4</sup>See *supra* § 4.11.

<sup>5</sup>*Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

<sup>6</sup>See *supra* § 4.12[9][D].

<sup>7</sup>*Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

users to locate images on the Web. In response to a query, small, low resolution “thumbnail” images were displayed next to a link and brief description of the corresponding site where the photograph could be found. Images were obtained automatically by a crawler program that downloaded full size copies to Arriba’s server, where they were converted to thumbnails. Thumbnail images could be copied by users, but their resolution could not be improved. Users, in turn, could access the site from where a thumbnail originated via a link or, for brief periods in 1999 and 2000, view full size copies of the photographs via in-line links or frames, separate and apart from the rest of the content on the linked site.

The Ninth Circuit ruled that the reproduction of thumbnail images constituted a fair use because defendants’ copying was transformative (to index images on the Web) and did not adversely affect the potential market for the genuine works because the thumbnails were not a substitute for full-size, high resolution images. The court found that the nature of the work (creative photographs) weighed slightly in favor of the plaintiff and the amount and substantiality of the portion used was a neutral factor because if Arriba had copied anything less than the complete works it would have been more difficult to identify each image, which would have reduced the usefulness of the search engine.

In an earlier ruling that was subsequently vacated because the issue had not been properly preserved for appeal, the Ninth Circuit had ruled that the defendant’s initial practice of also making available via in-line links and frames full size copies of the photographs that appeared on indexed sites (with the surrounding text and other Web content removed) was not a fair use. Displaying the exact image from a site in isolation from the surrounding material via a frame or in-line link was held to serve no transformative purpose and harm the market for genuine works because people receiving photographs in this format would have had no reason to visit the website from which it had been copied.<sup>8</sup>

In *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>9</sup> the Ninth Circuit reaffirmed its 2003 opinion in *Kelly v. Arriba Software Corp.* in a case involving very similar facts. In that case, Perfect

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<sup>8</sup>See *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 947–48 (9th Cir. 2002), vacated, 336 F.3d 811 (9th Cir. 2003).

<sup>9</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163–67 (9th Cir. 2007).



10, an adult magazine whose images were widely available without authorization on the Internet, sued Google and Amazon.com arguing that their visual search engines made unauthorized thumbnail reproductions of infringing copies of their works that were displayed with search results. To distinguish *Kelly v. Arriba Software Corp.*, Perfect 10 had argued that these thumbnail images undermined a market for thumbnail images sold for display on cell phones. Unlike in *Kelly*, Perfect 10 had argued (and the district court had agreed), the thumbnails displayed by Google had an adverse impact on the market for genuine products and therefore were not a fair use. The Ninth Circuit reversed, however, concluding that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case.”<sup>10</sup> The court noted that any downloads for mobile phones in fact had taken place, making the superseding use “not significant.” Likewise, although thumbnails directed users to Google AdSense partners, including partners that hosted infringing images, which the court conceded added “a commercial dimension that did not exist in *Kelly*,” the Ninth Circuit emphasized that the district court had not determined that this commercial element was significant.<sup>11</sup> Judge Ikuto, writing for the court, concluded that “the transformative nature of Google’s use is more significant than any incidental superseding use or the minor commercial aspects of Google’s search engine and website.”<sup>12</sup> With respect to the nature of the copyrighted work, the court found the photos to be creative but because the images appeared on the Internet before they were used in search engine results, this factor weighted only slightly against a finding of fair use.

In *Perfect 10, Inc. v. Yandex, N.V.*,<sup>13</sup> a subsequent case brought by Perfect 10 against a Russian search engine that, unlike Google, displayed full size versions of Perfect 10 images via in-line links (and not merely thumbnails) and also

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<sup>10</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007).

<sup>11</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007).

<sup>12</sup>*Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163–67 (9th Cir. 2007).

<sup>13</sup>*Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146 (N.D. Cal. 2013).

displayed them separate and apart from the websites on which they appeared, the district court, in granting in part the defendant's motion for summary judgment, ruled, among other things, that the defendant's use of the images in connection with a search engine nonetheless constituted a fair use because it was highly transformative.<sup>14</sup> The court wrote that "whether a browser window shows only a thumbnail and the full-size image—instead of the full-size image along with part of the surrounding web page—does not affect whether the use of the *thumbnail* has been transformed."<sup>15</sup> Further, the court held that "even if yandex.com's use of the thumbnail were broadly described as an 'in-line link connected to a full-size image,' that use remains highly transformative."<sup>16</sup>

The court also rejected the argument that the defendant's use adversely harmed the market for the genuine works because, among other things, Perfect 10 had presented evidence that Yandex made accessible "billions of unauthorized views" from third party websites because Perfect 10's evidence was not substantiated by competent evidence. Perfect 10 had introduced screen shots from third-party websites showing that links on those sites led to Perfect 10 images that had been viewed 3.8 million times as of December 2012. Perfect 10 did not, however, provide evidence that any of those views were the result of yandex.com users clicking on thumbnails stored on yandex.com servers in the United States, however. The court wrote that "[t]he simple fact that the thumbnail links were stored in yandex.com's index and accessible on the internet does not compel a finding that those links were actually viewed or used."<sup>17</sup>

On balance, the court, in weighing the various factors,

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<sup>14</sup>See *Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146, 1154–55 (N.D. Cal. 2013).

<sup>15</sup>*Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146, 1155 (N.D. Cal. 2013) (emphasis in original).

<sup>16</sup>*Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146, 1155 (N.D. Cal. 2013).

<sup>17</sup>*Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146, 1156 (N.D. Cal. 2013). Other arguments advanced by Perfect 10 were characterized as based on "speculation, not proof" or insufficient to show that the alleged drop in demand for Perfect 10 images was caused by Yandex, as opposed to other factors, because a "simple correlation, without more, does not constitute sufficient evidence that Yandex's use of 40,000 thumbnail images between June 2012 and March 2013 affected Perfect 10's market." *Id.* at 1156-57.

concluded that “Yandex’s significant transformative use” weighed more heavily in favor of fair use than the nature of the work, which weighed “slightly in favor of Perfect 10, and the neutral third and fourth factors. Upon due consideration, . . . Yandex.com’s thumbnails stored on its servers in the United States for a nine month period were a fair use.”<sup>18</sup>

By contrast, in *VHT, Inc. v. Zillow Group, Inc.*,<sup>19</sup> the Ninth Circuit held that the unauthorized use of copyrighted photos in connection with a visual search engine used on a commercial real estate service’s website was not a fair use, explaining that “the label ‘search engine’ is not a talismanic term that serves as an on-off switch as to fair use.”<sup>20</sup> Unlike the search engines at issue in *Kelly v. Arriba* and *Perfect 10 v. Amazon* (as well as *Perfect 10 v. Yandex*, although the Ninth Circuit didn’t address that district court opinion), Digs, the search engine employed on the Zillow.com website for home improvement and remodeling, was “a closed-universe search engine” that did not crawl the web. Users could search a “searchable set” of images within a “walled garden. . . .”<sup>21</sup> The search results did not direct users to the original sources of the photos, such as the plaintiff’s website, but rather linked to other pages within Zillow’s website. The Ninth Circuit found that making these images searchable did not fundamentally change their original purpose when produced by the plaintiff. Additionally, Digs displayed entire copies of plaintiff’s images, not merely thumbnails. Zillow’s use, the court found, merely superseded plaintiff’s purpose in creating the images in the first place. As in *Kelly v. Arriba* and *Perfect 10 v. Amazon*, the images at issue were found to be creative. But unlike in those cases, the Ninth Circuit found Zillow’s use to have few, if any, transformative qualities. In addition, “[i]n contrast to *Amazon* and *Kelly*, nothing justifie[d] Zillow’s full copy display of VHT’s photos on Digs.”<sup>22</sup> Finally, unlike in those cases, the court found that Zillow’s use undermined plaintiff’s market for licensing

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<sup>18</sup>*Perfect 10, Inc. v. Yandex, N.V.*, 962 F. Supp. 2d 1146, 1157 (N.D. Cal. 2013).

<sup>19</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 742-44 (9th Cir. 2019).

<sup>20</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 742 (9th Cir. 2019).

<sup>21</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 742 (9th Cir. 2019).

<sup>22</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 744 (9th Cir. 2019).

the photographs.<sup>23</sup> Although the plaintiff had only licensed a handful of photos for secondary uses (and none on a searchable database), the court characterized the market as more significant than the merely hypothetical market at issue in *Perfect 10 v. Amazon*. The appellate panel also found it significant that the plaintiff was “actively exploring” the market for licensing its photos to home design websites like Digs—including with Zillow itself.<sup>24</sup>

Following *VHT*, the Eleventh Circuit in *MidlevelU, Inc. v. ACI Information Group*,<sup>25</sup> affirmed a jury finding that Newstex (operator of ACI Information Group, a wholesale news content aggregator)’s use of MidlevelU (operator of the ThriveAP blog)’s copyrighted articles in the Scholarly Blog Index, a curated index of abstracts and full-text articles of academic blogs, was not a fair use, even though its database was searchable, because, among other things, the jury “could have reasonably found that the Index was not a transformative use based on the Index’s inclusion of iFrames showing the full-text content of MidlevelU’s articles. A reasonable juror could have found that the iFrames obviated any need for an Index subscriber to visit MidlevelU’s website directly, so the Index superseded the use of the originals.”<sup>26</sup>

Likewise, reproducing thumbnail images of advertisements for the purpose of advertising sales of the genuine product was held not to constitute a fair use in *Batesville Services, Inc. v. Funeral Depot, Inc.*<sup>27</sup> Similarly, creating links to a stream of a live webcast of motor races that were shown in real time was held not to be a fair use in *Live Nation Motor Sports, Inc. v. Davis*.<sup>28</sup>

District courts in New York have also relied on the fair use defense in dismissing copyright infringement claims (or entering judgment on the pleadings) premised on publishers’

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<sup>23</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 744 (9th Cir. 2019).

<sup>24</sup>*VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 744 (9th Cir. 2019).

<sup>25</sup>*MidlevelU, Inc. v. ACI Information Group*, 989 F.3d 1205 (11th Cir. 2021), *cert. denied*, — S. Ct. —, 2021 WL 2637905 (2021).

<sup>26</sup>*MidlevelU, Inc. v. ACI Information Group*, 989 F.3d 1205, 1222 (11th Cir. 2021), *cert. denied*, — S. Ct. —, 2021 WL 2637905 (2021).

<sup>27</sup>*Batesville Services, Inc. v. Funeral Depot, Inc.*, No. 1:02-CV-01011–DFH–TA, 2004 WL 2750253 (S.D. Ind. Nov. 10, 2004).

<sup>28</sup>*Live Nation Motor Sports, Inc. v. Davis*, Civil Action No. 3:06-CV-276-L, 81 U.S.P.Q.2d 1826 (N.D. Tex. Jan. 9, 2007); *see generally supra* § 9.03[3][A][i] (discussing the case).

use of embedded links to Instagram posts that included plaintiff's photographs.<sup>29</sup>

### 9.03[3][B][iv] *De Minimis* Infringement

Linking alternatively potentially could be found permissible as *de minimis* infringement. An act of unauthorized copying will not be deemed actionable where it is merely *de minimis*, as judged by both the quality and the quantity of the portion copied.<sup>1</sup> Although a link allows a visitor to create a complete copy of the linked page on a visitor's temporary screen RAM (when the site is called up), the copy is merely temporary and will not be permanently stored. Merely the

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<sup>29</sup>See *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020) (dismissing, as fair use, the copyright infringement claim of a photographer against a sports news publisher, which had included an embedded link to an Instagram post by professional tennis player Caroline Wozniacki, announcing her retirements (which included a low-resolution, cropped version of a photograph taken by the plaintiff), in an article it published about Wozniacki's career, which also quoted the text of the Instagram post); *Walsh v. Townsquare Media, Inc.*, 464 F. Supp. 3d 570 (S.D.N.Y. 2020) (entering judgment on the pleadings, based on fair use, in a Paparazzi photographer's copyright infringement claim, brought against the publisher of *XXL* magazine, which had embedded a link to an Instagram post by hip hop artist Cardi B, which included a photograph taken by plaintiff of Cardi B at a Tom Ford fashion show, in an article entitled *Cardi B Partners with Tom Ford for New Lipstick Shade*, which was focused on the event and referenced the Cardi B Instagram post which featured the photograph); see also *Boesen v. United Sports Publications, Ltd.*, 20-CV-1552 (ARR) (SIL), 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020) (denying reconsideration). Cf. *Nicklen v. Sinclair Broadcast Group, Inc.*, — F. Supp. 3d —, 2021 WL 3239510, at \*5-7 (S.D.N.Y. 2021) (denying defendant's motion to dismiss plaintiff's copyright infringement claim, premised on Sinclair's placement of an embedded link to plaintiff's video of a starving polar bear in an article describing how the video "went 'viral,'" because Sinclair's fair use defense could not be resolved on a motion to dismiss based solely on the allegations of the complaint, despite finding that the use was transformative); *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 604-09 (S.D.N.Y. 2020) (holding, in an opinion decided before *Boesen* and *Walsh*, that, on the facts of that case, fair use could not be established as a matter of law at the pleadings stage, in a case where plaintiff posted a photograph of an ephemeral lake on March 13, 2019, and the very next day Newsweek allegedly published an article about the ephemeral lake, embedding plaintiff's Instagram post about the lake, as part of the article).

#### [Section 9.03[3][B][iv]]

<sup>1</sup>See *supra* § 4.08[1].

linked page<sup>2</sup>—not the full site—will be copied into temporary memory. Moreover, temporary RAM copies generally will be destroyed when the user turns off his or her computer (and in some cases even sooner). Although *de minimis* infringement typically is judged by physical world standards, which focus on the amount and quality of the portion copied, it could be argued that, as applied to cyberspace—where the extent of copying under certain circumstances should be judged at least in part by the length of time that the content may be made available online, rather than merely the percentage of the work that was copied<sup>3</sup> (especially given the ethereal quality of cached copies)—a complete, but temporary, copy of a single linked Web page should be deemed *de minimis* in at least some cases.<sup>4</sup> As a practical matter, however, it is difficult to prevail on a defense of *de minimis* infringement.

### 9.03[3][B][v] *Sony* Safe Harbor

In a suit based on linking, it is also possible that a defendant could assert the *Sony* safe harbor, arguing that liability should not be imposed because linking has substantial and commercially significant non-infringing uses.<sup>1</sup> In evaluating the applicability of the *Sony* safe harbor, the nature of the content made accessible by the links—not the act of linking, in the abstract—is what should be the focus of any inquiry into whether the links have substantial noninfringing uses.

### 9.03[3][C] DMCA Safe Harbor Liability Limitation Defense for Information Location Tools

Even if linking is found to constitute copyright infringement, entities that qualify as “Service Providers” under the

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<sup>2</sup>Depending on the software run, a browser may automatically load pages in addition to the one directly linked to facilitate faster access to locations that a user may later select. In most cases, a user is not even aware of precisely which pages have been loaded into her computer’s temporary memory—many of which she in fact may not decide to access. Except where a website is comprised of a very small number of linked pages, the entire site generally is unlikely to be loaded into RAM.

<sup>3</sup>See generally *supra* §§ 1.06[6] to 1.06[9], 4.10.

<sup>4</sup>The transitory nature of a copy created in screen RAM also could be relevant to fair use analysis.

#### [Section 9.03[3][B][v]]

<sup>1</sup>See *supra* §§ 4.10[5], 4.11[3].



Digital Millennium Copyright Act (DMCA) may be able to limit their liability for damages and attorneys' fees for links established to infringing sites.<sup>1</sup> Entities, but not necessarily individuals, may qualify if, among other things, they provide "online services or network access." or operate facilities therefor.<sup>2</sup> The limitation would not apply to linking *per se*, but only to the act of linking or referring users to an online location "containing infringing material or infringing activity . . . ."<sup>3</sup> In other words, the limitation would not apply to all cases of unwanted links; only links alleged to lead to sites containing infringing content or promoting infringement (such as by the provision of cracker tools).

A Service Provider that otherwise meets certain general threshold prerequisites (described in section 4.12[3]) may limit its liability for infringement for linking or referring users to infringing material or activity by using "information location tools, including a directory, index, reference, pointer, or hypertext link . . . ." (1) if the Service Provider does not have actual knowledge or awareness of the infringement or, if it has either, it promptly removes or disables access to the infringing material; (2) where a Service Provider has the right and ability to control the infringing activity, it does not receive a financial benefit "directly attributable to the infringing activity . . . ." and (3) upon receipt of a Notification (as defined under the statute), the Service Provider removes or disables access to any allegedly infringing links.<sup>4</sup>

The DMCA liability limitations are analyzed extensively in section 4.12. The safe harbor applicable to links, as information location tools, is analyzed in section 4.12[7].

### **9.03[3][D] Extra-Judicial Remedies Available to Copyright Owners under the DMCA**

In addition to affording Service Providers protection from copyright liability for linking, the Digital Millennium Copyright Act provides copyright owners with a specific extra-judicial mechanism to obtain the removal of unwanted links

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#### **[Section 9.03[3][C]]**

<sup>1</sup>See *supra* § 4.12.

<sup>2</sup>17 U.S.C.A. § 512(k).

<sup>3</sup>17 U.S.C.A. § 512(k) § 512(d).

<sup>4</sup>See *supra* § 4.12[7].

alleged to be infringing.<sup>1</sup> If a site that has established a link has chosen to comply with the Act, copyright owners may be entitled to have the link removed merely by serving a substantially complying statutory “Notification” on the site’s registered agent.<sup>2</sup> This extra-judicial remedy is potentially quite valuable given how difficult it would be in most instances for a plaintiff to obtain a comparable court order based on copyright law.

The DMCA liability limitations are analyzed extensively in section 4.12.

### 9.03[4] Significance of Web Linking Agreements

Entering into an express Web linking agreement may be advisable when the owner of a popular site wants to maintain control over the manner in which other sites link to it. Likewise, a linking agreement may be appropriate if a trademark owner seeks to impose quality controls on the use of its marks.<sup>1</sup>

If a website owner expressly declines permission to link to its site, its refusal could negate any inference of an implied license, although it would have no bearing on whether a link constituted a fair use or merely *de minimis* infringement, if those defenses were found applicable.<sup>2</sup> Linking to a site over the express objection of the linked site also potentially could give rise to other claims, depending on the facts of a given case. More importantly, as a practical matter, a site that aggressively seeks to prohibit links may be more likely to take legal action (regardless of whether it would actually prevail).

To the extent a site commands license fees to link to it, the argument that linking constitutes a fair use would be weaker (since the existence of a commercial market for authorized copying is a factor that weighs against a finding of fair use).<sup>3</sup> On the other hand, the fact that so few sites in general seek to require permission to link potentially

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#### [Section 9.03[3][D]]

<sup>1</sup>See *supra* § 4.12[12].

<sup>2</sup>See *supra* § 4.12[12].

#### [Section 9.03[4]]

<sup>1</sup>For additional considerations involving Web linking agreements, as well as sample provisions, see *infra* chapter 20.

<sup>2</sup>See *supra* § 9.03[3][B].

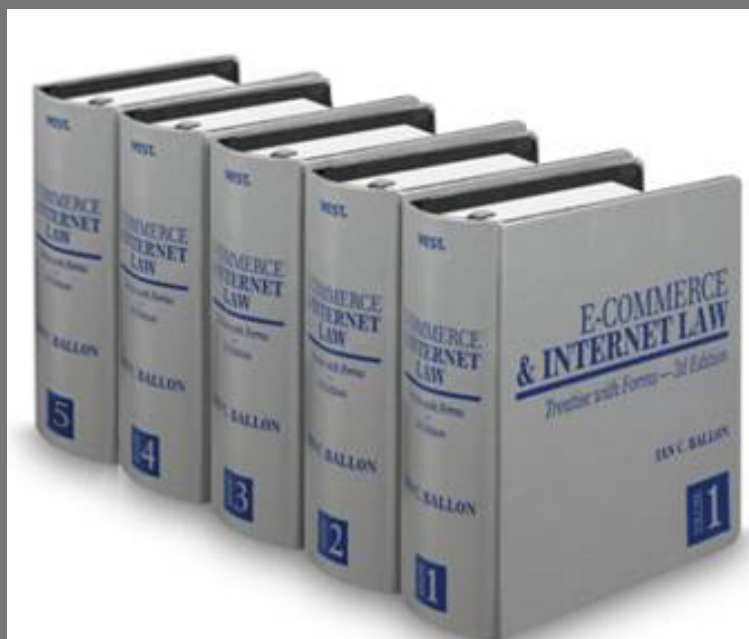
<sup>3</sup>See, e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471

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Mr. Ballon was the recipient of the 2010 Vanguard Award from the State Bar of California's Intellectual Property Law Section. He also has been recognized by *The Los Angeles and San Francisco Daily Journal* as one of the Top Intellectual Property litigators in every year the list has been published (2009-2021), Top Cybersecurity and Artificial Intelligence (AI) lawyers, and Top 100 lawyers in California.

Mr. Ballon was named a "Groundbreaker" by *The Recorder* at its 2017 Bay Area Litigation Departments of the Year awards ceremony and was selected as an "Intellectual Property Trailblazer" by the *National Law Journal*.

Mr. Ballon was selected as the Lawyer of the Year for information technology law in the 2022, 2021, 2020, 2019, 2018, 2016 and 2013 editions of *The Best Lawyers in America* and is listed in Legal 500 U.S., Law Dragon and Chambers and Partners USA Guide. He also serves as Executive Director of Stanford University Law School's Center for the Digital Economy.

Mr. Ballon received his B.A. *magna cum laude* from Tufts University, his J.D. *with honors* from George Washington University Law School and an LLM in international and comparative law from Georgetown University Law Center. He also holds the C.I.P.P./U.S. certification from the International Association of Privacy Professionals (IAPP).

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