

Copyright Infringement in the Hyperlinking Debate: The Inchoate Role of Commercial Motives and Financial Outcomes

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“I have gathered a garland of other men’s flowers and nothing is mine but the cord that binds them.”

Michel de Montaigne (1533 – 1592)

1. Introduction: The Nature of the Problem

Courts in a number of jurisdictions continue to wrestle with the question of whether, when and by whom hyperlinking¹ might result in a finding of copyright infringement. Not all of this is new. There has always been a clash of perceptions in cyberspace as to how the law should regulate its inhabitants. Users of the Internet picture themselves as free to wander its minimally controlled spaces browsing for content and able to speculatively click on links of potential interest to them in much the same manner as writers and readers in the offline world utilise references to material located elsewhere. Owners of copyrighted content, on the other hand, while welcoming (indeed needing) such searches seek, where they can, to charge for access to that content once found and enlist the law’s assistance in patrolling the Internet to scrutinise the activities of users to make that right to charge meaningful. For as long as disputes between the two viewpoints took this form, copyright law was usually able to accommodate them within its existing infringement paradigms. Now that right holders are in a position to gain financially from end users for the search itself (for example, by charging behind a paywall or by generating revenue from advertisements they place on their websites) or to license the browsing of content, the conflict is escalating, an inevitable side effect of a “networked information economy,”² an economy in which more than one market can be found for what looks like (or can be presented as) the same informational product.

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¹ Hyperlinking (a technology developed in the early 1990s) allows internet users to navigate between web pages and access files containing material that may be subject to copyright in its own right (such as text, images and sound recordings). Such material does not appear on the screen immediately before them but can be conjured up by one click on an icon or thumbnail picture or highlighted or underscored word or sentence. The technology enables a website operator not only to upload material of interest to users on other web pages it maintains, but also allows it to provide links to files that have been uploaded onto different websites run by third parties. These other web pages, in their turn, may provide links to even more remote web pages and files containing copyrighted material, potentially ad infinitum.

² Y Benkler, *The Wealth of Networks* (New Haven, CT: Yale University Press 2006).

Owners understandably resent the activities of those who seek to gain financially by appropriating part of the value of content that they have played no part in creating just by providing hyperlinks to that content. Conversely, users not unnaturally resist being charged for finding and following the most effective pathway to particular digital material. In their view, copyright owners have already taken their profit or had the opportunity to do so and should not be handed a second unearned fee. In these ideological tugs of war, means and ends can easily become rhetorically conflated in the process of winning courts and tribunals to the rhetor's cause. One way of bridging the conceptual divide is to focus on the motives underlying a hyperlink provider's activities and/or the possible impact of these activities on the copyright holder's financial situation, factors usually denied influence in traditional copyright infringement analysis (orthodox copyright doctrine would confine their role to assessing the amount recoverable when an award of damages or a restitutionary money remedy is sought.) Hovering over this unresolved debate is the prospect of using competition law and policy's longer history of grappling with similar issues to break the conceptual deadlock. In this paper the authors look at the ways in which different jurisdictions have sought to answer four interconnected questions:

- (1) Does economic analysis have a role to play in debates about liability for hyperlink provision and to what extent do courts actually have regard to that analysis?
- (2) Do commercial motives of the defendant and financial outcomes for the claimant form part of a single cumulative test or are they alternatives?
- (3) Are the principles enunciated in hyperlinking cases to impose or reject copyright liability confined to these cases or do they have wider implications for copyright law as a whole?
- (4) Does competition law and policy offer useful insights that could assist in answering these questions?

2. Formalist and Instrumentalist Approaches to Hyperlinking and the Search for a Via Media

Most, if not all, copyright regimes grant owners exclusive statutory rights to reproduce their works and to communicate those works to the public.³ Any discussion of the legality

³ This became one of the exclusive economic rights of copyright holders after all signatories to the WIPO Copyright Treaty ("WCT") 1996 were required to adopt measures to implement the "Internet right" namely Art 8 of the WCT which provides that: "[A]uthors of literary and artistic works shall enjoy the exclusive

of hyperlink provision must confront the argument that from a purely technical perspective all material in digital form could be said to be copied whenever a computer (or other electronic device) throws up a copy on screen to be read by the person browsing or clicking on a link. Again, since many computers are designed to cache material to facilitate browsing by users, the mere act of unauthorised caching (for however short a time) can be considered infringing. Following the same ruthlessly reductive logic, a finding of infringement against someone would also have to follow whenever an unauthorised hyperlink was created or displayed because offering access to copyrighted material is an act of making available or communicating to the public. For want of a better term we can call this approach *formalist*. Formalism has a certain brutal clarity that makes legal rules easy to state and apply. Despite this it has few judicial or academic fans. Given the sheer ubiquity of hyperlinks in today's online networked environment, and the far reaching ramifications of taking a purely formalist approach which sees potential copyright infringement in every unauthorised linking to a copyrighted work, it is tempting to reason backwards from this unpalatable consequence and regard the provision of hyperlinks as not only innocuous but necessary to make the Internet work quickly, efficiently and without strain for the user. For those who take this view, hyperlinking is no different from the hard copy practice of inserting in one's own work a reference to another person's copyrighted material in the manner of a footnote or cross reference. We can fairly call this way of looking at things, *instrumentalist*.⁴ Pure instrumentalism is as friendless as pure formalism. Courts and commentators alike see a more nuanced world, one in which there are "good links"⁵ and "bad links"⁶ The trick is telling the difference. Just how

right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

⁴ Instrumentalism is based on the premise that legal rules should be interpreted in light of their purposes to make the real world work better or more cheaply. It bears more than a passing resemblance to efficiency as economists define it.

⁵ A Strowel and N Ide, *Liability with Regard to Hyperlinks* (2001) 24 Colum. V.L.A J. L. & Arts 403, 407, 423.

⁶ Id. See also M Sableman, "Link Law Revisited: Internet Linking Law at Five Years" (2001), 16 Berkeley Tech. L.J. 1273; M Dockins, "Internet Links, the Good, the Bad, the Tortious and a Two Part Test" 36 U Tol L Rev 367 and A Dalal, "Protecting Hyperlinks and Preserving First Amendment Values on the Internet" (2011), 13 *U. Pa. J. Const. L.* 1017; J de Beer and M Burri, "Transatlantic Copyright Comparisons : Making Available via Hyperlinks in the European Union and Canada" Working Paper No 2013/22 | August 2013 http://www.wti.org/fileadmin/user_upload/nccr-trade.ch/wp3/Making_Available_via_Hyperlinking.pdf; M Geist, "Something for Nothing: The Non-Existent Benefit of Linking in the Access Copyright Deal" (4 May 2012), online: <http://www.michaelgeist.ca/content/view/6458/125/>; the European Copyright Society's, Opinion on The Reference to the CJEU in Case C-466/12 Svensson, 15 February 2013; T Shapiro, "The *Svensson* decision and Hyperlinks: the Nuances" (2014) 16 *E.C.L. & P.*, 3; J C Ginsburg, "Hyperlinking and "making available" (2014) 36 *EIPR* 147.

difficult this might be is illustrated by the decision of Kaplan J in *Universal City Studios Inc v Reimerdes*.⁷ His starting point was that links are “the mainstay of the Internet and indispensable to its convenient access to the vast world of information”⁸ and that an analogy could be drawn with roadway signs. Both are devices designed to point out the direction in which one might want to go. Kaplan J, however, obviously not entirely comfortable with this analogy, was also quick to observe that links, unlike roadway signs, could propel the link clicker almost instantly to the desired destination. In the end, despite his initial reservations, he was to find against the defendant largely on the ground that the hyperlink made available to all comers a way of sidestepping the plaintiffs’ geographic market segmentation system for the distribution of its DVDs. This, he thought, was more like the publication of a bank vault combination in a national newspaper. Even if no one uses the combination to open the vault, Kaplan J said, its mere publication has the effect of defeating the bank’s security system, forcing the bank to reprogram the lock. If nothing else, *Reimerdes* demonstrates the dangers of judges shooting from the hip with glib, contradictory and in the end facile analogies. (This particular trend was to continue, and not just in the United States.)

A more forthrightly (or less self doubting) instrumentalist approach was adopted by the Canadian Supreme Court in *Crookes v Newton*⁹ although the dispute in that case concerned standard and deep links¹⁰, to allegedly defamatory rather than copyrighted material. The majority in giving an insightful, albeit brief, analysis of what it could mean for the flow of information on the Internet (and, as a result, freedom of expression) if traditional legal rules were to be applied to hyperlinks, noted that:

“[H]yperlinks and references both communicate that something exists, but do not, by themselves, communicate its content. They both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier

⁷ 111 F Supp 2d 294, 324 (SDNY 2000).

⁸ Id, 315.

⁹ ([2011] 3 SCR 269. In the result, the Supreme Court upheld a finding of no liability on the part of the defendant who had provided the links. In the view of the trial judge (whose view remained unchallenged by both the majorities of the Court of Appeal for British Columbia and the Supreme Court), hyperlinks are analogous to footnotes since they only refer to another source without repeating it. Thus, liability could only arise under the no repetition/no publication rule only when hyperlinked material was presented in such a way that actually repeated defamatory content and could be considered to have been “published” by the hyperlink provider.

¹⁰As nomenclature suggests, a “deep link” directs the link clicker to a page on a website other than the home page on which the link features as opposed to a standard link which links to the home page onto which the linked to item was originally posted.

with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content-neutral.”

While the footnote analogy here has instinctive appeal it does not take us very far. There are after all no “bad footnotes”. There are, it seems, bad links.

One thing that we should stress at this point is that avoiding direct liability for copyright infringement does not mean escaping *all* liability. The link provider may infringe moral rights; knowingly facilitate third parties in copying actual content;¹¹ circumvent technological protection measures;¹² or engage in passing off, injurious falsehood or other forms of unfair competition. It is also useful to recall that in the hyperlinking jurisprudence both good and bad links are present in the same set of facts (standard links combined with more dubious kinds such as “deep” or “in links” zip files,¹³ embedded files,¹⁴ thumbnails,¹⁵ quirky headings or lengthy excerpts of text). Sometimes too, the facts are further complicated by the defendant’s use of framing¹⁶ technology. This promiscuous intermingling may have on occasion coloured judicial attitudes to the good as well as the bad.

3. Direct and Indirect Liability

A further element of complexity in any comparative survey of copyright liability for hyperlinking arises from the fact that conduct complained of will only rarely be attributable solely to the actions of a single individual or corporate. Much more common is the situation where multiple infringers jostle for the attention of copyright holders as potential defendants or seek to avoid liability by pointing the finger of blame at each other.¹⁷ Different jurisdictions have different mechanisms for widening or narrowing the

¹¹ *Metro-Goldwyn-Mayer Studios Inc v Grokster* 125 S Ct 2764 (2005).

¹² *Universal City Studios Inc v Reimerdes* 111 F Supp 2d 294, 324 (SDNY 2000).

¹³ Zip files are comprised of two or more items compressed into a single archive that takes up less disk space and is faster to transfer between computers.

¹⁴ What is commonly understood by the term “embedded” link is a link to a file that is a PDF that includes some non text item such as an image or video. The question of the legality of unauthorised embedded videos has been referred to the CJEU in Case C-348/13 *Bestwater International*.

¹⁵ A thumbnail is a miniature image of a page or image that identifies the contents of the file containing that page or image. The legality of their unauthorised use has been the subject of several cases in Europe and the United States as discussed in the text below.

¹⁶ Websites are sometimes devised using frames whereby a webpage is divided into several discrete areas each one able to be a webpage in its own right. Thus, framing technology enables multiple webpages from multiple origins to all appear on the same webpage. Its legality was only lightly touched on by the CJEU in *Svensson v Retriever Sverige AB* Case C-466/12 (13 February 2014), see discussion in text below.

¹⁷ Blaming others will not always work. Most jurisdictions’ procedural rules allow for concurrent liability so that hyperlink providers and users can both be found liable in the same proceedings.

infringement net and it is not our intention to attempt to traverse these in detail here.¹⁸ The following broad observations will serve for current purposes:

1. Painting with the broadest of cross jurisdictional brushes, it is possible to distinguish between direct and indirect infringement. Direct infringement occurs when a person does one of the acts reserved to the copyright holder or its licensees in one of the ways proscribed in the copyright statute (ie the statute regulates both the *content* of the copyright holder's exclusive right and the *manner* of its infringing). In some jurisdictions unlicensed authorisation is treated as a form of direct infringement in its own right (as in the United Kingdom, Australia, Canada and New Zealand).¹⁹ In others it is ancillary to someone else's direct infringement with a consequent need to be able to identify a direct infringer.
2. Extended liability can be imposed by the copyright statute itself or imported from a given jurisdiction's general law of obligations (usually agency and tort law). In most cases the two mechanisms exist side by side and there is no principle of coerced election. For claimants the main exception here is the United States where the copyright statute makes no provision for extended or indirect liability and the rules concerning it are therefore entirely judge made. This has important implications for the hyperlinking debate in that jurisdiction as we shall see.

4. Following the Hyperlinking Debate across Jurisdictions

While factual issues in the European, United States, Australian and Canadian cases that we look at in this paper are sometimes very different, the economic considerations and policy implications arising from those cases are very similar. That said, even in the most superficial survey of these landmark hyperlinking cases it has to be kept in mind that they fall to be decided under structurally very different copyright regimes. Convergent outcomes may owe something to the lack of a deep precedential well from which judges can draw within their own jurisdiction. Since different courts are hearing the same arguments it is not unnatural that they respond in similar ways to those arguments if there

¹⁸ For a detailed treatment of the different kinds of copyright liability in Europe, United States and Australia see A Strowel, *Peer-to Peer File Sharing Liability in Copyright Law* (Edward Elgar Publishing, 2009) 5. See also W Landes and D Lichtman, "Indirect Liability for Copyright Infringement: An Economic Perspective" Chicago Working Paper No 179 (2D Series) February 2003.

¹⁹ In these jurisdictions the statute applies the concepts of *primary* infringement (which covers acts that are both direct and indirect because authorisation of all or certain exclusive rights is also an exclusive right) and secondary infringement (which covers activities such as the sale of *articles* allowing users to make infringing copies etc).

is no obviously applicable prior authority to get in the way. Nor is it unlikely that courts unfamiliar with the finer workings of software technology seek ways of cutting through that detail by focusing on the commercial motives of the hyperlink provider and adverse financial outcomes for right holders and treating these as liability creating factors in their own right. That right holders should applaud this development is understandable. Often as not, the impetus driving right holders to the courtroom in the first place will stem from their perception of the impugned hyperlink provider as a parasitic, “post hoc scrambler for rent”²⁰ or as counsel for the plaintiff colourfully described the situation in an action against Microsoft for deep linking²¹:

“In this narrow corridor of cyberspace, [the right holder] must maintain control of the manner in which others utilize and profit from its proprietary services, or face the prospect of a feeding frenzy diluting its content.”

Of course, a convergence of legal outcomes in the hyperlinking jurisprudence does not betoken a convergence of analysis. Fortuitously similar reasoning at the micro level (there is little overt borrowing from the case law of other jurisdictions²²) disguises the fact that at the macro level two very different techniques are being used. The first is to closely parse the statutory words used in the particular jurisdiction to define, limit or extend the copyright holder’s right to make available or communicate a work to the public. The second is to resort to highly contextualised interpretations of statutory fair dealing or fair use rules.

Comparative analysis is further complicated when legislatures and administrative agencies in different countries experiment with initiatives designed to cut across judicially imposed solutions. These *ad hoc* legislative and administrative patches are designedly narrow in their focus and necessarily jurisdiction specific.

²⁰ An apt descriptor coined by Professor Wendy Gordon, see W J Gordon, “Dissemination Must Serve Authors: How the Supreme Court Erred” *Review of Economic Research into Copyright Issues* (2013) Vol 10(1) 1,16.

²¹ *Ticketmaster Corp v Microsoft Corp*, Civ. No. 97-3055 (DDP) (C.D. Cal.), Complaint, para 6.

²² English and Australian courts have sometimes found non binding decisions from other jurisdictions persuasive, see, for example, the referral by Tamberlin J in *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 to *Universal City Studios Inc v Reimerdes* 111 F Supp 2d 294, 324 (SDNY 2000) and the referral by Kitchin J to *Cooper* in *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EW HC 608 (Ch). However, there appears to be no or very little interest in other countries’ hyperlinking jurisprudence in United States courts and the CJEU.

(a) Deconstructing the Communication Right in Europe

The European Union's highest judicial body has recently made two limited and procedurally constrained forays into the hyperlinking debate in the *Meltwater* and *Svensson* cases.

(i) *The Meltwater Litigation*

Whether and when hyperlinking to informational products such as news items or journalists' opinion pieces may lead to copyright infringement on the part of the link creator sprang to prominence in Europe²³ in the long running *Meltwater* litigation²⁴ involving the allegedly infringing activities of a commercial news aggregation service and its users and ultimately culminating in a narrowly framed reference to the Court of Justice of the European Union (CJEU) from the Supreme Court of the United Kingdom²⁵ on the meaning of the "temporary act of reproduction" exception in the Information Society Directive. 2001/29.²⁶ Because of the way in which the issues were presented to it, the CJEU only had to focus on the rights and obligations of end users, not anyone else. End users, they said, in *The Public Relations Consultants Association v The Newspaper Licensing Agency & Ors*²⁷ do not require to be authorised by copyright holders to click on links to browse particular websites even if that which they see on their screens could be regarded as a substitute for hard copy works for which they might previously have had to pay. It is important by way of background to note, however, that the dispute had earlier thrown up other copyright issues on which both the United Kingdom's Copyright Tribunal²⁸ and its courts were initially asked to rule.²⁹ Because of tactical decisions made

²³An earlier hyperlinking to news dispute occurred in Scotland but its outcome remained inconclusive. In *Shetland Times Ltd v Jonathan Wills and Zetnews Ltd* (1997) F.S.R. 604 (Ct. Sess. O.H.) *Shetland Times* claimed the creation of links by *Shetland News* to stories published in *Shetland Times* amounted to copyright infringement. Although the court ordered the equivalent of an interim injunction against *Shetland News*, the parties settled before full trial.

²⁴[2010] EWHC 3099 (Ch); [2011]. EWCA Civ 890;

²⁵*The Public Relations Consultants Association v The Newspaper Licensing Agency & Ors* [2013] UKSC 18 (17 April 2013).

²⁶Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the "Information Society Directive").

²⁷Case C-360/13, 5 June 2014.

²⁸*National Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2012] EWCA Civ 890; *Meltwater Holding BV v National Newspaper Licensing Agency Ltd and Public Relations Consultants Assoc Ltd and UK Media Monitoring Association Ltd* CT114/09 (14 February 2012).

²⁹The most interesting of which was the nature and scope of the *de minimis* principle in copyright law. The discussion in the United Kingdom cases does not clearly distinguish between issues of *subsistence* (whether brief references can attract copyright in their own right) and *infringement* (whether the taking was substantial). Acceptance that headlines and key words were individually the subject of copyright would

by the parties as the case ascended the appellate ladder, these formed no part of the reference to the CJEU.

At this point it is useful to recall the technological and commercial milieu from which the Meltwater litigation emerged. Meltwater ran a digital media monitoring service alerting clients to information about themselves contained in various online publications. The key to such services was the use of so called “spider” or “bot” programs to “scrape” or “read” the contents of targeted publications and create an index recording the position of each word in every monitored piece of prose. The end product of Meltwater’s activities was a collated and conveniently accessible report emailed to clients (public relations consultants for the most part) under the caption *Meltwater News* and tailored according to search terms (rather mysteriously called “agents”) provided by the clients themselves. Meltwater’s service, as provided, was thus not entirely dissimilar from that offered by the more traditional type of press cutting service whose activities were blessed by the United Kingdom Court of Appeal in *Newspaper Licensing Agency Ltd v Marks and Spencer*,³⁰ albeit one that was achieved by greatly more sophisticated technical means. Meltwater’s reports to clients typically included the headline of an article, a hyperlink to the article itself, the opening words of the article and an extract showing the context in which the search term appeared. Once alerted by email, Meltwater clients could access *Meltwater News* either by opening the email or visiting the Meltwater website. The media interests most immediately and directly affected by Meltwater’s activities were the publishers of national newspapers and a collecting society through which they conducted the licensing of digital and hard copy material, the Newspaper Licensing Agency Ltd (“NLA”). The licensing scheme as first envisaged by NLA was intended to extract fees from both aggregators and end users. As things turned out, Meltwater’s own liability for all its energetic and lucrative scraping, indexing and hyperlinking never made it out of the United Kingdom courts because Meltwater felt obliged to concede before that point was reached,³¹ that, yes, it indeed might need a copyright licence from the NLA to provide its

allow the endless subdivision of the original work in which almost every taking would be substantial. That is a topic for another day.

³⁰ (2000) 48 IPR 229. See L Longdin, “Fair Dealing and Markets for News: Copyright Law Tiptoes Towards Market Definition” (2001) 7 NZBLQ 10.

³¹ Before the Copyright Tribunal hearing.

online services.³² Meltwater's motives in leveraging itself into a new upstream market delivering individually tailored news and information to its client base, a market that was designed to be parasitical on the newspapers' established downstream market for news and articles and to compete with them in that market, thus ended up neatly sidestepping inquiry into the role of its commercial motives and market foreclosure that are the subject of this paper.

(ii) *Svensson*

Predating *The Public Relations Consultants Association v The Newspaper Licensing Agency*³³ by a few months was the CJEU's ruling on another tightly framed reference from a national court. This was *Svensson v Retriever Sverige AB*³⁴ and this time the CJEU had to confront the issue of liability of a hyperlink provider head on. The CJEU's response was more than usually fact dependent even by the traditions of that court. The proceedings were brought by Swedish journalists who had written a series of newspaper articles in which they retained copyright. The basis of their complaint was that the defendant Retriever Sverige AB (a news aggregator) had harmed their financial interests by providing hyperlinks to versions of their articles previously posted (with their consent) on the open access web site of the four newspapers for whom the journalists regularly wrote. What was not clear was whether someone clicking on a hyperlink would be aware that he or she was being directed onto another website or were just looking at Retriever Sverige's website. After their claim was rejected at first instance the journalists appealed to the Svea Hovrätt who stayed the proceedings and referred four questions to the CJEU. These were, first, whether a *communication to the public* (within the meaning of Article 3(1) of the Information Society Directive³⁵ occurred when anyone other than the holder of copyright in a certain work supplies a clickable link to that work on its website.³⁶ Secondly, whether the answer to the first question was affected if the work to which the link referred was located on a freely accessible website on the internet or if access to that website was

³²It would have been an uphill task to challenge Recital 29 of the Information Society Directive 2001/29 which states: "The question of exhaustion does not arise in the case of services and on-line services in particular...[E]very on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

³³ Case C-360/13, 5 June 2014.

³⁴Case C-466/12 (13 February 2014)

³⁵Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

³⁶ Case C-466/12 (13 February 2014) para 13(1).

restricted in some way.³⁷ The third question concerned the legality of using framing technology and so called deep links. It asked whether it made a difference to the answer to the first question when anyone other than the holder of copyright in a certain work supplied a clickable link to the work on the holder's website if (i) after users clicked on the link they were shown to another website or (ii) if after users clicked on the link, the work in question was shown on another website but in such a way as to give them the impression it was appearing on the same website.³⁸ The fourth question asked if it were possible for Member States to grant more extensive protection to authors' exclusive right of communication by enabling communication to the public to cover a wider range of acts than provided for in Article 3(1) of the Information Society Directive.³⁹

In answering the first question, the CJEU, following its own earlier authority, held that the broad construction required to be given to "act of communication" meant that the technical means used to transmit a work did not in any way limit the meaning to be given to that phrase.⁴⁰ Similarly, the CJEU ruled, as long as communication *could* happen, it did not matter whether it actually *did* happen. How many users, if any, chose to follow the hyperlink was irrelevant.⁴¹ It was the provision of an *opportunity* to access the link that constituted the infringement. The CJEU then had to turn its mind to "the public" being communicated with. Here they drew what was to be a crucial distinction between the public that the copyright holders had in mind when they set up the original website and other *new* "publics" they had not envisaged at that earlier point in time. The newness of the public at which the link was targeted was what made the communication infringing. While the CJEU did not directly engage in economic analysis at this point it seems clear that "publics" look very like markets as an economist or competition lawyer would understand them.

As to the second question, the CJEU took the view that a hyperlink that had the effect of allowing persons clicking on it to bypass restrictions on public access to the original website (restrictions such as pay walls and the like) amounted to a positive intervention by the person providing the hyperlink which made any potential user

³⁷ Id, para 13(2).

³⁸ Id, para 13(3)

³⁹ Id, para 13(4).

⁴⁰ *Football Association and Premier League v QC Leisure* [2012] 1 CMLR 29; [2011] EUECJ C-403/08_O, [Bailii](#)

⁴¹ Here the CJEU cited their decision in *SGAE v Rafael Hoteles SA* [2006] ECR-I 11519 in which they had held that signals broadcast to guests in a hotel room were still acts of communication whether or not guests switched on their television sets to receive them.

following the link a member of the “new public” referred to above and hence created liability. A new public would also be created, the CJEU hypothesised, where the right holder had taken down or authorised the taking down of its original online posting or was now charging for access that which it had formerly provided for free.

The third question was rather more briskly answered. Framing does not alter the analysis (the copyright analysis at least) because if the public at whom the hyperlink is directed is not “new,” it does not matter whose website users might think they are looking at. What the users actually think or do matters not a jot. The CJEU’s response to the fourth question was equally crisp. Member states could not give wider protection to copyright holders than provided for under the Information Society Directive by expanding the meaning of a “communication to the public” to include activities not caught by the Directive. To hold otherwise, they said, would negate the Directive’s objectives of removing legal uncertainties that would adversely affect the workings of the internal market.

While extrapolation beyond the CJEU’s carefully crafted answers is not always wise, several observations about that court’s decision in *Svensson* can be hazarded:

- (1) The test propounded for assessing the legality of the person providing links is both objective and subjective. It is subjective in the sense that hyperlink providers must seek to put themselves into the mind set of the copyright holder when he or she first released the work in order to ascertain the nature and scope of the market into which it was intended to be pitched. The test is also objective in the sense that this imposed hypothetical standing in the shoes of the right holder is rationally defensible to outside observers.
- (2) The CJEU, in requiring a hyperlink provider to respond (by removing its link) when the right holder subsequently removes or authorises the removal of its work from a website, or proceeds to charge or impose conditions for access formerly provided for free, is requiring the hyperlink provider to act for the whole term of the copyright in the linked work as a copyright law policeman ever alert to the possibility that the right holder might decide to target a public to communicate with that is wider and newer than its original intended public. Although the CJEU does not discuss the issue in terms of implied consent (unlike the Federal Court of

Canada in *Warman v Fournier*,⁴²) the inference can be drawn that the original owners' consent was always contingent and hence revocable. Belated charging for access or changes to the terms of a creative commons licence accompanying posted material effectively turns an old public into a new public.

- (3) So far as users are concerned, it is the *potential* effect on the market for the right holder's services not the *actual* effect on that market that matters. This implies some kind of test of notional probability that is easier to state than apply.⁴³
- (4) While the CJEU's assumed remit to promote certainty within the European Union is both laudable and jurisdictionally limited it must be remembered that the very nature of the Internet makes it inevitable that hyperlinks will be global in their reach. Convergence with copyright regimes outside the Union is therefore equally desirable.

(iii) *Liability for Hyperlinking in the Courts of Member States*

A decade before *Svensson*, it fell to the 1st Civil Chamber of the Bundesgerichtshof (German Federal Supreme Court - *BGH*) in the so called *Paperboy* case⁴⁴ to consider the claims of the plaintiff publishing group Handelsblatt GmbH that the defendant, by reproducing newspaper article excerpts in which Handelsblatt had copyright and providing links that bypassed its home page, had acted in such a way as to infringe its copyright. The defendant operated a search engine called "Paperboy" which electronically skimmed through many websites looking for current newspaper articles. Searchers could generate free of charge a list of hyperlinks to all articles containing particular search terms of interest to them. The links provided direct access to the web pages containing the articles bypassing the home page of the site onto which the articles were originally uploaded. In finding no copyright infringement, the BGH pointed out, first, that copyright holder had already made its work publicly available on the Internet without installing any technical protection mechanisms. Secondly, it held the use of hyperlinks was not a process that should be reserved only for right holders or originators of databases. Searchers who knew the URL (Uniform Resource Locator address) of a page on the Web could go directly to

⁴² [2012] FC 803. See discussion of this point in section 4(d) below.

⁴³ This may be likened to the ways in which some jurisdictions impose liability for unjust enrichment. It is the unjustified gain to the hyperlink provider that matters not the loss to the right holder (that said, the remedy sought in *Svensson* seems to have been compensatory not restitutionary).

⁴⁴ *Urteil des Bundesgerichtshofes vom 17. Juli 2003, Aktenzeichen I ZR 259/00.* <http://www.jurpc.de/jurpc/show?id=20030274>.

that page without recourse to clicking on a hyperlink. Thus, to the BGH, a hyperlink was just a technical facility, a mere short cut, since clicking on it had the same effect as the more laborious task of typing in the URL in the address box of the browser. The hyperlink provider merely refers the user to a work in such a way as to facilitate access to the user to what is already publicly available. He or she does not make the protected work available on demand, nor intervene in its publication. It is the person who places the work on the Internet, who decides whether the work remains publicly available. The BGH also rejected the notion that the use of hyperlinks amounted to unfair competition simply because the plaintiff had lost advertising revenue when its home page was bypassed. In its view, the plaintiff had to accept there were inevitable drawbacks to publishing articles on the Internet and that expectations that hyperlink technology would not be used were unrealistic. Alluding to the wealth of information available online, the BGH observed that it could not be meaningfully mined and used unless search engines and hyperlinks were able to provide direct access to web pages.⁴⁵

A decade or so later (and also pre *Svensson*) another significant hyperlinking case came before Dutch courts. This was *Sanoma and Playboy v GS Media*⁴⁶ in which a Dutch television presenter in Holland had subjected herself to a nude photoshoot for Playboy magazine, and photos of her were uploaded by a fictitious person to an Australian file sharing site (FileFactory.com) ahead of the release of the magazine. A website GeenStijl.nl featured a story about the shoot and included a link to a zip file downloaded from FileFactory.com. At first instance, the district court settled on the existence of an intention to make a profit on the part of the defendant as the case breaker.⁴⁷ Evidence of a heavy volume of traffic on its website (some 230,000 visitors a day) was seen as damning in this regard. Because this greatly extended public had got to know about the photographs even before they had been published in the claimant's magazine *Playboy*, the district court had

⁴⁵ The authors have relied heavily on a German to English translation of the findings of *Paperboy* provided by M Knopp, "Internet Search Engine for Press Articles and Use of "Deep Links" Given Green Light," IRIS 2003-8:15/32. Available 1 July 2014 at <http://merlin.obs.coe.int/iris/2003/8/article32.en.html>.

⁴⁶ See http://www.boek9.nl/files/2013/IEPT20131119_Hof_Amsterdam_GeenStijl_v_Sanoma.pdf

⁴⁷ Cf. *TV Broadcasting Ltd v TV Catchup Ltd* [2013] EUECJ C-607/11. The CJEU intimated that although it was "not irrelevant", it was not necessary for an unauthorised communication of a work to the public to be a profit making venture on the part of the defendant in order for the right to be infringed. This is an understandable observation bearing in mind that a nexus between profit linked to the communication of a particular work could be difficult to prove if where a work is communicated by someone else. (On the evidence in the case itself, TVCatchup was not remunerated directly but rather indirectly through advertising.) Nor the CFEU said was it necessary for the plaintiff and defendant to have been in competition with each other. Neither the case law nor the Information Society Directive suggested this. These two issues had been referred to the CFEU by the English High Court.

no difficulty finding actual rather than potential harm to the copyright holder's financial interests. The court even brought to bear on these findings the concepts of "new public" and "intervening act"⁴⁸ in the evolving pre *Svensson* CJEU jurisprudence and asked itself whether the impugned link made protected works accessible to a public which was additional to the public envisaged by the owner. For the district court, the test for "new public" was easily satisfied because only a small circle of people knew about the existence of the photographs prior to the fictitious uploading. When the hyperlink to the photographs was created, these photographs gained exponentially greater exposure. When the case was appealed, however, the Amsterdam Court of Appeal⁴⁹ chose to align itself with the view of the BGH in the *Paperboy* case that, "a hyperlink referring to a work published at another location is nothing much other than a footnote in either a book or an article in a periodical that refers to a different work which has already been published." In its view, "[providing] a hyperlink is *in principle* (our emphasis) not an independent means of publication or intervention."⁵⁰ Having let the defendant off the hook for copyright infringement, the appellate court went on to find the defendant tortiously liable to Sanoma Playboy's publisher for its actions in placing the link,⁵¹ because, as it concluded: "Seen in the round, the hyperlink was to a great degree facilitative and moreover the inclusion of the hyperlinks in the texts of the articles could only be understood as encouraging the audience of the GS Media's website to look at the illegally placed photographs."⁵² In its torts analysis the appellate court found particularly convincing, first, the fact that GS Media had refused to remove the link after Sanoma demanded it be removed and, second, the fact that even after the Australian website had done what Sanoma asked of it and disabled the link, GS Media had proceeded to place a new link and allowed its visitors to also place new links. As the court put it, there was is nothing to suggest that without the help and support of GS Media, its audience would have been able to find the photographs by any simple

⁴⁸The emerging notion of an intervening act by which an undertaking expands the circle of persons having access to that communication and thereby renders the protected subject-matter accessible to a new public *Airfield NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) [2012] E.C.D.R. 3 para 77.

⁴⁹ *GeenStijl v Sanoma*, IEPT21031119, Hof Amsterdam, 19 November 2013. The authors have relied heavily here on a Dutch to English translation of key findings in both the district court and appellate court decisions in this case, available as at 1 July 2014 at <http://eulawradar.com/case-c-46612-svensson-hyperlinks-and-communicating-works-to-the-public/>.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para 2.2.4.

⁵² *Ibid.*

means.⁵³ None of this, of course, detracts from the Amsterdam Court of Appeal's relaxed *Paperboy* like response to the infringement point.

(b) Hyperlinking in United States Copyright Law

Aside from the landmark decision of the Supreme Court in *Metro-Goldwyn-Mayer Studios Inc v Grokster (Grokster III)*,⁵⁴ plaintiffs bringing disputes alleging hyperlinking liability have largely had to take their chances in the lower federal courts with all the opportunities for discordant judicial viewpoints that this provides. American judges have filled this precedential void in two ways. First by drawing a careful line between direct and indirect infringement (a distinction that is rather blurred in other jurisdictions⁵⁵) and the legal consequences that follow from each, and secondly, by inquiring whether hyperlinking could be brought within United States copyright laws' fair use defence⁵⁶, a defence that is considerably looser and more discretionary than that applying in most other countries' copyright regimes. Both techniques allow commercial motives and market outcomes to be legitimately weighed in the liability equation. To get to these second order issues, United States courts first have to decide a first order issue, namely, would the link being scrutinised otherwise infringe.

(i) *The direct versus indirect infringement divide in United States case law*

In deciding the first order issue, a loose consensus appears to have emerged from the United States jurisprudence that the creation, without more, of standard hyperlinks that give users "front door" access to copyrighted material is unlikely to lead to link creators themselves being found liable for *direct* copyright infringement.⁵⁷ Thus, in a recent decision *Pearson Education Inc v Ishayev*,⁵⁸ the court confirmed⁵⁹ that where links are not zip files or do not themselves contain substantive copyrighted works, creating the link does not directly infringe any of a copyright owner's exclusive rights. Hyperlinks, the court

⁵³ Ibid.

⁵⁴ 125 S Ct 2764 (2005).

⁵⁵ See discussion in the text in section 3 above and 4 (c) below.

⁵⁶ As the Supreme Court in *Campbell v Acuff-Rose Music Inc* 510 U.S 569, at 575 observed "The defense encourages and allows the development of new ideas that build on earlier ones, thus providing a necessary counterbalance to the copyright law's goal of protecting creators' work product. "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . ."

⁵⁷ *Universal City Studios Inc v Reimerdes* 111 F Supp 2d 294 (SDNY 2000).

⁵⁸ 2013 WL 3948505 (S D N Y August 1, 2013).

⁵⁹ In line with earlier cases such as *Ticketmaster Corp. v. Tickets.com Inc.*, 54 U.S.P.Q.2d 1344 (C.D. Cal. 2000) and *Bernstein v. JC Penney, Inc.*, No. 98-2958, (C.D.Cal. Sept. 29, 1998) (unpublished).

said, are nothing more than HTML instructions directing an internet user to a particular website. They are simply the digital equivalent of giving the recipient driving directions to another destination. The court did, however, caution that while linking to infringing content would not amount to *direct* infringement, uploading that content onto a server to which the impugned link connected might be an infringement and that providing the link might in unstated circumstances amount to *contributory* infringement.

What this means is that on the occasions on which United States courts have decided to attach copyright liability to the creators of hyperlinks to infringing material that is not stored on their own servers, they have done this by expanding the well established common law doctrines of secondary liability, namely vicarious and contributory liability.

Rooted in agency and tort law, vicarious liability in United States law requires proof that the defendant has a financial interest and some measure of control over the party doing the direct infringing and was successfully invoked in the Ninth Circuit Court of Appeals decision in the notorious peer-to-peer file sharing case *A&M Records Inc v Napster Inc.*⁶⁰ Contributory liability is a much less straight forward concept. As nomenclature suggests, liability depends on defendants not only having had some knowledge of infringing activity on the part of third parties but also on their providing some material assistance or contribution to that activity.⁶¹ Further expansion of secondary liability for copyright infringement took place when the Supreme Court in *Grokster III*⁶² was faced with a non copying defendant who had set up peer-to-peer computer programs enabling unlawful copying by third parties. In proceeding to reverse the judgment of the Ninth Circuit, the Court articulated a subset of contributory liability in the form of a test of authorisation by “active inducement”.⁶³

⁶⁰ 239 F.3d 1004, 1013 (2001).

⁶¹ *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971) cf a more succinct description in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir.1998) and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir.2007).

⁶² 125 S Ct 2764 (2005).

⁶³ “Active inducement” bears some similarity to the authorisation test applied in Australia under whose copyright statute a hyperlink provider can be caught under the copyright statute as a direct infringer for authorisation of third party infringing acts. For a cross jurisdictional analysis of *Grokster III* and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 in relation to copyright liability for third party infringement see S Ricketson and J C Ginsburg in “Inducers and Authorisers: A Comparison of the US Supreme Court’s *Grokster* Decision and the Australian Federal Court’s *KaZaa* Ruling” (2006) 11 Media & Arts Law Review 1. See also J Blevins, “Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms” (2013) 34 Cardozo L Rev 1821.

An important point to note about these forms of indirect liability in United States copyright law is that they depend on a showing of *direct* infringement by someone else.⁶⁴ How restrictive this could be was emphasised by Posner J in the Seventh Circuit Court of Appeals in *Flava Works Inc v Gunter*⁶⁵ (along with the delivery of other instructive lessons on the difficulties likely to face United States judges in hyperlinking cases). On the facts, the plaintiff Flava catered to the market for the production and distribution of videos of black men engaged in homosexual acts. It released its videos to websites that hosted them behind a pay wall so viewers could only access them after paying a fee. While viewers had to agree not to copy, transmit or on sell the video under Flava's terms of use, they were allowed to download the videos for personal, non commercial use. The defendant operated a publicly accessible online service called myVidster facilitating social bookmarking for which he did not charge patrons but relied instead on generating revenue from advertising on the myVidster site. The service allowed patrons enjoying similar sorts of videos to point them out to each other by bookmarking them on the website. Visitors to the myVidster site saw each bookmarked video available to be viewed in the form of a “thumbnail,” a miniature picture of the video's opening screen shot. Clicking on a thumbnail activated computer code that connected a visitor’s computer to the relevant server enabling the visitor to watch the video being transmitted directly from the server through a frame containing advertisements that myVidster put around it. It fell to be decided whether myVidster had acted as a contributory copyright infringer or was, in the words of Posner J, “an infringer’s accomplice.” Flava’s claim was that by providing a connection to websites that contained illegal copies of its copyrighted videos, myVidster encouraged its subscribers to circumvent Flava’s paywall thus reducing its income.

In stressing that it is imperative for a plaintiff to be able to identify the correct *direct* infringer before a finding of indirect infringement could follow,⁶⁶ Posner J found it was not the defendant but the plaintiff’s customers who had uploaded copyrighted videos onto the Internet. A person clicking on one of the addresses on the myVidster site to bypass Flava's pay wall and watching a copyrighted video for free was no more a direct

⁶⁴ *Napster*, 239 F.3d at 1013.

⁶⁵ 689 F.3d 754 (7th Cir. 2012).

⁶⁶ It was also this requirement that caused the plaintiff to become unstuck in *Tarantino v Gawker Media LLC* CV 14-603-JFW (FFMx April 22, 2014). The film director Tarantino complained the defendant had created a link to a leaked version of his film script for *The Hateful Eight* to an anonymous site. Tarantino, as the court put it, had to do more than “merely speculate that some direct infringement must have taken place.” For that reason, Tarantino’s allegation that Gawker Media was liable for contributory infringement because the links it set up “induced, caused or materially contributed” to infringing activity was not able to proceed to trial.

copyright infringer said Posner J than if he had snuck into a movie theatre and watched a copyrighted movie without buying a ticket.

Another lesson from *Flava* pointing up the difficulties of parsing the words of the copyright statute to find the solution to a technical problem arose from Posner J's almost playful dissection of the statutory wording to arrive at two irreconcilable interpretations of a right holder's exclusive economic right "to perform [a] copyrighted work publicly," under 17 U.S.C. §106(4) and then apply them to the facts to achieve very different outcomes. (A state of affairs that Posner J suggested required legislative clarification although it is difficult to see how this could be done.) The performance right so far as it related to the facts before the court, was defined as the right "to transmit or otherwise communicate a performance ... of the work ... to the public ... whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times." On one interpretation of this provision, dubbed by him "performance by uploading," Posner J suggested that uploading plus bookmarking a video should be treated as a public performance because it enabled a visitor to the website to receive (and if desired watch) a performance at will, and the fact that he would most likely be watching it at a different time or in a different place from the other viewers would not therefore affect its "publicness". Public performance occurs when the video is uploaded and the public becomes capable of viewing it, (an interpretation Posner J noted worked better at giving meaning to "public" in public performance but worse at giving meaning to "performance"). On the facts of *Flava* however, following this line of interpretation would do nothing for the plaintiff's cause, Posner J said, because there was no evidence that myVidster contributed to a decision by anyone to upload a Flava video to the Internet to become available to be bookmarked on myVidster's website. All myVidster did was to provide web addresses where they could go to find entertainment. Posner J drew an analogy with the *New Yorker* listing plays and giving the name and address of the theatres where they are being performed. In such a case, Posner J, said there is no inference that the magazine itself is performing, "transmitting or communicating" the plays.

A different interpretation, described by Posner J as "performance by receiving," would see performance occurring only when the work was transmitted to the viewer's computer in which case it could be said to be "communicated to the public in a form in which the public can visually or aurally comprehend the work." Posner J observed this argument could possibly have worked for the plaintiff, had he thought to plead it, since

myVidster did have some role there. But on the facts of the case, the viewer rather than the sender (the latter being the uploader of the copyrighted video) determined when the performance began.

While one cannot fail to be impressed by the sharpness and intellectual virtuosity of the mind behind this piling of hypothetical upon hypothetical, it is the very complexity of Posner J's heavily fact dependent reasoning that makes *Flava* the most uncertain of guides in the hyperlinking debate.

(ii) *The Fair Use Exit from the Hyperlinking Problem in the United States*

Economic analysis of a kind is required of American judges when looking at their broad fair dealing defence which uses the language of financial interest and market outcome to provide an exit from a liability that would otherwise attach. The relevant provision in the US Copyright statute⁶⁷ sets out a non exhaustive list of matters to be considered in assessing fair use claims. These are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of use upon the potential market for or value of the copyrighted work.

The case that perhaps best illustrates consideration of the fourth limb of the test for fair use in a hyperlinking context is *Perfect 10 Inc v Amazon Inc*⁶⁸ in which the Ninth Circuit Court of Appeals addressed the effect of Google's use of impugned links upon the actual and potential markets for copyrighted images of nudes over which Perfect 10 held the copyright. In this case Perfect 10 had sued Google (and also Amazon) for infringing its

⁶⁷ 17 USC §107.

⁶⁸ 487 F.3d 701 (9th Cir. 2007), para 14.

copyright by allowing Google's search engine to create and publicly display thumbnail versions of Perfect 10's images. The District Court⁶⁹ had earlier found in applying the first limb of the fair use test that Google's adwords and adsense advertising systems had increased the commercial nature of Google's and Amazon's use of Perfect 10's images. It had also found Google directly liable for copyright infringement by storing the thumbnails⁷⁰ and not able to be reprieved by fair use since it had superseded Perfect 10's own right to shrink its images for use in an adjacent market. In its view, persons who could obtain Perfect 10 images free of charge from Google would be less likely to pay for a download from Perfect 10's market for cell phone downloads. In coming to its conclusion that Google could not invoke fair use, the District Court distinguished the decision of the Ninth Circuit Court of Appeals in *Kelly v Arriba Soft Corp*⁷¹ (involving much the same sort of use of copyrighted photographic images) which found that that thumbnails were not a substitute for full size images and so did not harm the owner's ability to sell or license his images. The District Court went on to enjoin Google from creating and publicly displaying thumbnail versions of Perfect 10's images although it did not enjoin it from linking to third-party websites that displayed infringing full-size versions of these images. The Ninth Circuit Court of Appeals⁷² subsequently reversed the finding of direct infringement on Google's part and was expressly guided by its earlier decision in *Kelly v Arriba Soft Corp*⁷³ in applying the fair use defence to the *Perfect 10* facts. The Court first noted that the facts of *Kelly* differed from those of *Perfect 10* in that Perfect 10 was

⁶⁹ *Perfect 10 v Google* 416 F. Supp 828 (C D Cal 2006). Perfect 10 had also brought a similar action against Amazon.com and the cases were initially heard together.

⁷⁰ *Ibid*, 844, 851.

⁷¹ 336 F 3d 811 (9th Cir 2003).

⁷² *Perfect 10 v Amazon*, 487 F.3d 701 (9th Cir. 2007), para 47.

⁷³ 336 F 3d 811 (9th Cir 2003). In the *Kelly* litigation, Ditto.com (associated with Arriba Soft) was an early version of an image search engine similar to Google's Image Search in that if a searcher tapped in say "Porsche", a selection of images of Porsches would be thrown up on the screen from around the Web. Ditto.com not only presented each image in a proportionately shrunken form but also provided a link allowing the searcher to open the full-size image in a new web browser window. Arriba was sued by a photographer Kelly who discovered Ditto.com had indexed his website and the images he had uploaded there. The Ninth Circuit Court of Appeals in *Kelly* found that although Ditto.com's use of thumbnail images was fair use, Arriba was still liable for direct infringement of the public display right for opening new windows to display images by using the same "in-line linking"(framing") technology also used by other Web search engines such as Google and Altavista. This conclusion clearly had a serious impact on the ability to use hyperlinks on the Internet and opened up the spectre of a rash of civil lawsuits because of the existence in the United States of statutory damages under 17 USC § 504 (c), a money remedy that requires no evidence of harm suffered by the plaintiff or profit reaped by the defendant. (Not only may a minimum amount of US\$750 and a maximum amount of US\$30,000 be awarded for the infringement of any one work, an award is potentially able to be increased up to US\$150,000 if the copyright owner is able to prove wilful infringement.) This led the Ninth Circuit Court of Appeals to issue a revised ruling in which it withdrew that part of its opinion dealing with in-line linking and the public display right.

asserting that its interests were harmed in the adjacent market for reduced-size images downloadable on cell phones. The Ninth Circuit was not at all impressed by the mere spectre of a new emerging market for cell phone downloads for Perfect 10. It noted the absence of any real evidence that Google users had actually downloaded thumbnail images for cell phone use and suggested that any potential harm to Perfect 10's market remained in the realm of the hypothetical.⁷⁴

(c) The authorisation route to direct liability for hyperlink providers in Australia, the United Kingdom, Canada and New Zealand

The rules for assessing infringement under United Kingdom, Canadian, Australian and New Zealand copyright law are very different from those applicable in the United States. In these jurisdictions a hyperlink provider can be caught as a direct infringer by authorising third parties to carry out an infringing act such as copying. There is no need to sheet liability home to a third party and they can be identified as a class. The Australian statute,⁷⁵ for example, states in section 10(1): “copyright is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does *in Australia*, or authorises the doing *in Australia* of, any act comprised in the copyright.” (emphases added). Notwithstanding the different statutory framework, the Full Federal Court of Australia in *Cooper v Universal Music Australia Pty Ltd*⁷⁶, faced with a case based on facts not dissimilar to those in *Universal City Studios Inc v Reimerdes*⁷⁷ reached much the same outcome by finding that the defendant had *authorised* third party infringement. Similarly, even though the right to communicate a work to the public or make a work available online is differently couched in the European Union and Australia the trial judge in the *Cooper*⁷⁸ litigation reached the same factual destination (ie the unauthorised provision of a hyperlink to copyrighted material is not of itself communicating a work to the public or making a work available online) as the CJEU in *Svensson* but without the need to develop the concept of a “new public”.

⁷⁴The Ninth Circuit also found on fair use grounds that the images were transformed by Google from an aesthetic product to an indexing mechanism and thus the thumbnails could not be substitutes for the legitimate originals.

⁷⁵ Copyright Act 1968 (Cth).

⁷⁶ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

⁷⁷ 111 F Supp 2d 294, 324 (SDNY 2000).

⁷⁸ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, para 63. Tamberlin J expressed himself “not satisfied that the Cooper website has “made available” the music sound recordings within the meaning of that expression. It is the remote websites which make available the sound recordings and from which the digital music files are downloaded as a result of a request transmitted to the remote website.”

The appellate court in *Cooper* had little difficulty finding liability by authorisation where the defendant hyperlink provider had built his business model built around copyright infringement by end users and had a financial interest in any primary infringements occurring. It made no difference that Cooper (the originator, owner and operator of a highly organised and structured website mp34free.net) had stored no infringing files himself and had made no charge for users to download files from remote servers, deriving his profits solely from advertising revenue generated by visitor traffic to his website. Cooper's appeal turned upon the resolution of one issue only, namely whether he had "authorised" copyright infringement by the users of mp34free.net.⁷⁹ As Tamberlin J at first instance, pointed out,⁸⁰ Cooper's website had been carefully designed to attract and be user friendly. Visitors not only from Australia but around the world could readily search the site and select links to popular (and hence commercially successful) sound recordings for free downloading from a variety of online catalogues without the consent let alone the knowledge of the relevant owner. The court found purely cosmetic Cooper's "disclaimer"⁸¹ of liability which acknowledged the linking function of the website in the following terms: "When you download a song, you take full responsibility for doing so. None of the files on this site are stored on our servers. We are just providing links to remote files." The website's privacy policy also purported to disclaim responsibility in the following terms: "This site only provides links to the recording sites and no songs are located on our servers. We are not responsible for any damage caused by downloading these files, or any content posted on this website or linked websites."⁸² In similar vein, in the United Kingdom case, *Twentieth Century Fox Film Corp and others v Newzbin Ltd*⁸³, the trial judge relied on evidence that Newzbin, the defendant hyperlink provider, had developed a very substantial business and had a sophisticated and substantial infrastructure

⁷⁹ Australia's safe harbour for hyperlink providers discussed in the text below did not exist when the facts giving rise to the litigation took place, thus, it was not able to be argued by way of defence.

⁸⁰ In *Universal Music Australia v Cooper* (2005) 150 FCR 1, para 15.

⁸¹ No doubt included in the light of *University of NSW v Moorhouse* (1975) 133 CLR 1.

⁸² While the parties in *Cooper* had no cause on the facts to pay particular attention to the effect of the words 'in Australia' in the Australian statute, the Full Federal Court offered some guidance on their meaning that may well have resonance in future cross jurisdiction hyperlinking cases. The significance of those words, the court said, is that they create a nexus between infringements of copyright under the Act and Australia. The provision is drawn to cover infringing conduct done in Australia and some conduct which, although not necessarily done in Australia, relates to infringing conduct done in Australia. Thus it creates two classes of infringement; one *involving* infringing conduct in Australia and the other *relating to* infringing conduct in Australia. If section 10(1) did not include the phrase 'or authorises the doing in Australia of', the court noted, it would be construed as applying only to conduct in Australia and would not catch authorisations outside Australia to do an act in Australia which only the owner of the copyright has the exclusive right to do.

⁸³ [2010] EWHC 608 (Ch).

to find the defendant directly liable for authorising infringing acts by others as well as communicating works to the public. In his analysis of Newzbin's financial accounts and the market for which it was catering, Kitchin J noted forensically that it was comprised of 700,000 members and that it had for the relevant financial year a turnover in excess of £1million, a profit in excess of £360,000 and paid dividends on ordinary shares of £415,000. (If nothing else *Newzbin* illustrates that the United Kingdom is not chained to the words of the Directive. It has another exit from the hyperlinking conundrum.)

(d) Canada: Self Help and Implied Consent

The Canadian position on hyperlinking is an interesting one in so far as one can deduce it from the exiguous amount of authority available. In the view of the Federal Court of Canada in *Warman v Fournier*⁸⁴ copyright owners can be expected under some circumstances to engage in self help when works they have posted online themselves are deeply linked to without their consent. For Rinnie J, it is the person who uploads a work onto the Internet who decides whether the work can remain publicly available. In finding that the respondents' creation of a deep link to a photo of the applicant on the applicant's website was non infringing, he reasoned that the applicant would only be a victim of infringement if the respondents had done something that only he had the right to do without his authorisation. Since the photo remained within the applicant's full control he could have removed it from his website if he did not wish it to be linked to. Presumably (although Rinnie J did not elaborate⁸⁴ on this) the applicant could also have helped himself by imposing stricter controls over access by searchers). Unfortunately, for present purposes, Rinnie J's explanation did not have to (and did not delve) into any difference it might have made had the link to the photo not been a deep link to it on the applicant's web page but to some other site not under the applicant's control.

(e Ad Hoc Government Intervention and Legislative Patches

(i) Safe Harbours for Linkers

The United States was the first jurisdiction to offer a legislative patch to assist in the resolution of hyperlinking disputes where the provider of a link is found to be liable under existing principles of copyright law. While not changing the rules at all, Congress inserted

⁸⁴[2012] FC 803.

provisions in the Digital Millennium Copyright Act of 1998⁸⁵ providing a safe harbour for “information tool providers” protecting them against monetary (but not injunctive) relief where those providers have referred or linked users to an online location containing infringing material, provided that they (i) do not have actual or constructive knowledge of the infringement, (ii) do not receive any benefit directly attributable to the infringing activity and (iii) respond expeditiously to remove the reference or link upon notification of claimed infringement (such notice must be reasonably sufficient to enable the service provider to locate the link or reference).⁸⁶

Australia too has had a safe harbour for linking since 2000⁸⁷. Its first and very wide attempt at protection covered a service provider providing facilities for making, or facilitating the making of, a communication. A hyperlink provider was not taken to have authorised any infringement of copyright in an audio-visual item merely because another person uses the facilities so provided to do something the right to do which is included in the copyright. The safe harbour⁸⁸ provisions underwent fine tuning to bring them more closely in line with those in the United States after the two countries signed a free trade agreement in 2004 requiring this legislative change. In pursuit of this objective Australia has since 1 January 2005 conferred automatic immunity on those carriage service providers who refer users to an online location using “information location tools or technology”⁸⁹ provided that they have not received a financial benefit⁹⁰ directly attributable to the infringing activity if they have the right and ability to control that activity. To retain protection they must also expeditiously remove or disable access to a reference residing on its system or network upon receipt of a notice in the prescribed form that the copyright material to which it refers has been found to be infringing by a court.

⁸⁵ Pub.L. 105–304, 112 Stat. 2860.

⁸⁶ 17 USC § 512(d).

⁸⁷ Australia’s first attempt involved the Copyright Amendment (Digital Agenda) Act 2000 (Cth) inserting a new section 112E into the Copyright Act 1968 (Cth) which created a wide safe harbour for “a person (including a carrier or carriage service provider”) who provided facilities for making, or facilitating the making of, a communication.”

⁸⁸ In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, Wilcox J in the Federal Court pointed out that Parliament had only intended to ‘protect the messenger’ by providing this exemption. The provision did not, he found, extend to a messenger’s authorisation of infringement by third parties.

⁸⁹ The immunity under s 116AF was inserted into the Copyright Act 1968 (Cth) by the Australia and United States Fair Trade Implementation Act 2005 (Cth).

⁹⁰ “Financial benefit” does not include a benefit that merely results from the level of activity on the carriage service provider’s system or network. A financial benefit is regarded as directly attributable to the infringing activity only if the carriage service provider knew or ought reasonably to have known that an infringement of copyright was involved.

The European Union, by contrast, has no specific limitation on liability for persons operating websites that provide links. As a result, courts in different EU member states are left to develop different standards for linking liability or remain silent as in the United Kingdom.⁹¹

(ii) *Ancillary rights for the Press*

One solution in Europe has been to create new ancillary rights for copyright holders considered to be more than usually exposed to second comers exploiting their works on the Internet. In Germany since 1 August 2013 search engines such as Google and news aggregators such as Meltwater have been precluded from “displaying” excerpts of articles published in newspapers for one year unless they have paid press publishers for a licence to do so. The prohibition⁹² gives the press an ancillary exclusive economic right to commercially exploit their content for one year. The question arises here how this initiative sits with the CJEU’s prohibition in *Svensson* against expanding the right of communication to confer greater rights on copyright owners than provided for in the Information Society Directive. It could of course be that the Germans are not so much expanding the communication right but bypassing it although this would do little to promote that certainty within the European Union upon which the CJEU placed such store.

(iii) *The Rojadirecta Litigation: A Trans -Jurisdictional Cautionary Tale*⁹³

In 2011 the United States Office of Immigration and Customs Enforcement (ICE) responded to a complaint by sports rights holder Audiovisual Sport (a subsidiary of the giant Spanish communications group PRISA) and seized the US registered domain name of an online Spanish sports forum Rojadirecta.com on the grounds that some of its more than 800,000 users linked to video streams that infringed copyright.⁹⁴ Rojadirecta's parent company Puerto 80 sued in the US to get its domain name back claiming it did not itself

⁹¹ The *Gowers Review of Intellectual Property 2006* which had as one of its terms of reference, improving the balance and flexibility of intellectual property rights to allow individuals, businesses and institutions to use content in ways consistent with the digital age, did not see fit to mention the lack of a safe harbour for linkers or information tool providers. December 2006. Prepared for the Chancellor of the Exchequer and the Secretaries of State for Trade and Industry and Culture, Media and Sport.

⁹² Effected by sections 87 f-h of the Leistungsschutzrecht für Presseverleger (“LSR”).

⁹³ See F Mack, “Has the Quest to Quell Piracy Gone Too Far? Government Overreach in Forfeiture of Linking Websites” 68 U. Miami L. Rev. 561.

⁹⁴ The seizure occurred as part of the Obama Administration’s “Operation in our Sites” initiative which was targeted at other businesses as well as Rojadirecta.

host any copyrighted material and that it merely indexed links to sports streams already uploaded onto the Internet and carried links to files already hosted on other sites. In Spain itself, the Madrid Appellate/Provincial Criminal Court had acquitted Rojadirecta's owners of criminal charges for copyright infringement. In its view Rojadirecta was an "intermediary" deriving no direct profit from third party copyright infringement although it was aware of advertising on its website.⁹⁵

Following the *Flava* judgment discussed above, and 19 months after it had seized Rojadirecta's domain name, the United States Government returned it and dropped their claim.

5. Uses and Abuses of Economics in the Hyperlinking Debate

What is not likely to go away anytime soon is that we are now living in a hyperlinked environment that has become, as one commentator put it, "a marketplace of attention" with an entire industry growing up around the provision and manipulation of links connected to search engine results.⁹⁶ As courts wrestle with the problem of determining liability for linking to copyrighted material in digital form, they may find the answer they seek lies not in some long overdue legislative bright line rule⁹⁷ but in a rule of reason economic analysis of the motives and interests of the parties in dispute and the actual or likely effects on particular product or service markets.

Courts, of course, are no stranger to mandatory consideration of economic factors on a case by case basis in copyright infringement disputes involving hyperlinking. Indeed (as discussed above) such a requirement underpins the creation in the United States of a

⁹⁵ Rojadirecta also faced civil and criminal actions in Italy. In a 2011 civil action between Reti Televisive Italiane and Rojadirecta the court found Rojadirecta had consciously and willfully assisted the infringement of the right to broadcast sporting events because the linking activity, although itself generally legitimate, had been functionally integrated in a broader activity facilitating and contributing to the infringement. The court concluded that Rojadirecta had carried out its activities with the clear goal of commercially exploiting the broadcasted sporting events through the insertion of advertisements on its website. In the criminal action, an ex parte order was obtained (and confirmed on appeal in 2013) that blocked access within Italy to all present and future IP numbers associated with Rojadirecta's domain names. See further details provided by F Mack, "Has the Quest to Quell Piracy Gone Too Far? Government Overreach in Forfeiture of Linking Websites" 68 U. Miami L. Rev. 561.

⁹⁶ J Webster, "Structuring a Marketplace of Attention" in J Turov and L Tsui (Eds) *The Hyperlinked Society: Questioning Connections in the Digital Age* (Ann Arbor, MI: University Of Michigan Press (2008) 23.

⁹⁷ Interestingly, of the nine significant and largely consumer friendly amendments recently made to the United Kingdom copyright statute not one addresses problematic issues surrounding hyperlinking. The amendments in the Enterprise and Regulatory Reform Act 2013 reflect in part the United Kingdom government's response to the Report by Professor Ian Hargreaves, *Digital Opportunity* (May 2011) which recommended significant changes to the UK's copyright law. See HM Government, Modernising Copyright: A modern, robust and flexible framework Government response to consultation on clarifying copyright law <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>

statutory safe harbour for “information tool providers”⁹⁸ (persons referring or linking users to an on-line location containing infringing material).⁹⁹ One of the express disqualifiers for immunity is gain of direct economic benefit from the infringing activity.¹⁰⁰

In disputes over copyright liability for hyperlinking, some United States courts, without statutory prompting, have adopted a hard line objectivist approach to commercial motive as well as looking at the effect on the market or potential market for the copyright owner’s product through an economic lens. Thus, in *Universal City Studios v Reimerdes*¹⁰¹ when the United States District Court, in upholding the trial judge’s award of an injunction, intimated that the defendant’s hyperlinking to the DECSS code threatened not only to reduce the plaintiff’s revenue from the sale and rental of DVDs but also threatened to impede the studios leveraging into new, potentially lucrative online markets such as video-on-demand. That the hyperlink provider may neither have sought by its activities to make a direct or indirect financial gain nor attempted to avoid a loss personally carried no weight in the analysis. In essence, the court’s focus remained on the outcome for the plaintiff, *viz* that the system it had developed to provide copyright protection for its DVDs had become compromised by the links and could lead to the market for compliant DVD players drying up.

While market and economic analysis in fair use situations is in theory much more hobbled and more embryonic in other jurisdictions such as the United Kingdom, Canada, New Zealand and Australia with their much more narrowly framed fair dealing exceptions,¹⁰² nevertheless, judicial disapprobation attaching to the commercial purposes of an allegedly infringing defendant is clearly discernible in cases such as *Newspaper*

⁹⁸ The exemption extends only to monetary (not injunctive) remedies.

⁹⁹ Similar protection is offered online service providers who cache information in their systems on behalf of their users under the Digital Millennium Copyright Act 1998, 17 USC, §512 (b) (1998). Again the exemption only covers direct liability for copyright infringement and claims for monetary damages.

¹⁰⁰ The information tool provider must also have responded expeditiously to remove the reference or link upon notification of claimed infringement (such notice must have been reasonably sufficient to enable the service provider to locate the link or reference.)

¹⁰¹ 111 F.Supp.2d 294. As Amended Sept. 6, 2000.

¹⁰² Fair dealing exits from the problem are not even a possibility in some civil law copyright regimes lacking even these minimalist fair dealing exceptions. The closest German law comes to allowing fair dealing, for example, is in the application of its implied consent exception whereby putting content on the Internet can in some circumstances be construed as acquiescing in activities that are normal or customary in that medium of which hyperlinking is one. The topic is fully explored by F Potalberger, in “Google and the Thumbnail Dilemma: Fair use in German Copyright Law” (2013) 9 J L and Policy for Info Soc 139. The German position is not dissimilar to that arrived at by the Canadian Federal Court in *Warman v Fournier* [2012] FC 803.

*Licensing Agency Ltd v Marks and Spencer*¹⁰³ a decision of the United Kingdom Court of Appeal. To competition lawyers there is nothing unusual in this two pronged inquiry into purpose and effect.

6. Some Competition Law Perspectives on the Hyperlinking Debate

Many of the dilemmas facing courts in hyperlinking cases have their parallels in other areas of law.¹⁰⁴ This is particularly so in the case of competition law where judges and regulators face some of the same problems and use similar analytical tools. We must stress here that what we are talking about is not the direct application of competition to the facts of particular cases. Direct enforcement of competition rules while theoretically possible in the hyperlinking context is unlikely for a variety of reasons. Neither the hyperlink provider nor the copyright holder will usually possess the degree of market power that would open them to scrutiny by regulators.¹⁰⁵ It also needs to be remembered that competition law and policy is about protecting the process of competition not propping up individual competitors whose business or market share is harmed by the rigours of the competitive process itself.¹⁰⁶ Copyright law's task on the other hand, is to unashamedly balance the economic and social interests of market participants. Even in those few cases where those restrictions did not operate there is a widespread perception in most jurisdictions that intellectual property rights have to be approached more gingerly or at least differently from other forms of property¹⁰⁷ when they surface in competition proceedings. That is not our primary focus in this paper. What competition law can provide, on the other hand, is an

¹⁰³ (2000) 48 IPR 229.

¹⁰⁴ Tort, for example, see M Dockins, "Internet Links, the Good, the Bad, the Tortious and a Two Part Test" 36 U Tol L Rev 367 and M Ding, "Perfect 10 v Amazon.com: A Step Toward Copyright's Tort Law Roots" 23 Berkeley Tech. L.J. 373 (2008).

¹⁰⁵ But see the Hargreaves Report, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011) para 4.44 where it was pointed out that while collecting societies (such as the NLA) fulfil a valuable role in licensing markets and reducing transaction costs by enabling "many to many" licensing, they can also harm competition because they are in effect natural monopolies. In its view collecting societies manage what is in some respects (to licensees at least) a regulatory cost. Indeed one of its recommendations was that the UK should support moves by the European Commission to establish a framework for cross border copyright licensing, with clear benefits to the UK as a major exporter of copyright works. Collecting societies should be required by law to adopt codes of practice, approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets. Id, p 41.

¹⁰⁶ *Brown Shoe v United States* 370 US 294 (1962).

¹⁰⁷ Detailed treatments of the ways in which the interface between competition law and intellectual property operates in individual jurisdictions can be found in S Anderman and H Schmidt, *EU Competition Law: The Regulation of Innovation* (Oxford, OUP 2011); K Coates *Competition Law and Regulation of Technology* (Oxford, OUP, 2011); I Eagles and L Longdin, *Refusals to License Intellectual Property: Testing the Limits of Law and Economics* (Hart Publishing, Oxford, 2011).

analytical tool kit and a set of similar fact situations from which copyright lawyers could usefully draw some valuable lessons were they so inclined. The lessons to be sure are not always positive. Competition cases and academic commentary on those cases throw up more than their fair share of cautionary tales, most notably:

(a) Beware of technology specific fixes

It is sometimes suggested that competition rules themselves need to be adjusted or downplayed in technology rich industries.¹⁰⁸ Lurking behind this suggestion are two highly contestable assumptions. The first is that judges are good at predicting technological change and its effect on the economy. The second is its Panglossian opposite. Technology will evolve and mutate to find its way around any legal rule that gets in its way so let us not worry too much about how the rule might work in any particular context. Both of these propositions cannot both be true at the same time. Transposing them to the hyperlinking debate, the first viewpoint would see the courts constantly fine tuning the content of infringement rules not only to reflect the existence of new technology but also make that technology work more efficiently. The second “who cares” approach, on the other hand, could justify a complete absolution of hyperlink creators or their automatic condemnation and is the very antithesis of a *via media* taking us back where we started.

If competition law teaches us anything about adjusting to new technologies, it is that there are limits to what a court can do to keep the law in step with technological change without stepping outside the judicial role as traditionally conceived. Actual or perceived gaps in the law cannot be waved away by judicial fiat. It is one thing for courts to keep the technology in mind when seeking to give meaning to terms such as “communication to the public” as laid down in a pre-existing legislative requirement and quite another to seek to rewrite that requirement with the freedom of a true legislator.¹⁰⁹

(b) Keep the economics transparent

While the frequent and sometimes acrimonious disagreements between economists in competition proceedings are sometimes seen as something less than their finest hour and thus an excuse for keeping economists out of the courtroom, few

¹⁰⁸ For a dissection of the reasoning behind this suggestion see Eagles and Longdin, n 107 above, 48. The reasoning has not gone uncontested among competition lawyers and economists, id, 49.

¹⁰⁹ For a trenchant criticism of the CJEU’s tendency to confuse the two processes see J Griffiths, “Constitutionalising or Harmonising the Court of Justice: The Right to Property and European Copyright Law” (2013) 38 E L Rev 65. The phenomenon, however, is not confined to Europe.

competition lawyers would now take this view. Genuine differences between economists are better aired than hidden, they would say. The alternative of allowing judges to invisibly and haphazardly shop for their favourite brand of economics would quickly bring both law and economics into disrepute and yet this is what seems to be happening in the hyperlinking cases.

(c) Assess the risk of inferring adverse market outcomes from market intent

As most economists would concede, predicting market outcomes before they occur is not the most precise of sciences. Awareness of this inconvenient but inevitable truth sometimes led finders of fact in competition cases to treat proof of anti-competitive purpose as a convenient surrogate for anti-competitive effect. It quickly became clear, however, that this evidentiary short cut came with its own set of problems. Given that public confessions of malign intent are in the nature of things likely to be rare and statements made in the shadow of litigation more than usually self serving, courts were driven to infer such intent from perfectly normal business behaviour. (Profit seeking is after all why most firms enter markets.)

7. The Effect of the Hyperlinking Decisions on Copyright Law as a Whole

The history of copyright,¹¹⁰ in common law jurisdictions at any rate, is one of an evolution during the nineteenth century from a disconnected series of discrete statutory rights each focusing on a separate “intellectual product” (“the book”, “the play” or “the design”) into a relatively unified set of rules covering most forms of protectable expression. Subconscious copying may be hard to prove¹¹¹ but the orthodox rule proceeds on the basis that once proven liability will follow. Evidentiary and substantive issues are kept distinct.¹¹² The hyperlinking debate played out across jurisdictions threatens to throw this evolution into reverse particularly in relation to infringement.

What then do we think a unified theory of infringement has to say to us? It would tell us first that the test for infringement is purely objective. The state of mind of the

¹¹⁰ The evolutionary process is traced in B Sherman and L Bentley, *The Making of Modern Intellectual Property Law: The British Experience 1760 -1911* (CUP, Cambridge, 1999).

¹¹¹ See, for example, *Stephen Malmstedt v EMI Records Ltd* [2003] ECDR 162.

¹¹² See *Mitchell v BBC* [2011] EWPC 42, para 39. Canadian courts have on occasion conflated the two, see *Gondos v Hardy* (1982) 38 OR 2d 555, 569.

putative infringer is or should be irrelevant.¹¹³ Liability is strict, Exceptions and defences are those stated in the statute and must be narrowly construed, The rules are technology and context blind. Harm to the copyright owner while it may affect the remedy is not an element of the cause of action and a finding of substantive liability can be found in its absence.

The hyperlinking cases, as we have seen, are based on a very different set of assumptions and reflect very different policy choices. Motive and its presence or absence are very much part of the liability equation. Courts proclaim their allegiance to limited and narrowly framed exceptions while in the same breath expanding their reach in ways that seem far from the statutory language that created them but are justified by an expressed desire to make technology work as efficiently as possible.

Given that the hyperlinking jurisprudence cannot be wished away however inconvenient that might be for traditional views of how copyright infringement is meant to work, the question is what is to be the nexus between that jurisprudence and existing copyright norms? Two futures are possible. The hyperlinking cases could be walled up in their own technology driven doctrinal ghetto. Alternatively, their effect on the wider law could be frankly acknowledged so commercial motives and market outcomes would extend or contract liability across the board. The smart money would seem to be on the first.

¹¹³*Francis Day and Hunter v Bron* [1963] Ch 587, 614, 625. This has long been the case in the United Kingdom law see *Baigent v Random House Group* [2007] FSR 24, para 99; *Mansell v Valley Printing Co* [1908] 2 Ch 441 and the position is the same in Australia, see *Andritz Sprout-Bauer Australia v Rowland Engineering Sales* (1993) 28 IPR 29 and the United States, see *Fred Fisher Inc v Dillingham* (1924) 298 F 145, *Edwards and Deutsch Lithography v Boorman* (1926) 15 F 2d 35.