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Controlling World Wide Web Links: Property Rights, Access Rights and Unfair Competition

CHRIS REED*

INTRODUCTION

This Article examines whether property laws allow the proprietor of a website to prevent others from linking to his site. The Article concentrates mainly on whether the law empowers the proprietor of a website to prevent links, and then asks whether (and on what basis) the law should so empower him. The reason for this approach is simple—the application of the existing law to the Internet is so undeveloped that any theoretical approach to the initial analysis is in danger of producing the same sort of results as the Classical Greek approach to taxonomy, which classified a giraffe as a hybrid between a camel and a pard, a spotted panther. Before a theory can be developed, it is necessary to identify and describe the phenomena from which the theory is to be induced. It would be premature to assume at the outset that Internet activities are analogous to similar paper-based activities, or that the law will adopt the same approach to resolve a similar dispute, until the question has been analyzed in depth.

The author's approach is therefore that of an automobile mechanic who, when presented with a defect in a new type of vehicle, searches for an appropriate tool to mend that defect. As the vehicle is novel, none of the tools

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2. It was only after centuries of zoological study that a clear picture of the range of animal varieties emerged, thus enabling Linnaeus to develop his system of taxonomical classification. Carolus Linnaeus, Systema Naturae per Regna Tria, Secundum Classes,Ordines, Genera, Species,Cum Characteribus, Differentiis, Synonymus, Locis. Giraffes are now clearly identified and classified as antelopes.
in his toolbox are likely to be entirely appropriate, but one or more will nearly
fit. His task is to discover the most appropriate tool and learn how to use it in
a new way. If the problem seems likely to recur, he may develop a modified or
new tool specifically for that job. The lawyer’s task is very similar. The first
part of this Article therefore examines the legal toolbox, to discover those rules
of law that might be used to resolve a dispute between the website proprietor
and the linking party. The final part sets forth suggestions as to how the law
might develop appropriate tools to resolve this issue in future cases.

It is important to recognize that the toolbox is very extensive. If a web link
infringes the rights of the proprietor of a linked-to website, that infringement
potentially occurs everywhere that the linking website is received, potentially
involving almost every jurisdiction in the world. In theory, therefore, an
aggrieved proprietor could commence an action in the jurisdiction that provides
him with the best prospect of success. In practice, however, an action would
only be sensible in a jurisdiction where the defendant has assets against which
a judgment can be enforced. Provided such a jurisdiction exists, a judgment in
favor of the website proprietor is likely to have worldwide effects. This might
be because it would include an injunction against further infringements in other
jurisdictions (possibly worldwide) which may be enforced by sanctions against
local assets or the defendant’s person. In other words, it is technically

3. In order to analyze the legal issues raised in this Article, it has been necessary to coin some new, and
inelegant, terminology. In this Article:

- a linking web page means a page containing a link to a different web page held on
  another’s website. The person who devises and controls the contents of a linking page
  is described as its author (even though, in the copyright sense, authorship might reside
  in a third party, e.g., a designer commissioned to produce the page);
- a linked-to web page (or site) is the page (or home page) of the site whose URL is
  contained in the linking page. The person who controls the site containing the linked-to
  page is described as its proprietor;
- a viewer is a user of the World Wide Web. He views a linking or linked-to page using
  his web browser software, e.g., Netscape Navigator or Internet Explorer.

4. There may be some exceptions—for example, in Myanmar (formerly Burma) it is a criminal offense
to possess an unlicenced modem. My thanks are due to Christopher Millard of Clifford Chance for providing
this information.

5. For a more detailed analysis of this issue see Jane C. Ginsburg, Copyright Without Borders? Choice
of Forum and Choice of Law for Copyright Infringement in Cyberspace, 15 CARDozo ARTS & ENT. L.J. 153
(1997).

6. See, e.g., the practice of the Dutch Courts, deriving from the Supreme Court (Hoge Raad) decision
in Interlas/Lincoln, HR 24 November 1989, NJ 404. Although that case concerned trademark infringement,
it is recognized that the principle applies at a minimum to other intellectual property rights. Wolfgang V.
Meibom & Hohann Pitz, Cross-Border Injunctions in International Patent Infringement Proceedings, 19
EUR. INTELL. PROP. REV. 469, 469 (1997). Even though the U.K. courts, for example, do not grant such wide-
ranging injunctions, a Dutch worldwide injunction would be enforceable in the United Kingdom under the
impossible to partition the Internet to allow the web page containing the infringing link to continue to be received in other countries, while ensuring that no infringement takes place in the jurisdiction in which the judgment was issued. As a result, to comply with a local order, the defendant is forced to take the same action worldwide.\(^7\)

Because of the nature of the World Wide Web, a website is normally accessible from anywhere in the world and can be linked to from anywhere. For that reason it is not helpful to examine the laws of only one country when analyzing this problem. This Article takes English law as its common thread, because that is the jurisdiction in which the author works, and compares and contrasts it with U.S. and other laws, as appropriate.

I. THE NATURE OF THE PROBLEM

The possibility that linking to another’s website might be unlawful was raised for the first time in 1996, in the Scottish case of *Shetland Times v. Shetland News*.\(^8\) A few months later in February 1997, a similar action was filed in New York in *Washington Post Co. v. Total News, Inc.*\(^9\)

A. *The Shetland Times Case*

On October 24, 1996, Lord Hamilton made the following order in the Court of Session at Edinburgh:

> The Lord Ordinary . . . ad interim interdicts the Defenders . . . from (1) storing in any medium by electronic means or otherwise copying or (2) including in any service operated by

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\(^7\) Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Article 25 defines “judgment” to include judgments which are not final and which are interlocutory or provisional in nature. 1978 O.J. (L 304) 77.

\(^8\) Thus, for example, when in 1995 the Bavarian Lander government ordered CompuServe to stop providing access from within Germany to neo-Nazi news groups, CompuServe was initially forced to suspend worldwide access to those news groups. *CompuServe Suspends Access to Specific Internet News Groups*, (visited Nov. 26, 1998) <http://www.eff.org/pub/Alerts/Foreign_and_local/cserv.press_rel>.


The case was concerned solely with the headlines to stories on the *Shetland Times* website. These were reproduced by the *Shetland News*, presumably by accessing the web page containing the story, bookmarking that page, and then copying the bookmark from the browser software’s bookmark.htm file to a *Shetland News* web page. The resulting web link would consist of the text placed by the *Shetland Times* between the `<TITLE>` and `</TITLE>` elements of the source code of that web page as well as the URL of that page, reported to the *Shetland News* browser software by the *Shetland Times’* server. The web link would take the format: `<A HREF="http://www.shetland-times.co.uk/.../story.html">Headline text</A>.

The reason given by the judge for granting the interim interdict was that there was a prima facie case that these web links infringed copyright and that the balance of convenience favored granting the interdict until trial. The potential copyright infringements were:

1. The headlines were potentially “cable programmes” as defined in section 7(1) of the UK Copyright, Designs and Patents Act of 1988. A cable programme is “any item included in a cable programme service[,]” and both the *Shetland Times* and *Shetland News* Websites were potentially cable programme services. Copyright in a cable programme is infringed under section 20(c) by its “inclusion” in a cable

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11. Web pages are coded in HTML, Hypertext Mark-up Language. An HTML World Wide Web page consists of pure ASCII text, with formatting tags defining appearance and layout (e.g., text appearing between the `<i>` and `</i>` tags is displayed in italics). Images are incorporated into the page by including a reference to the graphics file containing that image. When a web page is received by the viewer’s browser software (e.g., Netscape or Internet Explorer), the software interprets the page as best it can and displays the result on the viewer’s screen.
12. Uniform Resource Locator, effectively the address.
13. So far as copyright law is concerned, Scottish and English law are the same.
14. “Cable programme service” is defined as “a service which consists wholly or mainly in sending . . . information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception—(a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users). . . .” Copyright, Designs and Patents Act, 1988, ch. 48 § 7(1) (Eng.). See infra Part II.B.2.a.
15. Copyright, Designs and Patents Act, 1988, ch. 48 § 1(1)(b) (Eng.).
programme service.

2. Some headlines might themselves be literary works, in which a copyright subsists by virtue of section 1(1)(a) of the Copyright, Designs and Patents Act of 1988. If so, those works had been copied, an infringement by virtue of section 17(1) and (2). It is important to note that there was no suggestion that the news stories contained in Shetland Times' website were included in the Shetland News cable program service merely by linking to them. Indeed, the judge said:

If the information is being sent, it prima facie is being sent by the pursuers on whose website it has been established. The fact that the information is provided to the caller by his accessing it through the defenders' website does not, in my view, result in the defenders being the persons sending the information.

It must be borne in mind that this was an action for an interim interdict and that the case has subsequently been settled. Although the approach taken by the parties and the court to the issue is helpful in identifying potentially applicable areas of law, the case has no real precedential value.

16. Interestingly, the copying of a cable programme is also an infringement by virtue of section 17(1), and if the headlines were cable programs, their copying could have been an additional ground for granting the interim interdict. Id. § 17(1). This point appears not to have been argued before the judge. See infra Part II.B.2.


18. Id.

19. The terms of the settlement are:

The Defenders shall be entitled to link to stories on the Pursuers' website by means of headlines provided that they will not include in any service operated by them on the Internet any hyperlink linking to the Pursuers' website (www.shetland-times.co.uk) other than as follows:

(a) each link to any individual story shall be acknowledged by the legend "A Shetland Times Story" appearing underneath each headline and of the same or similar size as the headline;

(b) adjacent to any such headline or headlines there shall appear a button showing legibly the Shetland Times masthead logo; and

(c) the legend and the button shall each be hypertext links to the Shetland Times online headline page.
B. The Total News Case

The Total News dispute arose over a website, operated by Total News, which was designed to act as a gateway to other news services available via the World Wide Web. A viewer visiting the site would see displayed on the screen of his browser three frames: a frame containing buttons labeled with the names of the news services which could be accessed via the site; a frame in which the news stories were displayed; and a frame containing advertising.

When the viewer selected a particular news service, web pages from the server operating that service were displayed in the news stories frame, but the other two frames remained visible. The effect was that a viewer could read a news story from, for example, the Washington Post, but would continue to see the Total News advertising (and, as a side effect, would either not see the advertising on the news service's website or would see it with reduced prominence).

A group of plaintiffs filed a complaint in February 1997 alleging misappropriation, trademark dilution and infringement, copyright violation and other related tortious acts. In June 1997, the action was settled on terms that TotalNews would: cease to provide links to the plaintiffs' news stories (which resulted in the framing of those stories), cease to use any of the plaintiffs' proprietary logos or graphics, and link to the plaintiffs' sites only via plain text hyperlinks.22

C. The Underlying Issues

Most proprietors of web pages are delighted if another page contains links to their pages. This is because the World Wide Web grew up as a way of making information accessible worldwide while retaining some control over its appearance. The majority of those persons and organizations who have a web presence are there because they wish to attract as many readers and viewers as possible. Why are these cases different?

22. See id. (setting forth the full terms of the settlement).
The answer is that, in each case, the plaintiff attempts to generate revenue via advertising on its website.23 This advertising often resides on the home page, through which viewers who visit the site can access other items, each of which has its own page. This was particularly clear in the Shetland Times case, because, at the time the dispute arose, the pages containing news stories did not carry any advertising. When the Shetland News provided direct links to a Shetland Times news story, viewers accessed that story directly without passing through the Shetland Times home page, and thus without seeing the advertising. This was perceived by the Shetland Times as a threat to its advertising revenue, and thus led to the copyright infringement action.

In the Shetland Times case it seems likely that there was no intention on the part of the Shetland News to bypass the Shetland Times’s advertising, though this is less clear in the Total News dispute. It is perhaps worth pointing out here that the problem faced by the Shetland Times and by the plaintiffs in Total News can be seen as one of ineffective use of the World Wide Web technologies. It is possible to include a Common Gateway Interface (CGI) or Perl script as part of a web page, which assembles the page dynamically. This script can automatically direct the viewer to the page containing advertising or incorporate advertisements into the requested page as it is sent to the viewer. Additionally, there are technological measures that can be used to prevent a linked-to page from being displayed within a frame.

The fact that a plaintiff can take practical steps to prevent infringement of his rights by a defendant is not, however, a justification for the infringement of those rights. Additionally, many proprietors of websites will not have the technical expertise to control linking. Because advertising revenue is at present one of the main ways of financing a web presence, the issue of controlling web links is of major practical importance. Furthermore, a website proprietor may also wish to protect his image or reputation, and thus will object to certain links on that ground even if he has no advertising revenue to protect.

D. How Web Links Work

In order to analyze how the law might be applied to web links, it is necessary to understand the way in which a link works. Each link is part of a web page whose display is created on the viewer’s computer by his browser

23. A good example of a site which is funded largely by advertising is the Yahoo! search engine, <http://www.yahoo.com>.
software. The web page is built up using the instructions contained in the HTML file produced by the creator of the page, which is transmitted to the viewer’s browser when he enters that page’s URL. The HTML file contains text to be displayed as part of the page, the URLs for any images or other binary files (e.g., sound files) that are to be incorporated automatically into the page, and instructions for laying out the page on the viewer’s screen.

The HTML file may also contain the code for a link. That code highlights some element of the page, normally either a piece of text or an image, which is selectable by the viewer with his mouse. The HTML file associates a URL with the page element. When the viewer selects that page element, the browser software sends a request to the associated URL for a file and, upon receipt, performs the appropriate action for that type of file. The simplest kind of link is to another web page; its selection by the viewer results in his browser receiving a new HTML file and, by following the instructions in its code, building a fresh page for display.

It is important to note that the creator of the web page containing the link does not transmit the linked-to page to the viewer. He merely provides the address from which the linked-to page can be obtained. It is the viewer, through the browser software, who requests the page, receives a copy of its code, and displays the resulting work; while it is the proprietor of the linked-to page who transmits the HTML code to the viewer via a web server.

II. A RIGHT TO PROHIBIT LINKING

From the point of view of a website proprietor, the ideal situation would be an absolute right to prohibit linking to his site from another site. This would enable the proprietor to obtain injunctions against the operator of a linking site of which he disapproves totally and to control the nature of links from other sites by means of licenses.

A. Possible Rights

Absolute rights to prohibit another’s activities will normally be found only

24. Hypertext Mark-Up Language, supra note 11.
25. This analysis is rather simplistic, as it ignores the possibility that the linked-to web page is hosted on a computer belonging to another, most likely a commercial access provider such as AOL. However, the presence of third parties does not alter the analysis to any material degree.
in the field of property rights. Of these, the most likely candidates offering a website proprietor the desired powers of control are trespass and copyright.

1. Trespass

Trespass, on closer examination, turns out to offer little help to the website proprietor. Trespass to land is the unjustified interference with another's right to possession of that land, and trespass to goods is the unjustified interference with or denial of the owner's right to possession of the goods. Trotter Hardy has suggested that the theories of property that underlie the law of trespass would justify the courts in extending the doctrine of trespass to include unauthorized access to a website.

A closer examination of these theories, however, indicates that the property right protected by trespass is that of possession and that trespass cannot be extended to cover the exploitation of rights based on personality. An exception is Radin's theory, which is based on the concept of personhood, and which might therefore provide an appropriate basis for developing a trespass-like protection of property in websites. Thus, for example, Radin identifies a greater element of personhood in non-commercial than in commercial speech. Further, Radin suggests that an additional right which should be available for property linked to personhood is the right of control over it.

However, the main tenor of Radin's argument is that tangible property which is bound up with a person should receive greater protection than other types of property, rather than that the categories of property protected by trespass should be expanded to include intangible emanations of personality. Note also that the extension of trespass to cover the exploitation of rights based on personality was specifically rejected by the Supreme Court of California in Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 490 (Cal. 1990). See also Michelle J. Burke & Victoria M. Schmidt, Old Remedies in the Biotechnology Age: Moore v. Regents, 3 Risk 219 (1992). Furthermore, as Trotter Hardy recognizes, the extension of trespass under this theory would only provide a sure remedy for the individual proprietor of a website, as a corporate proprietor would be less likely to exhibit personhood in the sense used by Radin.

It may be relevant, though, to note that the law already recognizes an element of corporate personhood in the sphere of non-property rights. Some data protection laws extend to data referring to corporations as well as to individuals. For example, art. 1 Danish Law on Private Registers (Lovbekendtgørelse om private registre 1987 as amended 1992); Art. 3(a) Swiss Data Protection Act; CODE CIVIL art. 28 (Switz.) (providing a legal
extended to interferences with goods or land that do not adversely affect the plaintiff’s right of possession. This is clearly illustrated by the U.S. Restatement (Second) of Torts, which, in the case of land, makes it clear that trespass requires the entry of a person or thing onto (or under or immediately above) the plaintiff’s land or the remaining of the person or thing once a right to do so has expired. It is perhaps arguable that by requesting a file, the viewer is temporarily using the plaintiff’s land, assuming the computer hosting the website is situated there. This, however, cannot be a trespass to the land because, in order to constitute trespass, the interference must be direct, not indirect. A trespass to land may only be committed by physically entering or placing property on the land.

Trespass to goods seems initially more promising, as the Restatement definition extends to “using or intermeddling with a chattel in the possession of another” and cases where “the possessor is deprived of the use of the chattel for a substantial time.” The argument would be that an unauthorized viewer of a website is guilty of trespass to the computer equipment on which the website is hosted, either simply by using it or because the use of that equipment by the viewer temporarily deprives the possessor of the power to use that fraction of the computer’s processing abilities that is dedicated to serving the viewer’s request.

An examination of the cases on dealing with sections 218 and 221 of the Restatement (Second) of Torts indicates, however, that neither of these acts will amount to trespass to chattels. If the use is such as totally to obviate the person with some protection against the violation of its personality. Additionally, under most legal systems a corporation can be defamed. South Hetton Coal Co., Ltd. v. North-Eastern News Ass’n, Ltd., 1 Law Rep. 133, 137 (Q.B. 1894); RESTATEMENT (SECOND) OF TORTS § 561. However, under English law a governmental body has no claim for defamation of its governing reputation because such a claim would restrict free speech. Derbyshire County Council v. Times Newspapers Ltd., 2 W.L.R. 449 (H.L. 1993). Because these are not property rights, however, an aggrieved proprietor of a corporate website would need to demonstrate unlawful behavior on the part of the person accessing or linking to that site. See infra Part III.

32. RESTATEMENT (SECOND) OF TORTS § 217(b) (1965).
33. Id. § 218(c).
34. The viewer’s entering of the URL into his browser software makes that software request a file from the proprietor’s web server. The viewer is thus, indirectly, issuing commands to, and therefore using, the computer on which the web server software is running.
plaintiff's possession of the chattel, even temporarily, that will amount to trespass. However, if the use still allows the plaintiff to retain possession and use of the chattel, as is the case with all website accesses, that use will not amount to a trespass. To the extent that the computer running the web server devotes itself exclusively to serving the viewer's request for a file, that exclusivity is of such short duration that the proprietor's other computing activities will be almost totally unaffected.

In reality, the act complained of is not that the defendant has deprived the proprietor of possession of his land or goods, but that he has provided to a third party (the viewer) the technical information that the viewer requires to request a file to be delivered from the site. The defendant therefore cannot be guilty of trespass to the computer hosting the website. The position is similar under English law; direct use of another's goods can amount to trespass, but an indirect use will only be actionable as a conversion if the use is so extensive as to deny the owner's right to continued possession.

Even if trespass theory were to be developed to encompass the transient interferences with land or goods involved in accessing a website, it must still be recognized that the person who creates the link to that website does not himself perform any interfering act. He could of course be liable for inciting the viewer to trespass. However, in most cases, the website proprietor does not object to the presence of the viewer but to the existence of the link. If the viewer is not a trespasser, the link cannot be an actionable incitement to trespass.

A further objection to the use of trespass to control web links is that many (perhaps most) proprietors of websites do not possess the land or equipment on which the site is situated, but rather, make use of space on a third party's computer systems, so that only the third party could sue in trespass. If trespass were extended to web links, its fundamental underpinnings would need to be revised to cover not just a plaintiff's right to possession, but also his right to control the use made of the information which constitutes his website.

35. Provided it is for "a time so substantial that it is possible to estimate the loss caused thereby." Restatement (Second) of Torts § 218 cmt. (i).
38. See the explanation of linking technology supra Part I.D.
Generally speaking, control rights of this kind are found only in copyright or trade secrets law. This adds weight to the proposition that trespass is an inappropriate tool for resolving the problem of unwanted web links.

2. Copyright

Copyright would seem to provide the only realistic prospect of a website proprietor’s absolute right to prevent links to his site. Copyright is the exclusive right to make or distribute copies of a work; and the entire technical basis of the Internet, thus including the World Wide Web, is that information is passed between computers in the form of copies. Under the Berne Convention, the owner of copyright in a work created in one country is entitled to national treatment in all other Berne Convention countries, which means that a copyright infringement action can be brought in the alleged infringer’s own jurisdiction where injunctive remedies will more easily be enforceable. Therefore, the question that needs to be answered is what, if any, works are copied when one website links to another.

B. Copyright in Web Links

Few would deny that World Wide Web pages fall within the ambit of copyright protection. The text of a web page is protected as a literary work: any graphic images are protected as artistic works, any linked sound or video files are protected as sound recordings or films, and the whole is protected as a compilation. It follows that copying of the whole or a substantial part of any web page is an infringement of copyright in the work or works copied. However, prior to the *Shetland Times* and *Total News* actions there were few who would have been prepared to assert that placing a link to another’s web page from one’s own page might, in some way, infringe a copyright of the author of the linked-to page. Yet, in both cases, copyright infringement is the main basis on which linking was asserted to violate the proprietor’s rights.

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43. 17 U.S.C. § 102(a)(5) (including pictorial, graphic, and sculptural works); Copyright, Designs and Patents Act, 1988, ch. 48 § 4(1) (Eng.).
44. 17 U.S.C. § 102(a)(6); Copyright, Designs and Patents Act, 1988, ch. 48 § 5(1) (Eng.).
45. 17 U.S.C. § 103(a); see also Copyright, Designs and Patents Act, 1988, ch. 48 § 3(1) (Eng.) (explaining that a compilation is a literary work).
1. Web Links as Literary Works

A simple link from one web page to another is composed of two parts: text which is displayed on the viewer’s screen, usually underlined, and which is often the title given to the page by its author; and the URL, the address from which the linked-to page can be obtained, which is not normally displayed. These links might attract copyright in three different ways: the page title might be protected as a literary work, the URL might be protected as a literary work, or the combination of the two might be a compilation and thus protected as a literary work. For example, in a theoretical example based on the Shetland Times case, only the words “Headline text” are produced by traditional authorship methods, by a writer deciding what combination of words to use as the page’s title. This raises the question of what circumstances might qualify the title given to a web page by its author as a literary work.

United States copyright law is clear on this point. Section 102(b) of the Copyright Act of 1976 states that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” It follows from this that, as a general rule, titles of works attract no copyright protection, or do short phrases and slogans unless they exhibit a minimal level of creativity sufficient to take them outside section 102(b). Additionally, because the title text element of a link is largely functional, acting as a label which identifies to the viewer the work which can be accessed via that link, it will only be protected by copyright if it exhibits a higher level of originality than is normally required for literary works.

United Kingdom law does not contain any express equivalent to section 102(b), but its effect is largely the same. Under section 3(1) of the U.K. Copyright, Designs and Patents Act 1988, a literary work is “any work, other than a dramatic or musical work, which is written, spoken or sung.” It is

46. However, the URL is included in the linking page as part of its source code. Most web browsers allow their viewer to view this source code.
47. <A HREF = "http://www.shetland-times.co.uk\...story.html"> Headline text </A>.
49. See Warner Bros. Pictures Inc. v. Majestic Pictures Corp., 70 F.2d 310 (2d Cir. 1934).
52. See Copyright, Designs and Patents Act, 1988, ch. 48 § 3(1) (Eng.).
only protected by copyright if it is original, which in essence means not copied, but the fact that it is original does not make it a "work." To constitute a "work," a collection of alphanumeric symbols must exhibit two characteristics. First, a work must contain a de minimis element of skill, judgment, and labor, though not necessarily any literary merit. This on its own is not enough, as decided by the Court of Appeal in Exxon Corp. v. Exxon Insurance Consultants International Ltd. In that case, the plaintiff asserted copyright in the invented word "Exxon," and was able to demonstrate that substantial effort and money had been expended in inventing the word. Nonetheless, the court held that it did not constitute a work and was thus not protected by copyright.

Second, a work must afford sufficient information, instruction or literary enjoyment to the reader. It was on this ground that copyright protection was denied in the Exxon case. In other cases the following were held not to be works for the same reason: a trivial advertisement slogan, an advertisement consisting of four, commonplace sentences, the title of a song, used as the title of a film by the defendant, and most titles of books, newspapers and plays. The most recent consideration of this point was in Noah v. Shuba, where the defendant had quoted a section of the plaintiff's work and added a seventeen word paragraph to the quotation. The court considered, obiter, that this paragraph would not be a work in its own right because it did not afford sufficient information, instruction or literary enjoyment to the reader.

From this we can deduce that the vast majority of web page titles will not amount to works. The editors of Copinger, the leading U.K. work on copyright, state that most titles of books, newspapers and plays are not works. Only a work that contains a substantial amount of original composition is protected by copyright. The court in Exxon held that the invented word "Exxon" did not constitute a work because it did not contain a de minimis element of skill, judgment, and labor. The court also held that the invented word did not afford sufficient information, instruction or literary enjoyment to the reader. Therefore, the invented word "Exxon" was not protected by copyright.

References:

60. But see IBM v. Spirales Computers Inc., (1984) 12 D.L.R. (4th) 351, 358 (holding that a functional work, a computer program, did not need to convey information, instruction, or literary enjoyment to be protected by copyright. It was sufficient that the program expressed ideas in some form of composition or language). However, a URL expresses not ideas but an address, the kind of noncreative information which U.K. law has normally protected by copyright only as part of a compilation.
copyright, take the view that a title is unlikely to be protected by copyright "unless it is sufficiently lengthy and original to have had labor in construction as well as in choice expended upon it." The example quoted in the Shetland Times judgment, "Bid to save centre after council funding 'cock up,'" seems unlikely to confer literary enjoyment on the reader, nor does it convey much information or instruction. Indeed, much of the journalistic skill involved in composing headlines would seem to consist of concealing information from the reader in a sufficiently tantalizing fashion so as to persuade the reader to examine the text of the story. The days of the (almost certainly apocryphal) Times (London) headline, "Small earthquake in Chile, not many dead," appear to be long past.

If the title of a web page will rarely be a literary work, its URL is even less likely to qualify. It consists of the following four elements, composed at different times and assembled according to the conventions produced by the World Wide Web Consortium: (1) the HTML elements of the URL ("<A HREF=...>"), which are common to all URLs and are not original; (2) the domain name of the web server on which the page resides, devised by the operator of that server when the domain name was registered ("www.shetland-times.co.uk"); (3) the directory structure of the web server (e.g., "/stories/council"), chosen by the operator for convenience of maintaining the website; and (4) the filename of the HTML file containing the web page, which might be generated automatically by the software used to create the page (e.g., "-w198037.html") or chosen to reflect the content of the page (e.g., "cockupl.html").

The combination of these elements requires no labor, skill or judgment—indeed, it is generally undertaken by the server software itself. This should be sufficient to prevent copyright arising under either U.S. or U.K. law. Only in very rare cases might the URL exhibit literary elements or convey information and instruction, other than instruction on how to locate the page to which it refers.

63. This headline, with alternative choices of wording and attribution, is regularly quoted as an example of the leaden style adopted by the serious British press before the era of modern journalism. See, e.g., A.A. Gill, Score Draws; Television, Times (London), July 24, 1994, available in 1994 WL 9214216.
64. In addition and irrespective of any creativity, these elements would seem to fall squarely within 17 U.S.C. § 102 (b) as being a "procedure, process, system, [or] method of operation." See 17 U.S.C. §102(b) (1998).
65. Perhaps Shakespeare would have produced a website, had the World Wide Web existed in the
In civil law jurisdictions, web links are even less likely to benefit from copyright protection. Civil law systems protect authors' rights, as opposed to copyrights, and the subject matter of protection is "intellectual creations" rather than the more utilitarian protection given in common law jurisdictions. The clearest example is probably German law, where under article 2(2) of the Copyright Law (Urheberrechtsgesetz), the standard of originality required for protection is "personal intellectual creations." Furthermore, in the case of utilitarian works (into which category a link would surely fall), German law requires an even higher standard for protection: that the work exhibit a higher degree of creativity than the average level in the field in question. Whether assessed under the normal civil law standard, or the higher level for utilitarian works, web links will almost never exhibit the necessary degree of intellectual creation required to attract protection.

One remaining possibility is that the linking page or site contains so many links to the plaintiff's pages that, taken as a whole, copying of the page titles amounts to an infringement. This possibility was examined by the English High Court in Electronic Techniques (Anglia) Ltd. v. Critchley Components Ltd., although in a different context. In that case, numerous small elements of the plaintiff's circuit diagrams had been reproduced on a large number of occasions by the defendant, but none of the individual takings was of a substantial part of the relevant diagram. The court held that it was a question of fact whether the reproduced works should be aggregated to assess whether the final amount

...sixteenth century. No doubt his URLs would have exhibited more literary elements than most, but even "www.FirstFolio.co.uk/Tragedies/JuliusCaesar/ActIII/Scene1/EtTuBrute.html" is at best no more than instructional, and its main purpose is to convey information rather than literary enjoyment.

The same principles apply to the question whether a substantial part has been taken. In one case dealing with a functional work, a proxy voting form, the court held that although parts of the work were copied verbatim, they did not display sufficient skill and labor on the part of the author to amount to a substantial part because they were merely instructions on how to use the form. See FAI Insurances Ltd. v. Advance Bank Australia Ltd. (1968) 68 A.L.R. 133, 141 (Austl.). See infra Part II.D.2 for the facts of this case.

66. Similarly, the French Intellectual Property Code requires originality in the form of an "intellectual creative process."

67. Thus at one time, software was only protected if it exhibited this high level of originality. Inkasso-Programm, Decision of 9 May 1985, BGH [Supreme Court] 1986 IIC 681 (F.R.G.); Betriebssystem, Decision of 4 October 1990, BGH, 1991 IIC 723 (F.R.G.). The originality requirements for software have since been harmonized in the European Union by Directive No. 91/250 on the legal protection of computer programs, which requires the program to be the author's "own intellectual creation." Council Directive 91/250, art. 1(3), 1991 O.J. (L 122) 42 [hereinafter Directive 91/250].

68. Though a web link might receive some minimal protection from direct copying under the provisions protecting nonoriginal writings in the Netherlands Copyright Act art. 10:1(1), and a collection of links would be protected under the catalogue rule in the Nordic countries (see, e.g. Danish Copyright Act, art. 5).

taken would amount to substantial copying, but was troubled by the logical inconsistencies of an approach which might turn an earlier, noninfringing copying, a previously noninfringing act, into a retrospectively infringing act due to later copying. It seems from the judgment that if all the copying had occurred at the same time, the court would have been more willing to find infringement.

2. Distribution, Transmission and Display

There is no doubt that someone distributes, transmits and displays the linked-to web page. However, the explanation of the way in which web links operate, set out in Part I. D, demonstrates that none of the potentially infringing acts is performed by the creator of the link. Distribution and transmission is undertaken by the plaintiff, because the link merely creates a request from the viewer to the web server which holds the plaintiff’s linked-to page. It is that server which sends the page to the viewer, not the server from which the linking page was obtained. The viewer’s browser software, and therefore the viewer, produces the display. It is possible that the creator of the link might face an action for inciting the viewer to display the linked-to page in breach of copyright, but this would require an assertion that the viewer had no license to access and display the page. The very act of making a web page available by placing it on a web server grants an implied license to access that page. In any event, the proprietor of the linked-to page is not normally complaining that the viewer viewed it, but that the viewer was directed to it by the creator of the linking page.

However, both U.S. and U.K. law contain special provisions relating to cable broadcasting. The U.S. provisions are limited to cable broadcasts of television programs, but the U.K. law is less specific. If a web link is not a literary work, is it nevertheless protected by copyright under the Copyright, Designs and Patents Act as a cable program, as the judge decided in the Shetland Times case? To be protected in this way, the website to which the link points must be a cable program service, and the link must be an item included in that service.

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70. See 17 U.S.C. § 106 (1984); Copyright, Designs and Patents Act, 1988, ch. 48 § 16 (Eng.).
71. See infra Part II.D.2.
72. 17 U.S.C. §§ 110-11; see also § 111(f)'s definition of "cable system."
73. See Copyright, Designs and Patents Act, 1988, ch. 48 § 7(1) (Eng.).
a. Is a Website a Cable Program Service?

Although the phrase "cable program service," to most people, suggests a television signal received by telecommunications rather than broadcasting, the definition in section 7(1) of the Copyright, Designs and Patents Act is much broader:

"[C]able programme service" means a service which consists wholly or mainly in sending visual images, sounds or other information by means of a telecommunications system, otherwise than by wireless telegraphy, for reception—

(a) at two or more places (whether for simultaneous reception or at different times in response to requests by different users), or

(b) for presentation to members of the public, and which is not, or so far as it is not, excepted by or under the following provisions of this section.\(^74\)

A website falls squarely within this definition. A request by a viewer is made by entering a URL into that viewer's browser software, which transmits the request to the server on which the website resides. On receipt of the request, the server transmits\(^75\) the requested resource to the viewer—including an HTML source code (information), graphics (images), sound files (sounds), etc. The server can be contacted from anywhere in the world, provided the viewer's service provider allows access to it. As a result, the reception "at two or more places" requirement is met.

The exceptions are set out in section (2). Only paragraph (a) is potentially applicable to a website connected to the Internet.\(^76\)

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\(^{74}\) Id.

\(^{75}\) In Shetland Times Ltd. v. Wills, 1997 S.L.T. 669, 671 (Scot. OH), the defenders argued "that the process involved in Internet communication did not involve 'sending' information." Lord Hamilton rejected this argument on the basis of the limited technological evidence before him. Id. In this author's view, evidence about how Internet transmissions work would have strengthened, rather than overturned, the judge's decision.

\(^{76}\) Interestingly, sections 7(2)(b)-(d) of the Copyright, Designs and Patents Act appear to mean that a website on an intranet is not a cable program service unless the intranet is connected to another telecommunication system. As, for security purposes, many intranets are connected only intermittently to another telecommunication system, (i.e., when a remote user dials in) the copyright status of such a website at
(a) a service or part of a service of which it is an essential feature that while visual images, sounds or other information are being conveyed by the person providing the service there will or may be sent from each place of reception, by means of the same system or (as the case may be) the same part of it, information (other than signals sent for the operation or control of the service) for reception by the person providing the service or other persons receiving it.\textsuperscript{77}

In the \textit{Shetland Times} case, the defenders argued that, because the \textit{Shetland Times} web page encouraged e-mail feedback, the website fell within this exception. Judge Hamilton disagreed, stating, "[w]hile the facility to comment or make suggestions via the Internet exists, this does not appear to me to be an essential element in the service, the primary function of which is to distribute news and other items."\textsuperscript{78}

The majority of web pages merely present information to the viewer, and any facility for transmitting information to the website (e.g., through a MAILTO link on the page) is incidental, rather than essential. The most obvious exception is a forms page, whose purpose is to collect information from the viewer. A website which consisted mainly of forms would fall within the section 7(2)(a) exception on the assumption that the "service" is the website as a whole, rather than the individual page.

\textit{b. Is a Link a Cable Program?}

"Cable programme" is defined in section 7(1) of the Copyright, Designs and Patents Act as "any item included in a cable programme service."\textsuperscript{79} The problem with applying this definition to web links is that the legislature clearly did not have the Internet in mind as a potential source of cable program services.\textsuperscript{80} This part of the Act was intended mainly for video transmissions\textsuperscript{81}

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any particular time will only be determinable by examining the log of external connections.
\textsuperscript{77} Copyright, Designs and Patents Act, 1988, ch. 48 § 7(2)(a) (Eng.).
\textsuperscript{78} Shetland Times Ltd. v. Wills, 1997 S.L.T. 669, 771 (Scot. OH).
\textsuperscript{79} Copyright, Designs and Patents Act, 1998, ch. 48 § 7(1) (Eng.).
\textsuperscript{80} See generally id. § 73 (1988) (permitting the reception and immediate re-transmission of broadcasts in a cable program service in certain circumstances). This provision makes no sense in relation to websites.
\textsuperscript{81} See id. § 17(4) ("Copying in relation to a . . . cable programme includes making a photograph of the whole or any substantial part of any image forming part of the . . . cable programme"). However, it must be remembered that the definition in § 7(1) extends both to sounds and "other information"—it has already been
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relayed to the viewer by means other than broadcasting. The purpose of these provisions was to confer a copyright in the transmission itself, independent from the copyright in any work which might be transmitted and which might belong to a third party. Additionally, some transmissions might not amount to any other type of work (e.g., a live discussion or news report).  

The natural meaning of "item" in this context would be any section of such a transmission which constitutes a self-contained unit, such as the news report referred to in the previous paragraph. Infringement would then take place by including the whole of that unit in another cable program service or, as section 16(3)(a) makes clear, a substantial part of it. The question of whether a lesser part of the unit (e.g., a single frame of video or even part of such a frame) constituted a substantial part would be dealt with using the same principles that apply to any other copyright-protected work.

If, however, the transmission of American Standard for Code Information Interchange (ASCII) text from a website is a cable program service, the problem of distinguishing one “item” from another becomes more complex. No video transmission is likely to contain a self-contained unit which consists only of a single frame of video, since such a transmission will effectively be invisible to the viewer. However, a website might transmit a single sentence, a single word, or even a single character which could be viewed as a separate element on a web page.

There are two approaches which the court might adopt. The first likely option may be described as the technological approach. This would examine the structure of the transmissions from the website in order to discover the self-contained units of transmission. If this approach were adopted, the result should be a finding that the smallest meaningful self-contained unit is an individual web page. A viewer’s transmission of a URL to the website results in the site transmitting the source code of that page, together with any images

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82. The simultaneous recording of such a transmission would qualify for protection as a "film" under section 5(1) of the Copyright, Designs and Patents Act, but only once it was recorded. The transmission would not be a copy of the recording, and thus, would thus be unprotected were it not for section 7.


84. The packets in which the page is transported are smaller units, but one individual packet cannot normally be displayed by the recipient browser software. Note, however, that the browser software will begin to build a screen display of the page once sufficient amounts of the packets have been received, but that picture will be incomplete, and possibly meaningless, until all the packets have been received.
and text referred to in the source code (or the addresses of those resources), so that the whole can be assembled by the viewer’s web browser and presented on screen. This seems to be the logical unit of transmission and therefore, in the author’s opinion, the “item.” It would thus follow that a link displayed on that page would not itself be a cable program, but merely a part of it. The question whether the inclusion of that link in another page infringed copyright would thus be whether a substantial part of the cable program (i.e., the page as a whole) had been copied.

The second approach may be described as the qualitative approach. In the same way that a literary work must exhibit a minimum amount of labor, skill and effort in its creation, together with a minimum level of content (i.e., literary expression or the affording of information or enjoyment), a transmission would have to exhibit the same minima to qualify for protection as a cable program. If this approach were adopted, a link to a web page would only amount to a cable program if the necessary minimum effort and content were exhibited by the creator of the link. The test would be the same as the test for determining whether a link amounts to a literary work. It has already been argued that the vast majority of web links will fail this test.

A third option, which is effectively what the pursuers in Shetland Times argued, is that any identifiable thing transmitted from a website is an item, and is thus a cable program. This suggests that a single ASCII character, or a single byte of a graphics file, is protected by copyright. This would lead to the anomalous position of protecting such extremely small elements if they are transmitted from a website, but not if they are copied from an e-mail or from a floppy disk. For that reason, this position should be rejected.

If the first approach were adopted, a web link would not attract copyright protection in its own right as a cable program. The question would still arise whether the link amounted to a substantial part of the linked page as a whole, and this should be answered in accordance with the principles already

85. See discussion supra Part II.B.1.
86. See supra Part II.B.1.
87. An e-mail will not amount to a cable program because it is transmitted to one person only, and the definition of “cable program service,” in section 7(1) of the Copyright, Designs and Patents Act, requires the information to be transmitted for reception at two or more places or for presentation to members of the public. An e-mail which is addressed to more than one recipient might be argued to fall within this definition, but it would be more realistic to view it as a number of person-to-person transmissions, each of which happens to have identical content. However, a news feed would appear to fall within section 7(1)’s definition of “cable program service,” which leads to the conclusion that an e-mail sent to a newsgroup is a cable program once it is included in the news feed.
established in relation to other types of work.\textsuperscript{88} It is worth noting that an important (though by no means the only) factor to be considered is the extent to which the copying diminishes the profits or supersedes the objects of the work.\textsuperscript{89} As the purpose for which the link is copied is to enable third parties to obtain direct access to the linked web page, and thus increase the number of viewers who access it, it seems difficult to argue that this factor will ever be relevant in the case of web links. If the second approach were adopted, the link would, in most cases, not qualify for copyright protection at all, so that the question of infringement by copying it would not arise.

\textbf{C. Infringement of Copyright in Particular Circumstances}

\textit{1. Framed Viewer-Selected Links}

Where the linking web page loads the linked-to page inside a frame, as in the \textit{Total News} case, the owner of the copyright in the linked-to page is more likely to have a remedy under copyright law. It seems unarguable that the display of the various frames on the viewer’s screen is a compilation of the works contained in each frame, and that the underlying HTML code of the frame contains the instructions for assembling that compilation. By including the plaintiff’s page within that compilation, the defendant might be found to have infringed under a number of headings: by copying indirectly, by making an unauthorized derivative work under U.S. law,\textsuperscript{90} by including it in a cable program service under U.K. law only,\textsuperscript{91} or by displaying it.

A court might have difficulty determining exactly how the defendant undertook the infringing act since the instruction to load the plaintiff’s page is

\textsuperscript{88} See, e.g., \textit{Copinger and Skone James on Copyright}, supra note 61, §§ 8-23; \textit{Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights} § 11-06 (W. R. Cornish ed., 3rd ed. 1996). \textsuperscript{89} \textit{Copinger and Skone James on Copyright}, supra note 61, §§ 8-27 (citing Bramwell v. Halcomb, 3 My. & Cr. 737 (1836)), \textit{reprinted in XL Eng. Rep. 1110.} \textsuperscript{90} 17 U.S.C. § 106(2) (1984). There must be some doubt whether using the linked-to page without altering it in any way is an infringement under § 106(2) as a derivative work is a recasting, reformulation, or adaptation under 17 U.S.C. § 101. The U.S. courts have taken contradictory positions on this issue. See, e.g., Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988) (removing prints or print pages from books and mounting them on tiles were derivative works and infringed the copyright). \textit{But see} C. M. Paula Co. v. Logan, 355 F. Supp. 189 (N.D. Tex. 1973). \textsuperscript{91} A framed web page would not be an infringing adaptation under section 21(1) of the Copyright, Designs and Patents Act. See, e.g., Copyright Designs and Patents Act, 1988, ch. 48 § 21(3)(Eng.) (restricting the meaning of “adaptation” to translation, conversion—from dramatic to nondramatic form, or vice versa—or recasting in pictorial form (i.e., as a comic strip)).
issued by the viewer's software. Nevertheless, the court likely would find the required act to reside in the HTML code, which sets up the link and the nature of the linked-to page's display when loaded. In the Netcom case, the court held that a person who posts plaintiff's work to a bulletin board "should be liable for causing the distribution of plaintiffs' work." The inclusion of a link to the same work in the defendant's HTML code would seem to be in accord with that activity.

The fact that this compilation is visible only as a transient copy on the viewer's screen presents no problems under U.K. law. Section 17(6) of the Copyright, Designs and Patents Act provides: "[c]opying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work." U.S. law seems to have reached the same position via case law for temporary copies in Random Access Memory (RAM), though it is still unclear whether temporary fixation of a work as a screen display is sufficient to amount to an infringement.

2. Automatically Loaded Links

Where a web page automatically loads a resource from another's website (normally an image) and incorporates it into the web page, the infringement issue is clearer. The viewer is likely to be infringing the copyright in that image unless he can argue that he has a license to load it. If the viewer is infringing, then the author of the linking web page is likely to be guilty of inciting that infringement.

Although, as explained below, making a web page available via the World Wide Web is likely to grant viewers an implied license to access that page, in the author's opinion that license does not extend to subelements of a page such as in-line images; these are normally loaded via an HTML code in a web page. The fact that the owner of the image has made the location of the image known, by including the relevant HTML code in his own pages, does not imply the grant of a license to third parties to make similar use of that image. The entirety of the image is copied, both into RAM and as a screen display, and thus

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93. Copyright, Designs and Patents Act, 1988, ch. 48 § 17(6) (Eng.).
95. Id. at 363. This may not matter, as the work needs to be copied to the viewer's RAM before the browser software can display it.
its copyright is infringed.

D. Defenses to Copyright Infringement

If the analysis above is incorrect, and the inclusion of a link to another's web page in some way infringes that person’s copyright, a number of defenses will be available to the producer of the linking page.

1. Fair Use Doctrine/Fair Dealing

The fair use doctrine set out in 17 U.S.C. section 107 is of wide application, and it has been held that even commercial uses of a work are not automatically presumed to be unfair. The question is whether the use of the work is fair in light of the four factors set out in section 107, the most important of which is "the effect of the use upon the potential market for or value of the copyrighted work." As has already been pointed out, the purpose for copying the link is to enable third parties to obtain access to the linked web page. This is also the reason why the plaintiff will have made his web page available, and so unless the link is designed to evade payment, for example, it seems likely that a simple web link will always amount to fair use.

Fair dealing under sections 29 and 30 of the Copyright, Designs and Patents Act is more precisely delimited than the U.S. equivalent, and will only amount to a defense if it is done: (1) for the purpose of criticism, review or news reporting, or (2) for the purpose of research or private study.

a. Fair Dealing for the Purpose of Reporting Current Events

A specific defense which might have been available in both the Shetland Times and the Total News disputes is that the incorporation of links is permitted under section 30(2) of the Copyright, Designs and Patents Act. This section provides that fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe copyright; and, in the case of reporting by means of a cable program (which includes a web page), no

98. See supra Part II.B.2.a.
acknowledgment of the source is required.99

To make out this defense, it is essential that the reporting should relate to current events. The fact that a web page has been made available and contains interesting material is not itself a newsworthy current event. This is demonstrated by Associated Newspapers Group plc. v. News Group Newspapers Ltd.,100 where the plaintiff published in the Daily Mail newspaper a series of extracts from letters between the Duke and Duchess of Windsor under an exclusive license from the copyright owner. The Sun newspaper, owned by the defendants, reprinted the full text of one letter and a portion of another. The court, granting an interlocutory injunction to prevent further copying, held that the section 30(2) defense was not available because the Sun was not reporting current events but merely copying material published by a commercial rival. The fact that the Daily Mail had published the letters under license was not news for the purposes of section 30(2). In the case of the Shetland News, this problem would not arise provided the links related only to news stories on the Shetland Times website which were current. If the Shetland Times retained outdated stories on its site, so as to allow readers to peruse back issues of the paper on-line, links to those stories would fall outside the defense.

Assuming that the story to which the link relates is a report of current events, the next question that arises is whether it is fair dealing to copy the entire headline. If that headline is itself a literary work or a cable program, the linking page would incorporate the whole of the work. One of the factors to be considered in determining whether the defendant’s dealing is fair is the proportion which has been copied. The principle established in British Broadcasting Corp. v. British Satellite Broadcasting Ltd.101 is that the quality and quantity copied should be “consistent with the nature of a news report and . . . no more than was reasonably requisite for a [report of that type].”102 In that case, which concerned the use of excerpts from the plaintiff’s broadcasts of World Cup football matches in the defendant’s sports news reports, the court was able to compare the reports with other news broadcasts to decide if the dealing was fair. At present there are no established standards for World Wide Web reporting; so, because web links are textual, the courts are likely to draw an analogy with traditional print news reporting. Evidence of the practice of

99. Copyright, Designs and Patents Act, 1988, ch. 48, § 30(3) (Eng.).
102. Id. at 150.
newspapers in relation to headlines in other newspapers will be necessary. However, the fact that the entire work is copied does not necessarily mean that the defense is unavailable, particularly where the nature of the dealing makes it necessary to copy the work in its entirety. It is almost certainly relevant here to point out that a link copies none of the news story itself, and that the link is nearly the smallest possible amount which can be copied in order to make the story accessible (although the page title could be omitted or condensed).

A further point which arises from this case is that there should be a genuine reporting of current events. It is arguable that if the linking web page merely reproduces the headline as part of the URL, it is making no attempt to report the event. Web authors who wish to rely on the section 30(2) defense would be safer to include a brief summary of the story on the page, as in the following (imaginary) link: “On Thursday the Shetland Islands lifeboat rescued a dismasted yacht. Full story: Yacht rescue (Shetland Times website).” The acknowledgment of the source, although not required under section 30(3), has been held to be a factor in favor of fair dealing.

Finally, the motive behind the copying is also relevant to fairness. If the copier is attempting to increase the number of its readers at the expense of the plaintiff, this is likely to lead to a finding that the dealing was not fair. The question whether the defendant’s copying reduces the value of or supersedes the plaintiff’s work is also relevant to the substantiability of any copying, but as has already been pointed out above, the copying of a web link tends to increase readership of a plaintiff’s work rather than decrease it. In any event, the mere fact that plaintiff and defendant are commercial rivals does not in itself make the dealing unfair, provided the other elements of the defense are made out.

However, framing the plaintiff’s web page, as in the Total News case so as to retain one’s own advertising on screen and thus benefit from advertising revenue

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106. British Broadcasting Corporation, 1992 L.R.-Ch. 141 at 158:

But section 30(2) contemplates that the use of a broadcaster’s copyright work may, subject to fair dealing, be made by another broadcaster. The fact that the other broadcaster is a commercial rival of the copyright owner does not, ipso facto, take the case outside fair dealing. It is a factor, and perhaps in some cases a very weighty factor, to be taken into account of in considering whether there has been fair dealing, but it is no more than a factor.
by use of the plaintiff’s work, is unlikely to amount to fair use.

b. Other Types of Fair Dealing

If the web page containing the links in question does not purport to be reporting current events, the section 30(2) defense will not be available. However, there are other fair dealing defenses which may assist a defendant. Of these, some will be unavailable because of the way the World Wide Web works, while others apply only to particular types of defendants. The only defense of general application is that of fair dealing for the purposes of criticism or review under section 30(1).

The requirements for the defense are threefold. First, there must actually be criticism or review of the work, and not merely a summarizing of its contents. If it were to be established that web links attract copyright in their own right as cable programs, the tradition that websites should include a page of “Useful links” or “Other Web resources” would need to cease in the U.K. However, a list of links or resources, which contained a critical assessment of the contents of each linked page, would probably fall within the section 30(1) defense. Second, the dealing (i.e., the copying) must be fair. This does not mean that any criticism must be fair, but that the amount of copying and the use made of it must be appropriate in relation to the criticism or review. Third, the dealing must be accompanied by a sufficient acknowledgment, which in essence requires the title or description of the source and its author to be identified.

2. Implied License

If links to web pages are works protected by copyright, it is necessary to obtain a license to copy them by including those links on one’s own web

107. The defense under section 29(1) of fair dealing for the purposes of research or private study does not apply to cable programs, and in any event is not available if the person copying makes multiple copies of the work available to others. Copyright, Designs and Patents Act, 1988, ch. 48 § 29(1), (3) (Eng.). The fact that a web link is created intentionally seems to take it outside the incidental inclusion defense of section 31. Id. § 31.

108. Id. §§ 32-50 (educational institutions); id. §§ 37-44 (libraries and archives); id. §§ 45-50 (public administration).


111. Copyright, Designs and Patents Act, 1988, ch. 48, § 178 (Eng.).
No express license was sought in the *Shetland Times* or *Total News* cases, but a license to copy or otherwise use a work can be implied from the circumstances in which the owner made the work available to the alleged licensee. For example, in the U.K. case of *Saphena Computing Ltd. v. Allied Collection Agencies Ltd.*, the court held that by supplying the source code of software to a purchaser, the software owner had impliedly licensed the purchaser to copy and make adaptations of that code for the purposes of the purchaser's business. These purposes would include repair, maintenance and enhancement of the software.

Where the license is implied from a contract between the parties, it has been held that the license extends no further than is necessary to give business efficacy to the contract; it permits performance of otherwise infringing acts only to the extent necessary to allow the work to be used for the purposes which were contemplated by the parties when the contract was made. There appears to be no U.K. case law on gratuitous implied licenses, but *Copinger* suggests that the same principles should apply. The test is clearly an objective one; what is relevant is the license that appears to observers to have been granted, not what, if anything, the author of the web page subjectively intended.

Support for this approach can be found in the recent Australian case of *Trumpet Software Pty Ltd. v. OzEmail Pty Ltd.* In that case the defendant included the plaintiff's software, Trumpet Winsock, on a diskette that the defendant had arranged to be distributed free with a computer magazine. Amendments were made to the configuration files of the software which resulted in its connecting by default to the defendant as Internet Service Provider, and which also suppressed notices that Trumpet Winsock was distributed as shareware. The diskette additionally contained other software relating to the use of the defendant's service.

One element of the defense to the plaintiff's action for copyright infringement was an assertion that, by marketing Trumpet Winsock as shareware, the plaintiff had impliedly granted to any potential distributor an unrestricted license to distribute the software. Judge Heerey held that any...
such license would be subject to terms, which should be identified by adopting the
same approach as that of implied contractual terms. A condition would be
implied if: (1) it were necessary to give business efficacy in the light of the
fundamental purpose of the work, and (2) it were so obvious as to go without
saying. In determining these matters, evidence of trade usage was admissible,
though in this case it was not sufficiently unambiguous to establish custom in
the legal sense. Applying these principles, Judge Heerey found that the
distribution license contained an implied term that the software should be
distributed in its entirety and unamended, but did not contain a term that no
other software should accompany Trumpet Winsock. The defendant’s
distribution fell outside the terms of the license, as files had been amended, and
was thus an infringement of copyright.

There must clearly be some evidence that the web page author has granted
an implied license to other web users, and that evidence would consist of the
following author’s acts: (1) placing the page on a web server; and (2) linking
to that page from some other web page linked to the World Wide Web.

In order to determine what the objective observer would understand by these
acts, it is necessary to examine how the World Wide Web is actually used.
There is insufficient space in this Article for a detailed explanation of the web,
but a number of general points are relevant to this issue: first, the World Wide
Web is so named because it consists of a mass of interconnected information
structures, which can be envisaged a metaphorical spider’s web. However,
those connections are not made at the server level, i.e., at the level of the
combination of web server software and computers that operates each website
(see Figure 1).

119. The mere fact that a copyright work is accessible does not of itself evidence the grant of a license.
“Silence as to the imposition of a restriction is not, in our view, necessarily indicative of a grant of freedom from
120. The act of placing a web page on a web server only makes it theoretically available to users—in
practice, nobody will know it exists so nobody will access it. The normal method of constructing a website is
to create a “home” page, which has links (direct or indirect) to all the other pages on the site, and then to register
that page with a public directory such as Yahoo!. Users who visit the site then create additional links to the
parts of it they find interesting; as a general rule, the more links there are to a site, the more users will visit it.
For example, there appeared to be about 10,000 links to the Queen Mary & Westfield College World Wide Web
site “www.qmw.ac.uk” as of February 1998.
121. My thanks are due to Lars Davies, Research Fellow in Internet Law at the Information Technology
Law Unit, who explained the intricacies of the technology and assisted me in matching them to the law.
122. For a comprehensive description of the World Wide Web, see ED KROL, THE WHOLE INTERNET
Instead, the connections are made between the individual pages which make up those websites (see Figure 2). This is immediately apparent when the nature of URLs is considered. Generally speaking, only the first part of the URL (e.g., “www.shetland-times.co.uk”) identifies a particular server. The remainder of the URL identifies subdirectories on the server, and the final element (e.g., “story.html” or “story.htm”) identifies the file on the server which contains the HTML source code for the particular web page. The fact that the World Wide Web only exists because of interconnections between pages, and that a page’s accessibility increases as more links are made to it, suggests that most web page authors would expect their page to be linked-to if it contained something of interest, unless they took positive steps to prevent such linking.

123. Internet technologies are very flexible, and URLs are not necessarily mapped so rigidly to servers, directories and files as the following paragraph might suggest.
Second, the HTML "language," in which web pages are written, is not really designed for linking servers. If the viewer merely typed the URL "www.shetland-times.co.uk" into his browser software, he might or might not receive any meaningful response. In those circumstances, when his browser software accesses the web server "www.shetland-times.co.uk," it does not inform that server which file is requested. What happens then depends on the response the server is programmed to make. It might treat the access as a request for a default page (often "index.html" or "home.html") or simply report an error to the browser software (though most servers are configured to deliver a default page). Alternatively, if the viewer has included a directory in the URL (e.g., "www.shetland-times.co.uk/stories/") and there is no default page in that directory, the viewer might receive a listing of the files available on that server in that directory. He would need to add one of them manually to the URL to receive a meaningful page, or else he might only receive an error message. This limitation of HTML, if indeed it is a limitation, again suggests that a web page author should expect links to individual pages rather than to the site as a whole.

Third, scripting languages such as CGI or Perl are readily available, and can be used by website authors to control the viewer’s access. Such a script
could force all viewers to enter through a "front" or home page, or it could assemble a page dynamically (e.g., to ensure that advertisements were displayed). If a web page author decides not to use these techniques, other authors might reasonably expect there to be no objection to linking directly to such a page.

Fourth, the World Wide Web would be unusable without navigation tools which direct viewers to websites and pages of interest. These tools fall into different categories, the most important of which are web directories and web crawlers. Web directories such as Yahoo! register the existence of websites in a structured directory. Viewers who find an entry on Yahoo! are linked to the URL provided by the person registering the site, and can then navigate the remainder of the site in the normal way.

Yahoo! will only contain an entry for a website if someone has taken the trouble to register it. Yahoo! does not, therefore, provide complete information about the contents of that site. This function is performed by web crawlers, such as Alta Vista, which follow links from pages they have already examined, retrieve the source code of the linked-to page, and then store that page’s URL with automatic indexing of its contents. This means that the URLs involved in the Shetland Times case were almost certainly stored on Alta Vista and other web crawlers, and a search for “shetland + council” would have found URLs for Shetland Times pages. All regular users of the World Wide Web are aware of these tools, and know that their own pages will be indexed unless they prevent such indexing.

All this suggests that a reasonable World Wide Web user would believe that a web page author’s act of making a web page available via the Internet was intended to confer an implied license on other web page authors to make links to that page. The mere fact that the web page contains no prohibition on linking is not in itself sufficient if the nature of the page is such that merely making it theoretically accessible does not, in and of itself, indicate the grant of a license. However, if a copyright work is made available for a particular purpose, a license to copy to the extent necessary for that purpose can be implied. In the Australian case of FAI Insurances Ltd. v. Advance Bank

126. Such as the Shetland Times home page, which links to the stories on the Shetland Times site. See <http://www.shetland-times.co.uk>.
127. For example, an unpublicized page, not pointed to by any other page on the website.
Australia Ltd., the parties were engaged in a battle for control of the bank’s board. Proxy forms for voting at the annual general meeting were distributed to shareholders by the bank, and FAI distributed a rival version based on the bank’s form but with different voting instructions. The court held that the bank had given all shareholders an implied license to copy for the purpose of voting at the meeting, and thus FAI’s copying did not infringe. Web pages are made available for a wide range of purposes, including (if the description of the World Wide Web above is accurate) being linked to extend the Web, which necessitates copying the URL.

Of course, any potential implication of a license can be negated by notice that no license is in fact granted. The apparently obvious way of doing this would be to place a statement on the page in question, stating that links to that page are only permitted under express license from the page’s author. Whether such a notice would be sufficient to negate the implication of a license in respect of web crawlers is more difficult to determine because humans do not read the text content of the page. Thus, a notice on the page could only operate as constructive, rather than actual, notice that a license was not given. It is arguably possible for a website operator to exercise some control over the activities of web crawlers through a file titled “robots.txt” in the root directory of the web server, a notice on the page itself would be insufficient to deny a license to web crawler operators.

III. PROHIBITING LINKING FOR CAUSE

As the above analysis demonstrates, only in exceptional cases will a website proprietor possess an absolute right to prevent links to his site. However, where the conduct of the linking person is legally objectionable, the proprietor of the linked-to site may be able to prevent or control linking on that basis.

129. If this analysis is correct, the mere fact of making a web page available would be sufficient evidence of the grant of an implied license to place the burden of proof that no license was granted on that page’s author. See Computermate Products (Austl.) Ltd. v. Ozi-Soft Ltd., (1988) 83 A.L.R. 492, 497. Copinger takes the view that the burden of proof will in practice always be on the person asserting that an implied license has been granted. COPINGER AND SKONE JAMES ON COPYRIGHT, supra note 61, §§ 8-147.
130. This file can be used to limit or deny access to all or part of the website. However, some web crawlers are "badly behaved," and will ignore the file and index all the web pages on the site anyway.
A. Actions for Breach of Unfair Competition Law

Both the Shetland Times and Total News disputes illustrate that the most likely ground for successful objection to a web link is not copying, but misappropriation of either work product or trade reputation that causes a diminution in revenue from the site. Conduct of this type fits more easily under the heading of unfair competition than copyright infringement. Unfair competition law, however, will only provide a remedy where both websites relate to businesses.

The United Kingdom has no general law of unfair competition, and complaints on this ground would be limited to those falling within the tort of passing off. Generally, as the inclusion of a link does not make any misrepresentations about the goods or services of the proprietor’s linked-to page, which are likely to cause damage to that person’s goodwill, passing off will rarely provide a remedy.

However, several civil law jurisdictions have a more strongly developed law of parasitic or unfair competition that provides a remedy for unfair, misleading or disparaging conduct in the course of business. Thus, for example, the Belgian Law of July 14, 1991 on Unfair Practices and the Protection of Consumers Arts 22-29, provides a remedy for commercial communications that contain disparaging statements (even if true) relating to another trader or his products, services, or communications, create confusion with other traders, or contain unfair comparative advertising. Article 1 of the German Act Against Unfair Competition prohibits in general terms misleading conduct in the course of business as an act of unfair competition. Similar provisions are found in article 260 (formerly article 212) of the Portuguese Código de Propriedade Industrial 1940 as amended. These, like the majority of unfair competition laws, concern themselves mainly with misappropriation of trade reputation.

131. See generally WORLD INTELLECTUAL PROPERTY ORGANIZATION, PROTECTION AGAINST UNFAIR COMPETITION (1994).
132. An internationally agreed definition of the basic principle of unfair competition law is set out in art. 10bis (2) of the Paris Convention for the Protection of Industrial Property (Stockholm Act 1967): “Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.”

For a comprehensive digest of world unfair competition laws see JOHN R. OLSEN & SPYROS M. MANIATIS, TRADE MARKS: WORLD LAW & PRACTICE (FT Law & Tax, London 1996) at § 22 of each national summary.
134. See article 1382 of the French Civil Code, prohibiting acts which cause confusion with another’s products or business, on which many unfair competition laws are based. C. CIV. art. 1382 (Fr.).
However, some go further and also provide a remedy for acts committed in the course of business that: (1) fall outside the norms of honest or good faith competitive conduct, and (2) cause damage to the plaintiff's business. Unfair competition laws in this second category will potentially provide a remedy for the misappropriation of work product.

Unfair competition law is not purely a civil law phenomenon, at least with regard to misappropriation of trade reputation. In Australia, section 52(1) of the Trade Practices Act 1974 provides that "[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." This provision has been developed through case law to deal with a wide range of unfair competition issues. The Australian courts have not yet been asked to examine the issue of web links under section 52, but a series of cases about character merchandising and media spin-off marketing gives some indication of their likely approach. The most recent decision in this line is Twentieth Century Fox Film Corp. v. South Australian Brewing Co. Ltd., in which the defendants marketed a product called "Duff" beer, intending to create a link in the mind of consumers between the beer and the cartoon program "The Simpsons."

It was clear on the evidence, however, that the product would not lead consumers to believe that it was authorized or licensed by the owners of "The Simpsons." In his judgment, Judge Tamberlin said:

On a literal reading of [section] 52 of the Act, the deliberate creation by the breweries of an association by use of the name "Duff" between the breweries’ beer can and "The Simpsons" program, in circumstances where there is no association and

135. See, for example, Article 1365 of the Indonesian Civil Code which prohibits, inter alia, acts or omissions which are contrary to honest usage, good faith and good conduct. See also Article 2598 of the Italian Civil Code which prohibits directly or indirectly making use of means not in conformity with the principles of professional ethics and which are likely to damage the business of others. C.c. art. 2598 (lt.).
138. Twentieth Century Fox Film Corp. v. South Austl. Brewing Co. (1996) No. NG 155. See also Pacific Dunlop Ltd. v. Hogan (1989) 23 F.C.R. 553 (finding a TV advertisement containing a character which clearly referred to "Crocodile Dundee" to be misleading and deceptive because viewers would believe the actor Paul Hogan had a commercial connection with the product).
indeed, where such an association is contrary to the express policy of the producers, amounts to misleading and deceptive conduct. There is no necessity to demonstrate that the viewer or consumer must think in specific terms of permission or allowance in order to constitute deceptive conduct. The intentional use of the name “Duff Beer” which produces the false association is sufficient, in my view. There must, however, be actual or likely misleading or deception of viewers or consumers.\textsuperscript{139}

The court is more likely to find a breach of section 52 of the Trade Practices Act where there is evidence of an intention to mislead.\textsuperscript{140}

The most likely way in which a web link might fall within section 52 is if it misappropriates the proprietor’s trade reputation by leading viewers of the page containing the link to believe: (1) that the linked-to pages are the work product of the proprietor of the linking page; or (2) that the proprietor of the linked-to page has some business connection with the proprietor of the linking page.

It seems probable, however, that a mere reference to the plaintiff or his products by means of a link will not be sufficient to establish an action under section 52. In McIlhenny Co. v. Blue Yonder Holdings Pty Ltd., formerly Tabasco Design,\textsuperscript{141} the plaintiff manufacturer of Tabasco sauce alleged that the use of the word “Tabasco” in the name of the defendant design company indicated a commercial connection between them and was thus an infringement of section 52. There were no visual similarities between the Tabasco sauce label and the defendant’s logo, and the court held that the parties’ fields of activity were so different that no misleading or deceptive conduct resulted.

In the United States, section 43(a) of the Lanham Act\textsuperscript{142} appears to be developing along similar lines to the Australian law. Section 43(a) provides a remedy for the commercial use of: “any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact that is likely to cause confusion,
mistake or deception as to the connection or relationship between the parties.\textsuperscript{143} The authorities indicate that the Lanham Act goes beyond trademark infringement and creates a federal statutory tort which gives broad protection against various forms of unfair competition and false or misleading advertising.\textsuperscript{144} In particular, and similar to section 52 of the Australian Trade Practices Act, the courts have given remedies for parasitic competitive practices that attempt to take advantage of another’s commercial reputation, particularly in the field of media-related marketing.\textsuperscript{145}

Using the Lanham Act to prevent web linking would require the website proprietor to prove false or misleading conduct on the part of the author of the linking page. There seems to be little hope for U.S. legislation which forbids linking absolutely, as such legislation likely would violate the free speech provision of the Constitution. For example, the Georgia Computer Systems Protection Act of 1991\textsuperscript{146} would have made it a criminal offense for a person to transmit data that uses, for example, a name, trade name, or logo to falsely identify the transmitter, or that falsely states or implies that the transmitter has permission or is authorized to use the name, and would thus have prohibited many types of web links. In June 1997, the Act was held to violate the First Amendment in \textit{ACLU of Georgia v. Miller}.\textsuperscript{147}

\textbf{B. Other Potential Actions}

There is insufficient space in this Article to examine all the other causes of action which might potentially be available to a website proprietor who is aggrieved by a link. Some likely causes of action include trademark infringement, passing off, or defamation. A further possibility is trademark dilution where local law extends to that concept. There is still doubt in most jurisdictions whether a URL, which points to a site whose domain name is also a trademark, can, on its own, infringe that trademark. A recent U.K. decision\textsuperscript{148}

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has held that registration of domain names which are identical or similar to another's trademark can establish a cause of action. However, in that case, there was clear evidence that the defendant had threatened to commence an infringing use of the domain names if its financial demands were not met; the action was decided on that basis and not on the ground that the domain names per se infringed the relevant trademarks.

Passing off will only assist a website proprietor where the offending link results in a diminution of the plaintiff's trading reputation or goodwill. The normal effect of a link is, if anything, to enhance the defendant's reputation, and his being linked-to demonstrates the plaintiff's importance. A successful action for passing off is likely to be rare.

Defamation is a third possible cause of action. It is possible to imagine web links which are per se defamatory—for example, a link to a reputable law firm's website contained in a page headed "These people helped us avoid the police," where the page is part of a site which consists mainly of obscene material (by the standards of the law firm's country). The normal principles of the relevant defamation law would apply to such actions, which would obviously be rare. It is interesting to note that all these potential causes of action are based on injury to the plaintiff's reputation (in particular his commercial reputation) and not on any property rights which he might possess in the website.

IV. APPROPRIATE REMEDIES FOR WEB LINKS

The main conclusion that can be drawn from the above analysis is that linking to another's website is unlikely to constitute an infringement of any property right of that site's proprietor. This is not meant to deny that property rights (primarily copyright) may subsist in a website, but rather to assert that the interests which property laws protect are not adversely affected by links to the site. Linking does not require any part of the website to be copied, nor does it deny the proprietor's right to possession of goods or land. Linking to a website is not an activity currently controlled by property laws.

149. And even where a link is created by bookmarking a web page, the minimal amount of copying involved will rarely amount to infringing copying. See supra Part II.B.1.
150. See supra Part I.A.
151. For a more detailed analysis of the reasons why unfair competition, rather than property law, is an inappropriate basis for misappropriation of trade reputation or work product claims see SANDERS, supra note 136, at 79-86.
would be required to extend the existing property rights in websites to encompass the activities of those who link to them. The question then remains whether the proprietor of a website should have the power to control links to his site, and if so, whether that right is most appropriately granted through property laws. This demands an analysis of the mischief which the law should seek to prevent.

The discussion of the technology of the World Wide Web above indicates that a website to which there are no links is, effectively, invisible to other users of the Web. However, the purpose of any website that is linked to the World Wide Web is to convey information to viewers. Links to a site are thus an integral part of its effectiveness. The mischief that the website proprietors complained of in the *Shetland Times* and *Total News* cases was not that the defendants had linked to their sites per se, but rather that the particular methods of linking adopted were likely to diminish the revenue derived from the sites. In both cases the actions were settled on terms that permitted the defendants to continue to link to the plaintiffs’ sites, but constrained the ways in which those links might be made. The mischief identifiable from these cases is most accurately described as damage to the plaintiffs’ economic interests by the manner of linking, rather than infringement of their rights through the mere existence of the links.

If this mischief is one that the law should seek to alleviate, then it might be justifiable to provide a website proprietor with some remedy where the manner of linking adversely affects him, though not an absolute power to prohibit linking without demonstrating some cause. But should that remedy be based on property rights?

In the author’s view, property rights are an inappropriate basis for providing such a remedy. Rights in physical property, such as land and goods, are based on the principle that the owner should have the exclusive right of possession of that property, whereas websites are intended by their proprietors to be a shared resource. Copyright is based on the principle that the owner of a work should have the exclusive right to make and distribute copies of the work. However, linking to a website does not normally involve the copying of anything in which the right subsists. Expanding copyright to cover web links

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152. And where they are not intended to be a shared resource, means exist to prevent access, such as: (1) installing the site on a computer which is not connected to the Internet; or (2) not creating any initial links to the site; or (3) restricting access through passwords.

153. *See supra* Part II.B.
would demand the introduction of a new exclusive right, the right to control future (noncopying) uses of the work.\textsuperscript{54} A new right of this type would seem to run counter to current trends in the development of copyright law, which seek to limit the ability of copyright owners to control nonauthorial elements of their works,\textsuperscript{155} such as software interfaces\textsuperscript{156} and collections of factual information.\textsuperscript{157}

A further argument against the control of linking through intellectual property laws, and copyright in particular, is that intellectual property rights are not absolute.\textsuperscript{158} Copyright is a qualified monopoly, granted by the State as a means of achieving particular ends. These ends differ from country to country, but include: the protection of an author's labor, skill and effort in creating a work against misappropriation by copying;\textsuperscript{159} the encouragement of creativity for the general benefit of the nation\textsuperscript{160} through a balance between exclusive rights and use rights;\textsuperscript{161} and the protection of the author's human rights, based

\textsuperscript{54}Some limited measure of control already exists by virtue of the moral rights (the right to claim authorship and the right to object to derogatory treatment of the work). See Berne Convention, supra note 41, at art. 6. But these rights could not be infringed by the mere existence of a web link. For a discussion of the limits of copyright in relation to digital works see, Fred H. Cate, The Technological Transformation of Copyright Law, 81 IOWA L. REV. 1395, 1409-10, 1440-58 (1996).

\textsuperscript{155}Keith Aoki suggests that this concentration on authorship may actually increase the ability of authors to control uses of the information contained in their works. "The subject of copyright protection has shifted from protection of discrete and embodied expressive works of authors in the name of promoting increased circulation of the underlying ideas such works contain to attempts to extend protection to the underlying information itself." Keith Aoki, (Intellectual) Property and Sovereignty: Notes Towards a Cultural Geography of Authorship, 48 STAN. L. REV. 1293, 1343 (1996).

\textsuperscript{156}Directive 91/250, supra note 67, at 44.


This trend is particularly well-illustrated by the European Union Directive which explicitly limits the elements protected by copyright to those exhibiting authorial expression. Council Directive 96/9, art. 1(3), on the Legal Protection of Databases, 1996 O. J. (L 77) 20, 24 [hereinafter Directive 96/9]. The Directive, in Article 7, also introduces a new sui generis right, based on unfair competition principles, to protect the factual content of a database. See also WIPO Copyright Treaty, Dec. 23 1996, art. 5, S. TREATY Doc. 105-17, and the proposal for a Database Treaty put forward at that Conference.

\textsuperscript{158}In theory the owner of physical property has absolute rights to possession, although in practice these rights may be limited or abrogated in the modern world by controls on land use, export controls, etc.

\textsuperscript{159}This is well-established as the basis of U.K. copyright law. See Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., 1 W.L.R. 273 (H.L. 1964). The economic basis of the law is often summarized in the maxim, "what is worth copying is prima facie worth protecting." University of London Press Ltd. v. University Tutorial Press Ltd., 2 L.R.-Ch. 601, 610 (1916).

\textsuperscript{160}The Copyright Clause of the U.S. Constitution empowers Congress to grant exclusive rights to authors to "promote the Progress of Science and useful Arts." U.S. CONST. art. I, § 8, cl. 8. "[T]he ultimate goal of copyright law is to increase our fund of information." MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 324 (2nd ed. 1995).

\textsuperscript{161}"Copyright law represents an economic trade-off between encouraging the optimal creation of works of authorship through monopoly incentives, and providing for their optimal access, use and distribution through limiting doctrines." Leaffer, supra note 160, at 17.
on the view of an authorial work as an external manifestation of the author’s personality. 162

An absolute monopoly would grant the copyright owner more extensive rights than are necessary for achieving these ends, 163 and so the right is qualified either by limiting the aspects of the work in which rights subsist 164 or by permitting uses of the work which do not defeat those ends. Any expansion of copyright to include a remedy for linking would require an equivalent expansion of the scope of fair use. However, this expansion would have to permit linking when the manner of the linking did not adversely affect the plaintiffs’ economic interests. 165 An extension of copyright in this way would achieve the desired end of prohibiting linking which damages the website proprietor’s economic interests, but would not enable him to control nondamaging links through licensing. Effectively, the extension would be an artificial way of achieving a remedy where the proprietor has cause to object to links to his website, as the extension would produce no effects where there is no cause for objection.

It would be less artificial, in the author’s opinion, to provide a remedy to the website proprietor through those areas of the law which address the mischief directly. The mischief is that the manner in which the defendant has linked to the website causes its proprietor economic damage. Of course, economic damage alone cannot support a cause of action, as this would outlaw all competitive activity. This suggests that the provision of a remedy to the website proprietor should have a tortious, or quasi-tortious, basis in that liability is based on some wrongful conduct on the defendant’s part.


The authors’ rights of continental Europe grew from a deep respect for intellectual creativity and so looked to protect moral integrity as much as economic return. The moral rights of the author were the first object of the law and only when they were secure was it proper to turn to the economic rights.


To the extent that courts nonetheless stretch copyright law to allow the copyright owner’s derivative work right to protect functionally determined compilations and subcompilations of data structures in software infringement cases, they convert copyright law into a de facto utility model law, one that grotesquely provides patent-like protection on the softest possible conditions for the longest possible time. Such gross overprotection suffocates the very incremental innovation that copyright law was intended to encourage.


165. See, e.g., 17 U.S.C. § 107; see discussion supra Part II.D.1.
The wrongful conduct element of website linking appears to reside in the misappropriation by the defendant of the proprietor’s intangible assets. These assets are of three kinds. The first asset is the proprietor’s intellectual creativity, for example, by incorporating links to images or text so that the viewer’s browser loads them into the display of the defendant’s web page. Misappropriation of intellectual creativity falls clearly within existing intellectual property law, particularly copyright, which would require little or no extension to provide a remedy for such activities, and should remain a matter to be regulated as a form of property right infringement.

The second asset is the proprietor’s work product, or in other words, his “sweat of the brow.” A typical example of such conduct would be the sort of virtual website discussed by Greenstone, where the author creates a home page from which the links are to third party pages, thus using their work product (without copying it) to make his site more attractive to viewers. This is exactly the mischief complained of in the Shetland Times and Total News cases. Even though U.K. copyright law might protect work product from direct copying through copyright, it would not normally prohibit indirect use of a work through a web link. According to U.S. law, work product falls outside the scope of copyright. This position is shared by E.U. legislation, with regard to protection of software and databases.

The third asset is the proprietor’s commercial reputation, which might be misappropriated, for example, by suggesting a link between the author of the linking page (or more likely, his products) and the proprietor of the linked-to site. Copyright might, through moral rights, provide a remedy where the misappropriation was of the plaintiff proprietor’s reputation as author, but would be completely inappropriate where any other aspect of his reputation was misappropriated.

The more appropriate model for providing a remedy for the misappropriation of the second and third types of intangible assets through web

168. See supra Part II.B.
171. See Directive 96/9, supra note 157, at 27.
links is unfair or parasitic competition law. Laws of this kind enable the courts to strike an appropriate balance between freedom of expression and the protection of intangible assets for the following reasons. First, they apply only to acts of misappropriation in the course of a business, thus impinging very little on the principle of free speech. Second, they recognize more explicitly than most copyright laws the need to strike a balance between the protection of intangible assets and the freedom to make use of them in competition with their "owner."

Breach of unfair competition laws requires not only an appropriation, but also a finding that the defendant's conduct went outside the norms of commercial competitive behavior. Finally, a plaintiff website proprietor will need to prove loss before a remedy will be awarded.

Proprietors of commercial websites may complain that being provided with remedies through unfair competition law rather than property law deprives them of the power to control linking through licenses. Yet there is no reason why they should have such powers. A link is a means of access to published information, and access to that information is a fundamental human right. For this reason alone, website proprietors should have no absolute right to control access to information by licensing web links. There is already reason to fear that copyright law is unnecessarily restrictive of access, and is thus a

172. Reichman proposes a modified liability regime based on trade secrets law to resolve the anomalies which arise where works such as computer software fall on the border between patent and copyright law. See Reichman, supra note 163, at 2519. Trade secrets are perhaps an appropriate model for software protection because some element of reproduction is likely to be present; but for web links, where no reproduction takes place, unfair competition law would provide a sounder basis for a liability regime, which could equally extend to the non-authorial aspects of software. Reichman's justification for his proposal, that a modified trade secrets law would provide "a loosely codified set of default rules that impose compensatory liabilities for socially undesirable conduct, and not as a regime of exclusive property rights" would apply equally well to a liability regime based on unfair competition principles. Id. at 2524.

173. In this respect §§ 102(b) and 107 of 17 U.S.C. are exceptions, not the norm. 17 U.S.C. §§ 102(b), 107 (1994).

174. In this context, the language of property rights seems inappropriate.

175. See supra note 129.

176. For an interesting example of how such licenses might be drafted, see the terms and conditions for access to the Expert Pages <http://expertpages.com>.

177. Universal Declaration of Human Rights (1948): "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 19 (1948). "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Id. at art. 29(2); see also The European Convention for the Protection of Human Rights, Eur. Consult. Ass'n art. 10 (1960).

178. "While the technological transformation of copyright law is already putting some expression, facts,
strong justification for refusing to extend it, or any other property law, to prohibit unauthorized linking to websites.

CONCLUSION: THE TAXONOMY OF WEB LAW

One of the greatest dangers of legal specialization is the assumption that any new phenomenon falls within one's area of expertise. Copyright lawyers have learned how to apply their specialty to the new digital technologies, and have identified a number of characteristics which indicate that a new problem is a copyright problem: digital information, computer storage, transmission by networks, and temporary copying in RAM (to name a few of the most salient). At first sight, disputes about web links display these characteristics.

This Article has attempted to demonstrate, however, that unauthorized web links are neither primarily an intellectual property phenomenon, nor any kind of property phenomenon. They do not involve copying or interfering with possession of physical property. They are merely addresses where information can be found, with the added bonus that the technology of the World Wide Web includes a transport mechanism for collecting that information once its address is known.

Where web links fall within the ambit of the law, they do so because of the behavior of their creator and their effect on the business of the proprietor of the linked-to site. The applicable law is, or should be, tortious in nature, and the appropriate tort is unfair competition. Attempting to resolve the issue through property laws would require the creation of new property rights, but these new rights would require us to distort the fundamental basis of property law.

The experience of the early taxonomists teaches us to be cautious in our classifications. We are less likely to identify things correctly if we approach them with preconceptions. Something may at first glance appear to be a duck,\textsuperscript{179} but turn out to be a platypus.\textsuperscript{180} An apparent copyright problem may in fact reside in the unfair competition domain. Innovation in the digital technologies is so rapid and presents us with so many unclassified phenomena that, if we are

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\textsuperscript{179} For an early rule of thumb test for infringement in computer program interfaces, now of interest only to legal historians, see Richard A. Forsten, \textit{It Walks and Talks Like My Duck, So How Come It's Not Infringement?: The Case Against "Look-and-Feel" Protection for Computer Programs}, 70 J. PAT. [\& TRADEMARK] OFF. SOC'Y 639 (1988).

\textsuperscript{180} For those interested in monotremes an excellent starting point is Stephen Jay Gould, \textit{To Be a Platypus, in BULLY FOR BRONTOSAURUS} (1991).
not careful in our taxonomy, the law may become populated with cameleopards, or even gryphons, hippogriffs, and cockatrices. The result will be interesting, but about as much use to a lawyer as a medieval bestiary would be to a modern zoologist.