



Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement

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INTRODUCTION: ONLINE LEAKS

Producing a film or television program involves a number of risks: financing collapsing, a marquee actor dropping out, or the studio delaying the project. Another threat, unique to the digital age, is that a script, television episode, or rough cut will be leaked online.¹ Leaks can provoke negative buzz,² diminish audience interest,³ and even cause the cancellation of a project.⁴ In the past few months alone, *The Expendables 3*,⁵ upcoming *Doctor Who*

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¹ See, e.g., Nicole Sperling, *The Big Batman Fake-Out*, ENT. WEEKLY (July 18, 2004), <http://www.ew.com/ew/article/0,,20835929,00.html>, [<http://perma.cc/U4Z4-EQB4>]; Andy Dehnart, *Survivor Spy Exposed*, THE DAILY BEAST (Jan 31, 2011), <http://www.thedailybeast.com/articles/2011/01/31/survivor-spoiler-exposes-russell-hantz-as-his-source.html>, [<http://perma.cc/67P3-9C9E>]; Andy Dehnart, *Survivor Spoiler Missyae Sued*, REALITY BLURRED (Feb. 1, 2011), http://www.realityblurred.com/realitytv/2011/02/survivor-redemption-island-survivor_spoiler_missyae, [<http://perma.cc/G47X-G99B>].

² See, e.g., *The Reid Report* (MSNBC television broadcast July 25, 2014) (reporting fan criticism of Ben Affleck and the release of photos of Ben Affleck as *Batman* and the trailer for *Fifty Shades of Grey*).

³ See Sperling, *supra* note 1.

⁴ See Complaint, *Tarantino v. Gawker Media, LLC*, No. 2:14-cv-00603 (C.D. Cal. Jan. 27, 2014) (hereinafter “Complaint”).

⁵ Eriq Gardner, *Lionsgate Granted Temporary Restraining Order Over ‘Expendables 3’ Leak*, HOLLYWOOD REPORTER (Aug. 5, 2014, 8:37 AM), <http://www.hollywoodreporter.com/thr-esq/lionsgate-granted-restraining-order-expendables-723391#>, [<http://perma.cc/S8T9-N567>].

episodes,⁶ a draft script for the new *Batman* movie,⁷ and Quentin Tarantino's *The Hateful Eight* screenplay⁸ have all been leaked online.

Although leaks have been a perennial problem for the entertainment industry, the Internet has increased their frequency and harm.⁹ In fact, despite praising the Internet's boon to creativity, The Lonely Island, Neil Gaiman, Trent Reznor, and others have complained that "pervasive leaks of unreleased films and music regularly interfere with the integrity of [their] creations."¹⁰ Additionally, information online not only spreads quickly, but also can be linked to and reposted on an infinite number of sites.¹¹ This is exacerbated by both online media outlets driven to scoop the competition and attract readers¹² and rabid fans eager to share information and spoilers.¹³ Moreover, once the public knows that Darth Vader is Luke Skywalker's father, Olivia Pope's mother is alive, and River Song is Amy's time-traveling daughter, those facts can be repeated without legal repercussion. Indeed, courts have consistently held that the underlying facts and ideas in a copy-

⁶ Clark Collis, *Once Upon a Time Lord*, ENT. WEEKLY (Aug. 18, 2014), http://www.ew.com/ew/article/0,,20741515_20839792_6,00.html, [http://perma.cc/3AF8-TUGW].

⁷ Sperling, *supra* note 1. The studio has insisted that the script was fake and others opined the leak was a publicity stunt, but the truth remains unclear. *Id.*

⁸ Complaint, *supra* note 4, at 2.

⁹ Sperling, *supra* note 1.

¹⁰ Nate Anderson, *The Lonely Island Gets Off the Boat to Oppose SOPA*, ARSTECHNICA (Jan 18, 2012), <http://arstechnica.com/tech-policy/2012/01/the-lonely-island-gets-off-its-boat-to-oppose-sopa/>, [http://perma.cc/8235-WWAK].

¹¹ See generally Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1364 (2006) (discussing the unprecedented rates of copyright infringement in the digital age).

¹² See generally Daniel S. Park, *The Associated Press v. All Headline News: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism*, 25 BERKELEY TECH. L.J. 369, 374–76 (2010) (describing economic realities and challenges of online media); Julian Sanchez, *AP Launches Campaign Against Internet "misappropriation,"* ARSTECHNICA (Apr. 6, 2009), <http://arstechnica.com/tech-policy/2009/04/ap-launches-campaign-against-internet-misappropriation/>, [http://perma.cc/8F5P-MC27]. A century ago, the Supreme Court stated that news has "peculiar value. . . in the spreading of it while it is fresh; . . . [a value that] cannot be maintained by keeping it secret." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918).

¹³ Spoiling reality shows by identifying participants before they are officially announced, identifying who is eliminated or will win, or revealing twists has become common practice online. See, e.g., Dehnart, *Survivor Spy Exposed*, *supra* note 1.

righted work are “free for the taking,”¹⁴ and the media is not liable simply because they published information that was illegally obtained by a third party.¹⁵

This Article examines the problem of scripts, television episodes, and movies being leaked online, and whether news and fan sites that link to such works are liable for copyright infringement. Although this article focuses on linking to leaked entertainment works, it applies to the broader issue of whether linking to copyrighted material infringes either directly or secondarily.

To contextualize the issue, this Article begins by recounting several high-profile leaks and the entertainment industry’s response, specifically asserting copyright infringement. Next, it outlines the pertinent provisions of the United States Copyright Act and case law addressing direct and secondary infringement. With this foundation, and guided by the Supreme Court’s 2014 decision in *ABC v. Aereo*,¹⁶ this Article analyzes whether linking to copyrighted works implicates the public performance and public display rights as defined by the Copyright Act’s Transmit Clause. It articulates a dichotomy distinguishing automated search engine links from volitional links, details when links will infringe, and evaluates potential defenses, including fair use. Ultimately, this Article concludes that volitional links to leaked entertainment works are transmissions that presumptively infringe, but may often qualify as non-infringing fair use. Consequently, copyright infringement is both a promising legal strategy for creators seeking to guard against the unauthorized release of their works and a hazard of which linkers must be aware.

¹⁴ Facts are not copyrightable. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354 (1991) (“Facts contained in existing works may be freely copied”). Nor are ideas underlying a copyrighted work: “no author may copyright his ideas or the facts he narrates.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985). Therefore, the idea and plot of a script or novel can also be disclosed without violating the author’s copyright. *Feist*, 499 U.S. at 345.

¹⁵ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); see also Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media From Newsgathering Torts*, 32 HARV. J. L. & PUB. POL’Y 1093, 1102–08 (2009) (detailing Supreme Court jurisprudence confirming that media may publish true information that was illegally obtained).

¹⁶ *ABC, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498 (2014).

INADEQUACY OF TRADITIONAL REMEDIES

Some in the entertainment industry have attempted to prevent unauthorized releases of copyrighted works by adding non-disclosure and liquidated damages clauses to contracts,¹⁷ disciplining employees who leak copyrighted works,¹⁸ and even suing third parties for the disclosure of “trade secrets.”¹⁹ This summer, BBC Worldwide “took disciplinary action” against employees, after a rough cut of *Doctor Who*’s Series 8 premier (featuring Peter Capaldi as the new Doctor) and six scripts were leaked to a publicly accessible website.²⁰ *Survivor* sued an online leaker for “misappropriation of trade secrets,”²¹ and threatened others who linked to *Survivor*’s internal materials and a participant contract with copyright infringement lawsuits.²²

These strategies, however, do not cover many situations. For instance, a limousine driver who finds a screenplay or a hotel clerk who overhears a conversation disclosing a spoiler has violated no contractual covenant with the production company, and it is questionable whether a trade secrets claim

¹⁷ See Andy Dehnart, *Survivor Heroes vs. Villains Spoiler Boot List: Accurate So Far, Reality Blurred* (May 6, 2010), http://www.realityblurred.com/realitytv/2010/05/survivor-heroes-vs-villains-boot_list/, [<http://perma.cc/VAJ6-ZYG4>]. Everyone involved in the CBS television series *Survivor* and *The Amazing Race* signs extensive confidentiality agreements. See Dehnart, *Survivor Spy Exposed*, *supra* note 1. Participant contracts for *Survivor* and *Amazing Race* include liquidated damages clauses of \$5 million and \$10 million, respectively. Dehnart, *Survivor Heroes vs. Villains*, *supra* note 17.

¹⁸ Some states permit employers to raise a disclosure of trade secrets claim based on an implied confidential relationship, but the employer must prove that there was a confidential relationship and a clearly articulated expectation and obligation of confidentiality. See, e.g., *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1549–1550 (11th Cir. 1996).

¹⁹ See Dehnart, *Survivor Spy Exposed*, *supra* note 1. Jim Early was sued by *Survivor* creator Mark Burnett’s production company for “misappropriation of trade secrets” and “tortious interference with contract” for disclosing *Survivor* spoilers. *Id.* The lawsuit was dismissed when Early chose to cooperate with producers to identify the source of the leak. *Id.*

²⁰ George Szalai, ‘*Doctor Who*’ Script Leak: BBC Worldwide Takes Disciplinary Action, THE HOLLYWOOD REPORTER, (JULY 18, 2014), available at <http://www.hollywoodreporter.com/news/doctor-who-leak-disciplinary-action-719538>, [<http://perma.cc/Q7TE-PHUV>]; Collis, *supra* note 6, at 27.

²¹ Dehnart, *Survivor Spy Exposed*, *supra* note 1.

²² Andy Dehnart, *Survivor Contract, Rule Book Are Back Online*, REALITY BLURRED, (Aug 31, 2010), http://www.realityblurred.com/realitytv/2010/08/reality-blurred-survivor_contract_back/, [<http://perma.cc/X99L-5R8Y>].

can succeed against a fan who shares information.²³ Other times, the source of a leak cannot be identified.

Accordingly, creators have begun looking to other areas of law, specifically, copyright infringement, for relief. Recently, creators and producers have asserted that, regardless of the source of the leak, third parties and websites that link to copyrighted works are liable as direct or secondary copyright infringers.²⁴ Not only does this avoid the problem of identifying the leak, but also it expands potential liability to media outlets, congregator websites, and fan sites.

ALTERNATIVE THEORIES OF LIABILITY: RECENT LITIGATION

A growing number of litigants are employing copyright infringement and secondary liability theories. For instance, a few weeks before its August premier, *The Expendables 3* was leaked online and available on several BitTorrent sites.²⁵ Lions Gate asserted that hosting or linking to the film directly and secondarily infringed on its reproduction, distribution, and performance rights, and obtained a restraining order that not only prohibited sites from hosting the film, but also from linking to sites on which it was available.²⁶ The Motion Picture Association of America (MPAA) has also begun suing websites that link to films, as infringing on the copyright owner's right to display.²⁷ And Twentieth Century Fox sued a woman for \$15 mil-

²³ Misappropriation of trade secrets claims typically are litigated against an employee or someone associated with the production, not a third party leaker. Dehnart, *Survivor Spy Exposed*, *supra* note 1 (quoting Jordan Susman, who specializes in entertainment litigation).

²⁴ Timothy B. Lee, *MPAA: You Can Infringe Copyright Just by Embedding a Video*, ARS TECHNICA, (Apr. 10, 2012), <http://arstechnica.com/tech-policy/2012/04/mpaa-you-can-infringe-copyright-just-by-embedding-a-video/>, [<http://perma.cc/YJL3-Y2VU>]; Nate Anderson, "We Just Link to Videos!" *Won't Stave off MPAA Lawyers*, ARS TECHNICA, (Dec 18, 2008), <http://arstechnica.com/tech-policy/2008/12/we-just-link-to-videos-wont-stave-off-mpaa-lawyers/>, [<http://perma.cc/V3BN-N36L>]; Complaint, *supra* note 4, at 2; *see* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929–330 (2005) (underscoring viability of secondary copyright infringement); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001) (embarking on litigation strategy to pursue digital music file sharing as secondary infringement).

²⁵ Gardner, *supra* note 5.

²⁶ *Id.*

²⁷ *See* Lee, *MPAA*, *supra* note 24; Anderson, "We Just Link to Videos!", *supra* note 24; David Kravets, *MPAA Reining in Illicit Movie Sites, Downloading Unabated*, WIRED.COM (Dec 17, 2008), <http://www.wired.com/2008/12/mpaa-reining-in/>, [<http://perma.cc/9JX9-QVUV>]. Others have also framed online linking as some

lion when it discovered she had posted a script of one of its movies in production.²⁸

CBS and the production company behind *Survivor* have been particularly aggressive in protecting what it deems “secrets.” Not only have they sued individuals who leaked program details, but they have initiated legal action against journalists reporting on the production. When journalist and journalism professor Andy Dehnart published an analysis of an annotated *Survivor* cast contract, CBS sent a Digital Millennium Copyright Act take-down notice to Scribd.com, the document hosting service used to present the files to which the story linked; CBS claimed that “[s]uch copying and use of this material constitute[d]” copyright infringement under the Copyright Act and DMCA.²⁹

form of copyright infringement. The AP sued a headline and news aggregation service for copyright infringement and misappropriation, but the case settled on undisclosed terms. *Press Release, AP Settles Lawsuit Against Moreover and VeriSign*, THE ASSOCIATED PRESS (Aug. 18, 2008), available at <http://www.ap.org/Content/AP-in-the-News/Archive/AP-settles-lawsuit-against-Moreover-and-VeriSign>, [http://perma.cc/G37Q-VTWS]. Righthaven brought a wave of cases claiming that posting a news article that links to the original story is copyright infringement. Nicole Downing, *Using Fair Use To Stop A Copyright Troll From Threatening Hyperlinkers*, 12 N.C. J.L. & TECH. ONLINE EDITION 155, 155 (2011). Righthaven also sued The Drudge Report for linking to a copyrighted photo along with a story about airport security on the Law Vegas Review-Journal website. Eriq Gardner, *Copyright Troll Righthaven Sues for Control of Drudge Report Domain*, ARS TECHNICA (Dec. 9, 2010), <http://www.arstechnica.com/tech-policy/2010>, [http://perma.cc/BX8B-Q3GU]. Blues Destiny Records sued Google for linking to one-click download site Rapidshare, which had the label’s music available for download. Nate Anderson, *Why Google Sued a Tiny Blues Music Label*, ARS TECHNICA (May 7, 2010), <http://arstechnica.com/tech-policy/2010/05/why-google-sued-a-tiny-blues-music-label/>, [http://perma.cc/PTV3-7A3G]. And a Dutch court held that the website Filefactory’s linking to photos constituted infringement. Timothy B. Lee, *Dutch Court Rules Linking to Photos Is Copyright Infringement*, ARS TECHNICA (Sept. 14, 2012), <http://arstechnica.com/tech-policy/2012/09/dutch-court-rules-linking-to-photos-is-copyright-infringement/>, [http://perma.cc/QEJ5-UDLK].

²⁸ Mike Masnic, *Fox Sues Woman for 15 Million*, TECH DIRT (Nov. 29, 2010), <https://www.techdirt.com/articles/20101128/23101612026/fox-sues-woman-15m-because-she-aggregated-tv-movie-scripts-she-found-online.shtml>, [http://perma.cc/SJP3-ZBV5].

²⁹ Dehnart, *Survivor Spy Exposed*, *supra* note 1. The material was removed, but when CBS did not follow up with an independent copyright infringement lawsuit against Dehnart, the *Survivor* material was back online. Andy Dehnart, *Survivor Contract, Rule Book Are Back Online*, REALITY BLURRED (Aug 31, 2010), http://www.realityblurred.com/realitytv/2010/08/reality-blurred-survivor_contract_back/, [http://perma.cc/X99L-5R8Y].

Perhaps the most high-profile dispute highlighting linking as copyrighted infringement was Academy Award-winning writer/director Quentin Tarantino's one million dollar lawsuit against Gawker Media and AnonFiles.com for linking to his leaked screenplay.³⁰ After Tarantino discovered that his screenplay for *The Hateful Eight*, an ensemble western that he planned to direct, had been leaked,³¹ he gave a "widely reported" interview in which he declared that he would no longer make the film.³² The next morning, online news organization Gawker reported the leak and cancelation of the film.³³ That article, *Quentin Tarantino Throws Temper Tantrum After Script Leak*, stated that "[a]fter learning Tuesday that his script for *The Hateful Eight* was leaked, Quentin Tarantino . . . decided to cancel the movie" and "then called Mike Fleming Jr. at *Deadline* so he could make his anger public."³⁴ Gawker's article added, "if anyone would like to . . . leak the script to us, please do so at [the provided email address]."³⁵

The next day, the website "The Wrap" published an article claiming that it had "obtained a copy of Tarantino's script that's making its way around Hollywood" and that "Hollywood assistants are now promulgating a link anyone can use to download a PDF of the script that will no doubt end up online in the coming days."³⁶ The screenplay then appeared on AnonFiles.com and Scribd.com.³⁷ Later that day, Gawker published a follow-up article reporting that "a document that appears to be the script has been made public online."³⁸ Gawker did not post the screenplay, but inserted links to AnonFiles.com and Scribd.com, with a note: "Enjoy!"³⁹

³⁰ Complaint, *supra* note 4, at 13.

³¹ He learned of the leak January 21, 2014. Order Granting Defendant Gawker Media's Motion to Dismiss at 2, *Tarantino v. Gawker Media, LLC.*, No. CV 14-603, 2014 WL 2434647 (C.D. Cal. 2014) (hereinafter "Order").

³² In the interview, Tarantino also stated that he had given the screenplay to six people, and opined the source of the leak. He added that he still planned to publish the screenplay. *Id.*

³³ *Id.*

³⁴ Lacey Donohue, *Quentin Tarantino Throws Temper Tantrum After Script Leak*, GAWKER (Jan. 22, 2014), <http://defamer.gawker.com/quentin-tarantino-throws-temper-tantrum-after-script-le-1506541036>, [<http://perma.cc/3QQT-FQ7E>]; Order, at 2.

³⁵ Complaint, *supra* note 4, at 6.

³⁶ Order, at 2.

³⁷ *Id.*

³⁸ Lacey Donohue, *Here Is the Leaked Quentin Tarantino Hateful Eight Script*, GAWKER (Jan. 23, 2014), <http://defamer.gawker.com/here-are-plot-details-from-quentin-tarantinos-leaked-1507675261>, [<http://perma.cc/Z79U-HX3A>].

³⁹ Complaint, *supra* note 4, at 2, 5.

Tarantino sued Gawker and AnonFiles.com. He alleged that by posting its articles and links, Gawker was “contributing” to the infringement of the copyrighted script and hurting its market value,⁴⁰ and that AnonFiles.com directly or indirectly caused, contributed to, enabled, facilitated, aided, abetted, induced and/or participated in the infringement.⁴¹ Peremptorily, Tarantino added that Gawker had exceeded the bounds of fair use, because it had not merely reported the leak, but “crossed the journalistic line by promoting itself to the public as the first source to read the entire Screenplay illegally” as evidenced by their headline boasting “Here Is the Leaked Quentin Tarantino *Hateful Eight* Script,” and inserting links for downloading the screenplay.⁴²

Gawker moved to dismiss, asserting that Tarantino had not alleged any direct infringement on which to ground his claim. The court agreed and dismissed Tarantino’s complaint. The court began by stating that the complaint alleged that Gawker was a contributory, rather than a direct, copyright infringer because it “facilitat[ed] and encourag[ed] the public’s violation of plaintiff’s copyright in the screenplay” by providing links to the copies posted on AnonFiles.com and Scribd.com.⁴³ That said, the complaint had not identified any third-party infringer, the exact right that was infringed, the date or details of any instance of third-party infringement, or how Gawker caused, induced, or materially contributed to such infringement.⁴⁴ Rather, the complaint merely speculated that direct infringement must have occurred.⁴⁵ Nonetheless, “[s]imply viewing a copy of allegedly infringing work on one’s own computer does not constitute the direct infringement” sufficient to support a claim of contributory infringement;⁴⁶ as

⁴⁰ *Id.* at 7–9; Matthew Belloni, *Quentin Tarantino’s Gawker Law Suit Dismissed But Can Be Refiled*, THE HOLLYWOOD REPORTER (Apr. 22, 2014), <http://www.hollywoodreporter.com/thr-esq/quentin-tarantinos-gawker-lawsuit-dismissed-698331>, [<http://perma.cc/KN8K-9ABE>].

⁴¹ Complaint, *supra* note 4, at 6–7.

⁴² *Id.* at 2.

⁴³ Order at 4.

⁴⁴ *Id.*

⁴⁵ *Id.* (citing, *inter alia*, *Flava Works, Inc. v. Clavio*, 2012 WL 2459146, at *3 (N.D. Ill. Jun. 27, 2012) dismissing contributory infringement claim where complaint failed to allege facts that some third-party was “infringing with the assistance and knowledge of” defendant).

⁴⁶ *Id.* at 3 (citing *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1169 (9th Cir. 2007) (viewing pages containing infringing images, but not “stor[ing] infringing images on their computers,” is not infringement)).

long as a viewer did not download and store the screenplay, viewers had not infringed.⁴⁷

COPYRIGHT INFRINGEMENT

These legal disputes underscore that whether a linker to copyrighted material is liable for infringement remains unclear. Although *Grokster*⁴⁸ countenanced secondary liability for the infringing acts of third parties, courts have had little occasion to address the copyright implications of linking, and most claims have involved automated search engines, rather than individuals who actively choose to link to copyrighted content. *Aereo* has now clarified that under the Copyright Act's Transmit Clause, Internet transmissions and communications of copyrighted materials implicate public performance and public display rights. This standard both brings the linking issue to the forefront and recalibrates direct and secondary liability arising out of linking to copyrighted works.

The Rights Granted to a Copyright Owner

To state a claim for copyright infringement, a plaintiff must establish that she owns a valid copyright in the work at issue and that one of its exclusive rights granted by the Copyright Act has been violated.⁴⁹ The Copyright Act grants the copyright owner the exclusive rights: "(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to display the copyrighted work publicly."⁵⁰ Because the copyright owner possesses only

⁴⁷ *Id.* at 4.

⁴⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁴⁹ See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011).

⁵⁰ 17 U.S.C. § 106 (2002). There is also a sixth right applicable only to sound recordings.

these rights in relation to the work, many unauthorized uses of a copyrighted work do not infringe.⁵¹

Determining whether linking to a copyrighted screenplay, television program, movie, or other copyrighted work infringes requires reviewing the rights potentially at issue: the rights to reproduction, distribution, public performance, and public display.

The Right to Reproduce Copies

The Copyright Act grants the owner of a copyrighted work the exclusive right to reproduce or make copies of that work. According to the Act, a copy is a material object “in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁵² A work is “fixed” if it is in a tangible medium in some sufficiently permanent form.⁵³ This excludes “purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television . . . or captured momentarily in the ‘memory’ of a computer.”⁵⁴ Therefore, simply viewing, listening to, reading on-line, or watching a visual display of a copyrighted work does not infringe on the reproduction right, because no new tangible, permanent copy of the work is made.⁵⁵

In the textual world determining whether a copy has been made is relatively easy; in the digital world, making that determination is more difficult. Courts have found that screen shots,⁵⁶ scanned versions of student

⁵¹ *Los Angeles News Service v. CBS Broad. Inc.*, 305 F.3d 924, 936–37 (9th Cir. 2002).

⁵² 17 U.S.C. § 101 (2010).

⁵³ *Id.*; *Matthew Bender & Co., Inc. v. W. Pub. Co.*, 158 F.3d 693, 702 (2d Cir. 1998); see *Capital Records, LLC v. ReDigi, Inc.* 934 F. Supp. 2d 640, 649 (S.D.N.Y. 2013); Order at 5–6 (the creation of a new material object defines the reproduction right). The House and Senate Reports on the Copyright Act explained: “the right ‘to reproduce the copyrighted work in copies’ means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form” H.R. REP. NO. 94-1476, at 61 (1976); S. Rep. No. 94-473, at 58 (1975).

⁵⁴ H.R. REP. NO. 94-1476, at 53.

⁵⁵ See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993); *Religious Technology Center v. Netcom On-Line Communication Services Inc.*, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995); see also David Nimmer & Melville B. Nimmer, *NIMMER ON COPYRIGHT* § 8.02 (“in order to infringe the reproduction right, the defendant must embody the plaintiff’s work in a ‘material object’”).

⁵⁶ See *Sony Entm’t. Am., Inc. v. Bleem*, 214 F.3d 1022, 1026 (9th Cir. 2000) (screen shot used in advertising found to be fair use).

papers,⁵⁷ digitized library books,⁵⁸ and text and photographs posted to a website, stored on a computer server, or in the computer's permanent memory⁵⁹ all constitute copies. Software⁶⁰ and digital materials (such as digital musical files⁶¹) downloaded to a computer are also copies, because the downloader's computer transfers a version of the material into its own memory or hard drive;⁶² this renders the item "fixed" in a sufficiently "stable" form to qualify for protection under the Act.⁶³ As one court addressing the transfer of digital music files explained, the "Internet transfer of a file results in a material object being reproduced . . . This understanding is, of course, confirmed by the laws of physics. It is simply impossible that the same 'material object' can be transferred over the Internet."⁶⁴

By contrast, audio streams, images, and audiovisual displays that appear transiently or contemporaneously on a television or computer screen, but disappear once the computer, television, or video game is turned off are

⁵⁷ See *Vanderhye v. iParadigms*, 562 F.3d 630, 641 (4th Cir. 2009) (finding student papers digitized and used in conjunction with a computer program to detect plagiarism were copies).

⁵⁸ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 90, 91 (2d Cir. 2014) (finding books digitized for visually-impaired patrons and to enhance searchability were copies).

⁵⁹ *Perfect 10*, 508 F.3d at 1160 (citing *MAI Sys. Corp.*, 991 F.2d at 517–18; 17 U.S.C. § 101); *Soc'y of The Holy Transfiguration Monastery v. Gregory*, 689 F.3d 29, 55 (1st Cir. 2012).

⁶⁰ *MAI Sys. Corp.*, 991 F.2d at 517–18 (quoting 17 U.S.C. §101).

⁶¹ *Napster*, 239 F.3d at 1014; *Capital Records v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 650 (S.D.N.Y. 2013); Order at 6.

⁶² See *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 171 (D. Mass. 2008).

⁶³ *Perfect 10*, 508 F.3d at 1160 (quoting 17 U.S.C. §101); see *MAI Sys. Corp.*, 991 F.2d at 517–18; *London-Sire Records*, 542 F. Supp. 2d at 166; *ReDigi*, 934 F. Supp. 2d at 649.

⁶⁴ *ReDigi*, 934 F. Supp. 2d at 649; Order at 6; *London-Sire Records*, 542 F. Supp. 2d at 173. Although the material object requirement requires a copy of the work to be made, destroying that copy does not negate the copying. Recently, *Capital Records* sued on-line music re-seller, *ReDigi*. *ReDigi* argued that since the First Sale doctrine permits a purchaser of a CD to resell it, it also permits a purchaser of digital music to resell it. Additionally, because the transfer protocol used by *ReDigi* destroyed the seller's original file upon completion of the transfer (ensuring that the total number of music files existing remained the same), the reproduction right was not implicated. The court stated that the transfer process involved a reproduction: Because digital music files are embodied in a new material object following their transfer via the Internet, the reproduction right is necessarily implicated. "Simply put, it is the creation of a *new* material object and not an *additional* material object that defines the reproduction right." *ReDigi*, 934 F. Supp. 2d at 649.

not reproductions.⁶⁵ For example, for a viewer to “view” online content on a computer screen, a temporary “copy” of the display is loaded into the RAM of the user’s computer. If not, no image will appear on the user’s monitor.⁶⁶ Yet, because the image disappears once the computer is turned off, it does not constitute a copy.⁶⁷ Devices and computer code that interact with or temporarily alter a copyrighted work’s appearance to the viewer are also not reproductions, because they are not incorporated into any permanent, or “stable,” form.⁶⁸ To illustrate, the Game Genie was a device that video game players could use to improve their play: it enabled players to alter individual features of a Nintendo game, such as a character’s strength or speed, by selectively “blocking the value for a single data byte sent by the game cartridge to the [Nintendo console] and replacing it with a new value.”⁶⁹ Nintendo asserted that the Game Genie-mediated audiovisual displays seen by players using a Game Genie were copies and derivative works of Nintendo’s copyrighted videogame. The court disagreed, saying that since the displays were not fixed in any concrete or permanent form, but disappeared when the game ended or was turned off, no copies were created.⁷⁰

⁶⁵ *MAI Sys. Corp.*, 991 F.2d at 517–18; *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995).

⁶⁶ Kara Beal, Comment: *The Potential Liability of Linking on the Internet: An Examination of Possible Legal Solutions*, 1998 BYU L. REV. 703, 708 (1998) (“When viewing a web page, the user’s computer accesses the data detailing the page from the Internet and the image of the page is stored in the random access memory (RAM) of the computer. This image remains in the computer’s RAM for the time that the user is viewing the page and then is replaced by other data.”).

⁶⁷ See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1111 (9th Cir. 1998). Indeed, the legislative history of the Copyright Act cites an image on a computer screen as an example of something that is not a copy. H.R. REP. NO. 94-1476 (1976).

⁶⁸ See *Micro Star*, 154 F.3d at 1110–11. The Ninth Circuit illustrated this with an imaginary low-tech product it called the Pink Screener, i.e., a piece of pink cellophane stretched over a frame. When placed in front of a television, the Pink Screener makes the televisual image look pinker. That pink audiovisual display observed by the television viewer, however, does not constitute a copy of the work because it does not incorporate the modified pink image in any permanent or concrete form. If someone filmed the program by filming the screen covered by the Pink Screener, a tangible, permanent copy is created. *Id.* at 1111.

⁶⁹ *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).

⁷⁰ *Id.* at 968. In *Micro Star*, the court remarked, “The Game Genie was dumb; it functioned only as a window into the computer program, allowing players to temporarily modify individual aspects of the game.” 154 F.3d at 1111. In a case involving the video game *World of Warcraft*, the Ninth Circuit stated that if “a player’s computer creates a copy of the game’s software in the computer’s random access

The Right to Distribute Copies

Related to the right to make copies, the Copyright Act grants the owner of a copyrighted work the right to distribute copies. According to the Copyright Act, a “distribution” occurs when a copy “changes hands”⁷¹ or is actually distributed to the public by sale, other transfer of ownership, rental, lease, or lending.⁷² For example, selling or sharing digital music files or copies of DVDs are distributions.⁷³

Where no copy changes hands or transfer of ownership occurs, however, there is no distribution.⁷⁴ Similarly, distributing a device used in conjunction with (or code that operates on) a copyrighted work does not amount to a distribution of the underlying work. For example, the lawsuits against

memory (‘RAM’), . . . [t]his copy potentially infringes . . .” *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 938 (9th Cir. 2011) (citing *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999)).

⁷¹ *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060, 1070 (9th Cir. 2014); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (citing 17 U.S.C. §106(3)). The term “publication” is sometimes used interchangeably with distribution, but is a legal word of art. For more detail on “publication” and its history, see *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 36 (1st Cir. 2003).

⁷² 17 U.S.C. § 106(3); see e.g. *Kernel Records Oy v. Mosely*, 694 F.3d 1294, 1303 (11th Cir. 2012).

⁷³ *U.S. v. Am. Soc’y of Composers, Authors, and Publishers*, 627 F.3d 64, 73 (2d Cir. 2010) (holding that a transmission of a copy is a distribution, but not a performance); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 174 (D. Mass. 2008) (concluding that electronic file transfers fit within the definition of “distribution of a phonorecord”); Matt Jackson, *Linking Copyright to Homepages*, 49 FED’L COMMUN. L.J. 731, 748 (April 1, 1997); *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (“any person or organization with a computer connected to the Internet can ‘publish’ information”).

⁷⁴ 2 PAUL GOLDSTEIN, COPYRIGHT § 5.5.1, at 5:102 (2d ed. 2000, 2005 supp.) (to infringe the distribution right, “an actual transfer must take place; a mere offer for sale does not suffice”); 2 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.11[D] (2007) (infringement of the distribution right requires an actual dissemination of copies); *Elektra Entm’t Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (“support in the case law for the ‘make available’ theory of liability is quite limited”); *London-Sire Records*, 542 F. Supp. 2d at 169 (“defendant cannot be liable for violating the . . . distribution right unless a ‘distribution’ actually occurred”). In *ReDigi*, Capitol Records argued that, independent of whether a sale occurred, ReDigi had violated the distribution rights simply by making Capitol’s recordings *available* for sale, but the court disagreed. It did, however, determine that a reproduction has been made and that right infringed. *Capitol Records v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 640 (finding infringement of the reproduction and distribution rights, but not the public performance right).

satellite provider Dish alleged that by enabling viewers to watch “Hopper-enabled” blocks of primetime programming (i.e., designated blocks of programming into which Dish had inserted code that caused the recording to skip commercial blocks), Dish had distributed copyrighted content. For purposes of ruling on that aspect of the motion, the court concluded that even if copies had been made by Dish, no copies had changed hands.⁷⁵ Instead, only data changed hands (such as the marking announcements and computer code that tell AutoHop when commercials begin and end).⁷⁶ Therefore, Dish did not violate the distribution right.⁷⁷

The Rights to Perform and Display the Copyrighted Work Publicly

The Copyright Act also gives an owner of a copyrighted work the rights to both “perform” a work publicly⁷⁸ and “display” the work publicly.⁷⁹ These are corollary rights, realizing that some works are performed, some are displayed, and some can be both performed and displayed; consequently, they are discussed here (and in the statute’s notes) in conjunction.⁸⁰ The Transmit Clause makes these rights both broader than they appear on their face and especially relevant to the online environment and contemporary communications media.⁸¹

According to the Transmit Clause, the right to “display” or “perform” encompasses performing, displaying, or showing a copyrighted work at a place open to the public *as well as* “transmitting or otherwise communicating” it to the public “either directly or by means of a film, slide, television image, or any other device or process.”⁸² This includes “the transmission of an image by electronic or other means, and the showing of an image on a

⁷⁵ Fox Broad. Co. v. Dish Network, 747 F.3d at 1070; Fox Broad. Co v. Dish Network, 905 F. Supp. 2d 1088, 1106 (C.D. Cal. 2012); see Andrew Wallenstein, *Dish DVR Spurs Warning*, DAILY VARIETY, May 29, 2012, at 1.

⁷⁶ Fox Broad. Co. v. Dish Network, 905 F. Supp. 2d at 1106 (noting data changes hands but not the copyrighted work).

⁷⁷ *Id.*

⁷⁸ 17 U.S.C. § 106(4) (2012). Section 110 also designates eleven types of performances that do not infringe within the meaning of the Act.

⁷⁹ 17 U.S.C. § 106(5) (2012).

⁸⁰ See H.R. REP. NO. 94-1476 (1976); 17 U.S.C. § 101 (2012).

⁸¹ See *Aereo*, 134 S.Ct. at 2510; Hubbard Broad. v. S. Satellite Sys., Inc., 777 F.2d 393 (8th Cir. 1985).

⁸² The Act’s Transmit Clause defines this to include the right to “transmit or otherwise to communicate a performance or display . . . to the public, by means of any device or process” 17 U.S.C. § 101. The amended statute clarifies that to “perform” or display an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible.” *Id.*

cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.”⁸³ Essentially, the Transmit Clause provides that one can perform or display by transmitting, or circularly, a transmission of a copyrighted work constitutes a performance or display of it. Indeed, Congress clarified that the definition of “transmit” is purposely broad enough so as to include:

*all conceivable forms and combinations of wires [sic] or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a “transmission,” and if the transmission reaches the public in any form, [it constitutes a public performance or display] within the scope of clauses (4) or (5) of section 106.*⁸⁴

This section of the Copyright Act was an amendment to undo the Supreme Court’s prior holdings that cable television providers retransmitting copyrighted broadcasts did not “perform” those works, and so were not infringing on them.⁸⁵ Hence, §106(4) and §106(5) clarify that a transmission (or retransmission) of a copyrighted work constitutes a performance or display of it.⁸⁶ As such, a singer performs within the meaning of §101(4) when she sings a copyrighted work, a broadcaster performs or displays (via transmission) when it telecasts that performance, and a viewer displays/performs (via transmission) when it watches that performance on a computer or television screen.⁸⁷

Recently, the Supreme Court applied the Transmit Clause to hold that internet television service Aereo “performed” copyrighted works “publicly” by transmitting them online to viewers.⁸⁸ Aereo captured broadcast signals, translated them into data, transmitted that data over the Internet, and saved them in viewer-specific folders on Aereo’s central hard drive. Then, when an Aereo subscriber wanted to stream a particular television show, she went online, clicked the corresponding selection, and Aereo transmitted the pro-

⁸³ H.R. REP. NO. 94-1476.

⁸⁴ *Id.* (quoting 17 U.S.C. § 101) (emphasis added).

⁸⁵ *Aereo*, 134 S.Ct. at 2510.

⁸⁶ *Id.* at 2514.

⁸⁷ *See id.*; *Am. Soc’y of Composers, Authors, & Publishers*, 627 F.3d at 74. In *Aiken*, also a pre-1976 Copyright Act case, the Court said that a recipient of a broadcast, such as a listener, does not perform when he turns on a radio that broadcasts a performance of a musical work. *Twentieth Century Music Corp. et al. v. Aiken*, 422 U.S. 151, 161–63 (1975). Under the 1976 Copyright Act’s articulation of the public performance right, this is no longer the case. *Aereo*, 134 S.Ct. at 2505–06.

⁸⁸ *Aereo*, 134 S.Ct. at 2510.

gram to her. Aereo asserted that it was not performing or transmitting content, but was providing equipment, like a cable system or DVR, and that any act that infringed was committed by the viewers using Aereo's equipment.⁸⁹

The Supreme Court rejected this argument.⁹⁰ It explained that when Aereo streams a program over the internet by means of technology,⁹¹ Aereo's system is communicating the copyrighted work by means of a device or process.⁹² Because the work's "images and sounds are contemporaneously visible and audible on the subscriber's computer (or internet-connected device)," Aereo is transmitting a performance whenever its subscribers watch a program.⁹³ Consequently, Aereo was involved in the process of transmitting content, and, thus, "performed" that content.⁹⁴

The Court further stated that a transmission or communication can involve a set of actions.⁹⁵ As such, when an entity "communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."⁹⁶ Indeed, to perform or display publicly encompasses indirect transmission to the ultimate public or the acts that result in the public seeing it.⁹⁷ In one case, satellite carrier Primetime 24 captured and uplinked copyrighted NFL broadcasts to satellite subscribers in Canada.⁹⁸ Primetime 24 asserted that this was not a public display of the broadcast, because the only display or performance occurred during the downlink from its satellite to viewers in Canada where the U.S. Copyright Act does not apply. The Second Circuit, however, held that the uplink signal transmission captured in the United States was a critical step in the

⁸⁹ *Id.* at 2507.

⁹⁰ *Id.*

⁹¹ *Id.* ("Here the signals pursue their ordinary course of travel through the universe until today's 'turn of the knob'—a click on a website—activates machinery that intercepts and reroutes them to Aereo's subscribers over the Internet.")

⁹² *Id.* at 2509.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* As one court explained in the context of digital music streaming, the "stream is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory: This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission." *Am. Soc'y of Composers, Authors, & Publishers*, 627 F.3d at 74.

⁹⁷ *WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 625 (7th Cir. 1982).

⁹⁸ *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10 (2d Cir. 2000).

process by which the copyrighted work made its way to and was displayed or transmitted to a public audience. Accordingly, these actions infringed on the NFL's public display right.⁹⁹

Further, the performance and display rights apply only to *public* displays and performances, not private ones.¹⁰⁰ In other words, only a transmission, performance, or display that is public infringes.¹⁰¹ The "public" is defined as a substantial number of people, outside of a normal circle of family and social acquaintances, or a group of significant number.¹⁰² The people comprising "the public" need not be situated together, spatially or temporally, or watch the transmission on the same device.¹⁰³ A display or performance to the public need not even be received or perceived at the same time.¹⁰⁴ Indeed, in *Aereo*, the Court rejected the notion that sending content to multiple individual subscribers to watch on their individual pieces of equipment at varying times, rather than to one group of subscribers all at once, constituted multiple private transmissions. Instead, the transmissions were deemed public.¹⁰⁵

FORMS OF LIABILITY FOR COPYRIGHT INFRINGEMENT

Direct Infringement

The rights of a copyright owner can be infringed directly or secondarily.¹⁰⁶ Direct infringement occurs when an individual engages in volitional conduct¹⁰⁷ that trespasses on the copyright owner's rights or acts on the copyrighted work directly.¹⁰⁸ An individual who has not directly commit-

⁹⁹ *Id.* at 10–13.

¹⁰⁰ *Aereo*, 134 S.Ct. at 2516.

¹⁰¹ *Id.*; *Cartoon Network LP v. CSC Holdings, Inc.* 536 F. 3d 121, 136 (2d Cir. 2008) (the statute does not encompass private transmissions).

¹⁰² *Aereo*, 134 S.Ct. at 2509–10. Designating a group as a "private club" or transmitting a communication to thousands of individuals separately does not render it private. *See id.*

¹⁰³ *Id.* at 2510.

¹⁰⁴ *Id.* at 2509.

¹⁰⁵ *Id.* at 2507–10.

¹⁰⁶ *Grokster*, 545 U.S. at 937.

¹⁰⁷ *Id.* at 936–37; *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1168 (C.D. Cal. 2002); Bartholomew & Tehranian, *supra* note 11, at 1367.

¹⁰⁸ *See Aereo*, 134 S. Ct. at 2512–13 (Scalia, J., dissenting) (conduct must be directed at the copyrighted materials); *Cartoon Network*, 536 F.3d at 130–31; *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (there must be a culpable, causal nexus between the defendant and the direct infringement); *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 147–48 (S.D.N.Y. 2009).

ted¹⁰⁹ or is too attenuated from the infringing act¹¹⁰ is not directly liable.¹¹¹ When multiple parties are involved or technological systems are used in the allegedly infringing act, a court must determine which party engaged in the volitional conduct that violated the Act.¹¹² This usually rests on who actually copied, distributed, performed, or selected the copyrighted content.¹¹³

One who manufactures or provides a product (such as a DVR or copy machine), or services that permit automated copying or storage by others, but do not themselves copy, are not a direct infringers.¹¹⁴ Accordingly, Internet service providers, cable companies, and other services that simply facilitate the transfer or storage of content or operate systems that automatically respond to a user request, but do not choose or act on content, do not commit direct acts of infringement.¹¹⁵ Every circuit court that has considered the direct liability of an Internet provider or automated system service provider has adopted this rule.¹¹⁶ By contrast, video-on-demand ser-

¹⁰⁹ See *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066–68 (9th Cir. 2014); *CoStar Group*, 373 F.3d at 550; *Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc.*, 907 F. Supp. 1361, 1369–70 (N.D. Cal. 1995) (direct infringement requires a volitional act by defendant).

¹¹⁰ *Grokster*, 545 U.S. at 937; *CoStar Group*, 373 F.3d at 550 (“There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner [used by others to make illegal copies] himself trespassed on the exclusive domain of the copyright owner.”). See also *Cartoon Network*, 536 F.3d at 130–133 (the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render provider directly liable for copyright infringement); *Netcom*, 907 F. Supp. at 1369–70 (direct infringement requires a volitional act by defendant; automated copying by machines occasioned by others does not suffice).

¹¹¹ “[V]olitional-conduct is not at issue in most direct-infringement cases; the usual point of dispute is whether the defendant’s conduct is infringing . . .” *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting).

¹¹² See *id.* at 2512 (Scalia, J., dissenting).

¹¹³ *Id.* at 2513 (Scalia, J., dissenting); *Cartoon Network*, 536 F.3d at 131–32; *CoStar Group*, 373 F.3d at 550.

¹¹⁴ See *Grokster*, 545 U.S. at 960 (Breyer, J., concurring); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 489 (2001) (print publisher obtained, coded, and transmitted articles); *CoStar Group*, 373 F.3d at 550; *Parker v. Google*, 422 F. Supp. 2d 492, 497 (E.D. Pa. 2006).

¹¹⁵ See *N.Y. Times Co.*, 533 U.S. at 489; *Netcom*, 907 F. Supp. at 1369–70.

¹¹⁶ *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066–68 (9th Cir. 2013); *CoStar Group*, 373 F.3d at 550; *Cartoon Network*, 536 F.3d at 130–33; *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (internet search engine not directly liable for automatic copying made during the engine’s caching process); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (electronic bulletin-board operator not directly liable for users who made infringing copies by uploading to or downloading bulletin board content).

vices (such as Netflix or Time Warner Entertainment On Demand) that curate and provide content, or a service that locates and uploads content itself¹¹⁷ act directly on the copyrighted content. Even though the service has an element of automaticity in that it transmits in response to a subscriber's click of a mouse or remote control, before that content could be made available as a viewing option, a human (i.e., the service) committed a volitional act by choosing that specific copyrighted content and making it available.¹¹⁸

For example, Internet service provider Netcom was sued because a user posted copyrighted Scientology works on an electronic bulletin board (which were then automatically stored on Netcom's server) that other users accessed.¹¹⁹ The court held that Netcom was not directly liable for any infringement, because it did not commit any volitional, infringing act of copying or posting. The court reasoned that Netcom's system, which allowed users to copy materials "is not unlike that of the owner of a copying machine who lets the public make copies with it."¹²⁰ The owner does not infringe simply by making his machine available, even though some customers might use it for infringing purposes.¹²¹ Similarly, Cablevision offered a remote-storage DVR system¹²² which recorded and stored TV programs not on an in-home DVR, but on a central hard drive maintained remotely by Cablevision.¹²³ With regard to the copies made in this process, the court assigned liability based on the volitional conduct of who caused the copy to be made.¹²⁴ In doing so, the court distinguished making a request of a human employee who then operates a copying system to make a copy from issuing a command directly to a system, which automatically obeys and engages in no volitional conduct.¹²⁵ Since it was the viewer, not

¹¹⁷ *N.Y. Times Co.*, 533 U.S. at 489.

¹¹⁸ *Aereo*, 134 S. Ct. at 2514 (Scalia, J. dissenting). Although the dissenters in *Aereo* urged that *Aereo* was not engaged in any volitional conduct "for the sole and simple reason that it does not make the choice of content," *id.*, this article suggests that *Aereo* did, in fact choose content: it affirmatively chose to provide and would transmit upon request all of the copyrighted content it could find. *Aereo* made available every television program available to its customers.

¹¹⁹ *Netcom*, 907 F. Supp. at 1365–66.

¹²⁰ *Id.* at 1369.

¹²¹ *See id.*

¹²² *Cartoon Network*, 536 F.3d at 124.

¹²³ *Id.* at 124.

¹²⁴ *See id.* at 131.

¹²⁵ *Id.* at 131. The court explained that the doctrine of causation-based liability places liability on one "whose conduct has been so significant and important a cause that [he or she] should be legally responsible." *Id.* at 132 (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* § 42, at 273 (5th ed. 1984)).

Cablevision, who actually caused the copies to be made, Cablevision was not directly liable.¹²⁶

This does not mean that the acts are lawful, but only that they do not result in *direct* liability. Instead, liability must be assessed using the principles of secondary infringement.¹²⁷ Indeed, most copyright infringement complaints against equipment manufacturers and service providers assert secondary infringement.¹²⁸

Secondary Infringement

Secondary infringement holds one responsible for the infringing acts of a third party.¹²⁹ Although not expressly articulated in the Copyright Act,¹³⁰ the Supreme Court has applied the concept of secondary infringement for more than a century.¹³¹ It is particularly apt to the digital world: when a service or product is used by others to infringe directly,¹³² it is often more effective for a copyright owner to sue the third party who contributed to or vicariously benefitted from that direct infringement than to sue multiple direct infringers individually.¹³³

Importantly, secondary infringement is not a version of less culpable infringement akin to a misdemeanor infringement, but is instead premised on an act of direct infringement and extends liability to certain parties who were culpably involved in, central to, or controlled and benefited from that infringing act.¹³⁴ As such, if there is no direct infringement, there can be no

¹²⁶ See *Cartoon Network*, 536 F.3d at 132.

¹²⁷ *Aereo*, 134 S. Ct. at 2514 (2014) (Scalia, J., dissenting); see *Cartoon Network*, 536 F.3d at 132–33.

¹²⁸ See *Aereo*, 134 S. Ct. at 2512.

¹²⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984); *Grokster*, 545 U.S. at 930; *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 149 (S.D.N.Y. 2009).

¹³⁰ See *Sony*, 464 U.S. at 434–35 (“The Copyright Act does not expressly render anyone liable for infringement committed by another. . . . The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity.”).

¹³¹ See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911).

¹³² *In re Aimster Copyright Litigation*, 334 F.3d 643, 651 (7th Cir. 2003).

¹³³ See *Grokster*, 545 U.S. at 929–30.

¹³⁴ See *Sony*, 464 U.S. at 437 (speaks to the relationship between the direct and secondary infringers); *Napster*, 239 F.3d at 1013 n.2. Judge Posner likened a contributory infringer to “an infringer’s accomplice.” *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 754–55 (7th Cir. 2012).

secondary infringement.¹³⁵ The Supreme Court has identified two forms of secondary copyright infringement: contributory infringement and vicarious infringement.¹³⁶

Contributory Infringement

“One infringes contributorily by intentionally inducing or encouraging direct infringement.”¹³⁷ Contributory liability requires evidence that the defendant: (1) knew or should have known that infringement was occurring or that its product, device, or service could be used to infringe, and (2) materially contributed or actively assisted in, facilitated, or induce such infringement.¹³⁸

For example, in *Grokster*, there was ample evidence that the defendants not only were aware that patrons were using their hosting services to infringe, but also took affirmative steps to promote their products for infringing uses.¹³⁹ There, record labels and movie studios alleged that users of Grokster’s and Streamcast’s peer-to-peer file-sharing services (including Morpheus and Gnutella) were directly infringing by “sharing” copyrighted materials over the network and that Grokster and Streamcast were contributorily infringing because they knowingly induced and furthered these acts.¹⁴⁰ The Supreme Court agreed¹⁴¹ that when there is sufficient evidence that the defendant not only made or distributed a product or service that is used to infringe but also intended and affirmatively encouraged people to use it in that way,¹⁴² liability for the infringing acts of third parties is appropriate.¹⁴³

¹³⁵ Fox Broad. Co. v. Dish Network, L.C.C., 905 F. Supp. 2d 1088, 1097–98 (C.D. Cal 2012); *Perfect 10*, 508 F.3d at 1169.

¹³⁶ See *Grokster*, 545 U.S. at 930.

¹³⁷ *Id.* at 930.

¹³⁸ *Id.* at 936–37; see also *Napster*, 239 F.3d at 1019–120; *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010).

¹³⁹ *Grokster*, 545 U.S. at 937–40.

¹⁴⁰ *Id.* at 939–41. *Grokster*’s “inducement rule,” borrowed from patent law, as was *Sony*’s staple article of commerce doctrine, provides that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936–37.

¹⁴¹ *Id.* at 934–35.

¹⁴² *Id.* at 939–40.

¹⁴³ *Id.* at 935.

Among the evidence corroborating Grokster's and Streamcast's unlawful objective and affirmative actions to foster or induce infringement,¹⁴⁴ the services promoted themselves as Napster-substitutes,¹⁴⁵ solicited former Napster users,¹⁴⁶ gave away software to help former Napster users convert Napster files, distributed promotional materials touting itself as the "#1 alternative to Napster,"¹⁴⁷ and answered user questions about locating and playing music.¹⁴⁸ Additionally, neither company attempted to "develop filtering tools or other mechanisms to diminish the infringing activity using their software."¹⁴⁹ Under the circumstances, this combination of particularized knowledge and actions made "[t]he unlawful objective . . . unmistakable," thereby supporting secondary liability.¹⁵⁰

Recently, the Ninth Circuit applied these principles to hold the operator of BitTorrent sites secondarily liable for users' infringements.¹⁵¹ Although the defendant argued that he had not developed or distributed a "device" or "software" used to infringe (as Grokster and Sony had), the court disagreed.¹⁵² It explained that the file-sharing systems the defendant operated provided "the site and facilities" for the infringement by users, and the record was replete with instances of the defendant personally responding to queries from users, helping them upload torrent files, locating requested copyrighted materials, troubleshooting playback issues, and instructing how to burn infringing content onto DVDs.¹⁵³ In combination and context, this

¹⁴⁴ *Id.* at 934–37.

¹⁴⁵ Napster was also found secondarily liable for the infringements of its users. Napster, the grandfather of file-sharing sites such as Gnutella and Morpheus, was an integrated service that enabled users to locate, transfer, and download digital music files. It supplied users with software to download materials and links to music files. *Napster*, 239 F.3d at 1019; *see also Grokster*, 545 U.S. at 924 (describing Napster as a "notorious file-sharing service").

¹⁴⁶ *Grokster*, 545 U.S. at 937–38.

¹⁴⁷ *Id.* at 925; *see also Napster*, 239 F.3d at 1013; *In re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003).

¹⁴⁸ *Grokster*, 545 U.S. at 938.

¹⁴⁹ *Id.* at 939.

¹⁵⁰ *Id.* at 939–41.

¹⁵¹ For a description of the technology and protocols involved in Bit Torrent, *see Columbia Pictures v. Fung*, 710 F.3d 1020 (9th Cir. 2013).

¹⁵² *Id.* at 1033. The court explained that *Grokster* was not limiting secondary liability to instances where a device was used to infringe, but was instead addressing the defendant's argument that it was insulated from liability (for commercial products capable of significant non-infringing uses), just as Sony was insulated from liability for infringing uses of the Betamax. *Id.* at 1033 (citing *Grokster*, 545 U.S. at 931–34).

¹⁵³ *Id.* at 1036.

evidence supported the conclusion that the defendant knew of and purposely and materially contributed to the infringement.¹⁵⁴

By contrast, a defendant will not be liable where there is no evidence that he encouraged or induced infringement or possessed the culpable intent to infringe.¹⁵⁵ Therefore, neither creating or distributing products or services that could be used to infringe, nor the mere awareness of the potential for infringement is sufficient for liability.¹⁵⁶ For example, in *Sony*, Sony's awareness that its product could be used by consumers to infringe was not alone by itself sufficient to impute to it liability for infringement.¹⁵⁷ Universal Studios and Disney claimed that because Sony's VCRs enabled viewers to copy copyrighted works, Sony was enabling infringement, and should be held responsible as a contributory infringer.¹⁵⁸ The Court, however, held that secondary liability required more acute fault than awareness that a product could be used to infringe.¹⁵⁹ Rather, liability was appropriate only if Sony had sold the equipment knowing that consumers would use it to make unauthorized copies of copyrighted materials *and* had actively furthered or contributed to this illegal use.¹⁶⁰ Because Sony had not so furthered illegal uses and the product was capable of and generally used for non-infringing uses¹⁶¹ (such as time-shifting and making copies for private home use), the Court concluded that most consumer uses of VCRs were fair use and did not infringe.¹⁶² As there was no direct liability by users of the VCR, there was no basis for secondary liability of Sony.¹⁶³

Generally, provided it does not curate or directly act on content, an Internet provider is not liable for the infringing acts of third parties. In one

¹⁵⁴ *Id.* at 1023–24.

¹⁵⁵ *Perfect 10*, 508 F.3d at 1172.

¹⁵⁶ *Grokster* further stated that neither profiting from nor failing to prevent infringement *alone* is sufficient to prove the unlawful intent necessary for contributory liability, but when combined with other evidence, can support an intent to induce infringement. 545 U.S. at 937, 939–40; *see also* Jackson, *supra* note 74, at 741.

¹⁵⁷ *Grokster*, 545 U.S. at 932–33.

¹⁵⁸ *Sony*, 464 U.S. at 420, 434.

¹⁵⁹ *Grokster*, 545 U.S. at 932–33. The Supreme Court drew from patent, copyright's kin, for this concept. It cautioned that trademark, however, is fundamentally different from copyright, so its concepts of contributory infringement and liability often are inapplicable to copyright. *Sony*, 464 U.S. at 439 n.19. In particular, it rejected the standard for contributory trademark infringement articulated in *Inwood Laboratories, Inc v. Ives Laboratories*. 456 U.S. 844, 854–55 (1982).

¹⁶⁰ *Sony*, 464 U.S. at 439.

¹⁶¹ Therefore, Sony's "equivocal conduct of selling an item with substantial lawful as well as unlawful uses" was absolved. *See also Grokster*, 545 U.S. at 932–33.

¹⁶² *Sony*, 464 U.S. at 454–56.

¹⁶³ *Id.*

case, a user posted copyrighted content on a forum which was then automatically copied onto an Internet provider's system and distributed to users.¹⁶⁴ The court said that despite ISPs being conduits, they were not secondarily liable for the infringement of the poster.¹⁶⁵ Similarly, the requisite knowledge and action are typically lacking with search engines that compile materials automatically and generate results in response to a user request. Owners of copyrighted works available online have claimed that search engines infringe when they generate results and links corresponding to those works,¹⁶⁶ but courts have uniformly rejected these claims. The nature of a search engine is to automatically search for, compile, and catalogue information, and then automatically generate a list of links in response to a user request.¹⁶⁷ This automaticity removes any volitional aspect; therefore courts have found there is not sufficient basis for secondary liability.¹⁶⁸ This does not mean that linking does not infringe, but that under such circumstances, a search engine is not a direct infringer.¹⁶⁹

In addition, the Digital Millennium Copyright Act (DMCA) provides that ISPs, search engines, and similar information location services are not subject to liability for infringement claims that arise "by reason of the storage at the direction of a user material that resides on a system or network controlled or operated by or for [a] service provider."¹⁷⁰ If, however, the

¹⁶⁴ Religious Technology Center v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1367–69 (N.D. Cal. 1995) (online service was not liable for direct or vicarious infringement, but a triable issue existed as to whether it was liable for contributory infringement).

¹⁶⁵ *Id.* at 1370, 1372.

¹⁶⁶ *Field*, 412 F. Supp. 2d at 1115.

¹⁶⁷ A search engine uses an automated process wherein an automated program continuously crawls the Internet to locate, analyze, and catalog Web pages into searchable Web index (the search engine). *Id.* at 1110. It also stores the HTML code from those pages in a temporary repository or a cache. *Id.*

¹⁶⁸ *Id.* at 1106 (Internet search engine not directly liable for automatic copying made during the engine's "caching" process); Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 800–02 (9th Cir. 2007); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1170 (9th Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).

¹⁶⁹ *See Field*, 412 F. Supp. 2d at 1118–22. In one of the Google cases, the district court opined that it if anyone was creating a copy, it was the users who clicked on the hyperlink to request the cached page. *Id.*

¹⁷⁰ Pub. L. 105-304, 112 Stat. 2860, 17 U.S.C. §§ 512(c)(1), (d); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012). Section 512(d) states that a service provider is not liable by reason of "linking users to an online location containing infringing material or infringing activity, by using information location

entity either has actual or constructive knowledge that the material or activity is infringing, or, upon becoming aware, fails expeditiously to remove or to disable access to the material, this defense is lost.¹⁷¹ Additionally, 17 U.S.C. § 512(b)(1)(C) shields Internet service providers¹⁷² from liability for the activities of their users and storage of web pages carried out through “an automated technical process” and “for the purpose of making the material available to users . . . who . . . request access to the material from [the originating site].”¹⁷³ The protection is lost if the entity receives a financial benefit directly attributable to the infringing activity¹⁷⁴ and fails to terminate repeat infringers.¹⁷⁵ Consistent with this standard, the Ninth Circuit

tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

- (1) (A) does not have actual knowledge that the material or activity is infringing;
- (B) . . . is not aware of facts or circumstances from which infringing activity is apparent; or;
- (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity

¹⁷¹ 17 U.S.C. § 512(d)(1).

¹⁷² 17 U.S.C. § 512(k) defines “service provider” more broadly for purposes of subsection (c) than it does for subsection (a). “As used in . . . section[s] other than subsection (a), the term ‘service provider’ means a provider of online services or network access, or the operator of facilities thereof, and includes an entity described in subparagraph (A).”

¹⁷³ 17 U.S.C. § 512; H.R. REP. NO. 105-551, pt. 1, at 24 (1998); *see also Viacom*, 676 F.3d at 28, 39 (explaining that service providers are not limited to those who merely store material); *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 667 F.3d 1022, 1026, 1035 (9th Cir. 2011) (publicly accessible website that enables users to share videos with other users); *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2011) (“Because Photobucket offers a site that hosts and allows online sharing of photos and videos at the direction of users, Photobucket, like YouTube qualifies as a ‘service provider’ under § 512(k)(1)(B)”); *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 633-34 (S.D.N.Y. 2011); *Corbis Corp. v. Amazon.com*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004) (“Amazon operates web sites, provides retail and third party selling services to Internet users” but does not sell its own inventory).

¹⁷⁴ 17 U.S.C. § 512(d).

¹⁷⁵ 17 U.S.C. § 512(i)(1)(A).

stated that, to the extent that search engines' cached webpages constitute "copies," they were intermediate and temporary, thus falling within the DMCA's safe harbor.¹⁷⁶

Vicarious Infringement

Another form of secondary copyright infringement is vicarious infringement. One "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."¹⁷⁷ It is based on the maxim that whoever acts through another, acts as if he were doing so himself.¹⁷⁸ Vicarious liability does not require the defendant to know of the infringing act,¹⁷⁹ but arises out of the defendant's authority or control over the direct actor.¹⁸⁰ One is deemed to exercise control over an infringer when she has both the legal right to stop or limit the infringer's actions (and infringement) and the practical ability to do so.¹⁸¹ For example, employers can be vicariously liable for the acts of employees,¹⁸² and owners of restaurants and clubs can be vicariously liable for DJs and bands performing copyrighted music in their establishments.¹⁸³

¹⁷⁶ 17 U.S.C. § 512(b); see *Perfect 10*, 508 F.3d at 1169. Section 512(b) gives certain service providers a safe harbor against monetary damages for infringement if their activities involve copying only for "intermediate and temporary storage."

¹⁷⁷ *Grokster*, 545 U.S. at 930.

¹⁷⁸ See RESTATEMENT (SECOND) OF AGENCY § 212, cmt. a (1958) (stating the "general rule . . . that one causing and intending an act or result is as responsible as if he had personally performed the act or produced the result"); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 745 (D. Md. 2003).

¹⁷⁹ Unlike contributory infringement, which has a relatively specific knowledge requirement, knowledge is not an element of vicarious liability. See *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262–63 (9th Cir. 1996).

¹⁸⁰ See *Sony*, 464 U.S. at 437 (noting that in many lower court copyright cases, the secondary infringer is in a position to control the infringement).

¹⁸¹ *Grokster*, 545 U.S. at 930 n.9.

¹⁸² See *Vance v. Ball State University*, 133 S. Ct. 2434, 2448 (2013); RESTATEMENT (THIRD) OF AGENCY, § 7.08 (2005).

¹⁸³ *Broad. Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353, 354 (6th Cir. 2014); *Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1155 (9th Cir. 2012); *Warner Bros., Inc. v. Lobster Pot, Inc.*, 582 F. Supp. 478, 482 (N.D. Ohio 1984) (restaurant owner who hired musician to play in restaurant was vicariously liable when the musician infringed on copyrights); *Warner Bros., Inc. v. O'Keefe*, 468 F. Supp. 16, 20 (S.D. Iowa 1977) (individual who owned and ran a bar that featured live and jukebox performances of copyrighted material was vicariously liable for infringement).

In addition to possessing control over the infringer, to be liable one must profit from that direct infringement.¹⁸⁴ For liability, there must be a causal relationship between the infringing activity and the revenue, such that the defendant enjoys “an obvious and direct financial interest in the exploitation of copyrighted materials.”¹⁸⁵ Evidence that “customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available,”¹⁸⁶ or that the infringing activity was the main draw, will suffice;¹⁸⁷ that an ISP receives revenue for providing Internet service will not.¹⁸⁸

To illustrate, the Sea Bird Jazz Lounge and adjoining Roscoe’s House of Chicken and Waffles hosted bands and DJs that performed copyrighted music.¹⁸⁹ Rather than suing the various performers, the copyright owners sued the owner of the venues, claiming he was vicariously liable for the infringements.¹⁹⁰ The court agreed that the owner derived financial benefit from the music (as it drew crowds) and had managerial authority over the employees, the power to hire and fire, and the power to stop the musical acts from appearing.¹⁹¹ Consequently, the court found the owner vicariously liable.¹⁹² In a similar case, the owners of a bar and grill popular for playing records and hosting live bands were sued.¹⁹³ One of the bar’s owners averred that since *he* had not personally played the music and was unaware of the infringing actions, he was not liable.¹⁹⁴ The court rejected this argument,

¹⁸⁴ *Grokster*, 545 U.S. at 930. To be clear, the Supreme Court’s definition required that the defendant profit from the “direct infringement,” not that the defendant directly profit from the infringement. *Id.* The Copyright Act defines “financial gain” as including “receipt, or expectation of receipt, of anything of value.” 17 U.S.C. § 101 (2012). In *Napster*, the Ninth Circuit described this as having a direct financial interest in or realizing a financial benefit from the activities. *Napster*, 239 F.3d at 1022–23.

¹⁸⁵ *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); see also *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

¹⁸⁶ *Ellison*, 357 F.3d at 1079.

¹⁸⁷ See *id.*; *Napster*, 239 F.3d at 1023 (finding that copyrighted music was primary draw for users).

¹⁸⁸ See *Ellison*, 357 F.3d at 1079. In *Ellison*, because there was inadequate proof that “customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available,” the defendant was not vicariously liable. *Id.*

¹⁸⁹ *Range Road Music*, 668 F.3d at 1151.

¹⁹⁰ *Id.* at 1152.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1155.

¹⁹³ *Broad. Music*, 754 F.3d at 354.

¹⁹⁴ *Id.*

stating that because the owner had the right and ability to supervise the performances and had an obvious financial interest in the infringement (inasmuch as it attracted customers)¹⁹⁵ he was vicariously liable.¹⁹⁶

By contrast, the owners of a multi-media messaging network were not vicariously liable for third parties who sent copyrighted content over the network because they did not supervise the network's carriers or the content sent.¹⁹⁷ Indeed, merely possessing the general ability to locate infringing material and terminate users' access does not amount to the degree of control necessary to impute vicarious liability.¹⁹⁸ That a defendant could have implemented a system to prevent third-party infringements may suggest that it has some degree of control over infringers, but does not substitute for proof of a supervisory relationship to support vicarious liability.¹⁹⁹ Similarly, the right and ability to control necessary to remove an Internet provider from DMCA protection requires the provider to "exert[] substantial influence on the activities of users."²⁰⁰

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Indeed, the court referenced *Sony*, in which the owner of a dance hall was vicariously liable when an orchestra hired to play music for the customers performed copyrighted works: "Substitute 'restaurant that offers dancing' for 'dance hall' and you have this case." *Meadowlake*, 754 F.3d at 355 (citing *Sony*, 464 U.S. at 437 n.18). Radio station owners who sold airtime to "independent" disc jockeys were also vicariously liable for the copyright infringement of those disc jockeys. *Real-songs v. Gulf Broad. Corp.*, 824 F. Supp. 89, 92 (M. Dist. La. 1993); *see also* *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 913 (D. Conn. 1980) (corporate vice-president and general manager of radio station was vicariously liable for infringing conduct of radio station, since he oversaw operations, had a direct financial interest in the station, and failed to take any precautions against infringement).

¹⁹⁷ *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072 (9th Cir. 2013).

¹⁹⁸ *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012) ("the 'right and ability to control' infringing activity under § 512(c)(1)(B) 'requires something more than the ability to remove or block access to materials posted on a service provider's website'" (citing *Capital Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011))).

¹⁹⁹ *See Luvdarts*, 710 F.3d at 1072. To hold otherwise would confer liability based on the failure to change behavior, and blur the distinction between contributory and vicarious liability. *Id.* at 1071–72. Notwithstanding, the failure to implement a system can be circumstantial evidence of the intent to promote and foster infringement as a contributory infringer. *See Grokster*, 545 U.S. at 936–37.

²⁰⁰ *Viacom*, 676 F.3d at 38; *see* 17 U.S.C. § 512(c)(1)(B) (2012); *Fung*, 710 F.3d at 1045.

DOES LINKING IMPLICATE COPYRIGHT?

Defining Links and Linking

Determining whether linking to copyrighted material infringes, directly or secondarily, requires ascertaining what a link is and what it does in relation to the copyrighted work. As a threshold matter, complaints about linking do not fit within the same legal rubric any more than crimes, torts, and contract claims involving baseball bats fall under a single doctrinal heading of “Baseball Bat law.”²⁰¹ Therefore, two different allegations of infringement must be distinguished: (1) using copyrighted materials *to designate a link* to copyrighted content, and (2) *linking to* the copyrighted material. The former asserts that the use of copyrighted material (usually by a search engine) as thumbnail or image link infringes on the reproduction, distribution, or derivative works rights.²⁰² For example, in *Kelly v. Arriba Soft Corporation*, a search engine downloaded images from websites, generated smaller, lower resolution versions of them, and used these thumbnails as links to the source websites.²⁰³ In another set of cases brought by Perfect 10, Google and similar engines²⁰⁴ created and stored in their caches (in con-

²⁰¹ For example, some complaints are about deep-linking that bypasses home pages. In these, the proprietor of the website hosting the linked-to material makes that material available publicly, but the link allows viewers to bypass the original sources’ home pages (on which they sell advertising). Beal, *supra* note 67, at 704; Downing, *supra* note 27, at 158–59. For example, Ticketmaster complained that Tickets.com’s linking to the Ticketmaster site infringed on Ticketmaster’s copyright. The Court rejected the claim, explaining that no copying was involved; rather, the user is transferred to the genuine web page. The court analogized this to traditional indexing techniques or footnoting to a source, because a hyperlink “tells the reader where to find the referenced material.” *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553, at *5–6 (C.D. Cal. Mar. 27, 2000).

²⁰² *See, e.g.*, *Perfect 10, Inc. v. Visa Int’l Ass’n*, 494 F.3d 788, 800–02 (9th Cir. 2007); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 n.11 (9th Cir. 2007); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116–17 (9th Cir. 2007); *Kelly*, 336 F.3d at 815; *Field*, 412 F. Supp. 2d at 1118–22; *see also* *Playboy Enter., Inc. v. Webworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997) (images downloaded from website and posted on defendant’s website infringed on display right).

²⁰³ 336 F.3d at 815–16.

²⁰⁴ *Perfect 10, Inc. v. Amazon.com, Inc., consolidated with Perfect 10 v. Google, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 2007 U.S. App. LEXIS 11420 (9th Cir. Cal., 2007), *summary judgment granted* *Perfect 10, Inc. v. Amazon.com, Inc.*, No. CV 05-4753 AHM (SHx), 2009 U.S. Dist. LEXIS 42341 (C.D. Cal. 2009); *Perfect 10, Inc. v. Google, Inc.* 653 F.3d 976 (9th Cir. 2011).

nection with links to content) thumbnail images of Perfect 10's copyrighted photos.²⁰⁵ In each instance, the courts held that the defendants' uses of the copyrighted works were fair use:²⁰⁶ the links were used for limited, archival and indexical purposes, helped users efficiently locate pertinent content, had been transformed into directory-like formats, and served a very different function than the originals.²⁰⁷ The copies also did not substitute for, diminish the market for, or reduce the value of the originals.²⁰⁸ These are traditional copyright and fair use cases despite the technological medium, so they do not pronounce a rule regarding copyright liability for linking.

Links may be easy to use, but they are not necessarily easy to define. Courts attempting to apply copyright principles from the textual, tangible world to the digital realm have been analogized to the following: footnoting or placing references in a printed text,²⁰⁹ a library card catalogue that directs users to books,²¹⁰ a directory of the location of copyrighted works,²¹¹ and roadway signs on "the information superhighway that both indicate direction [and] . . . take one almost instantaneously to the desired destination"²¹² None of these, however, captures the unique communicative and technological operations of a link.²¹³

²⁰⁵ *Perfect 10*, 508 F.3d at 1154, 1156; *Field*, 412 F. Supp. 2d at 1106.

²⁰⁶ *Perfect 10*, 508 F.3d at 1160; *Field*, 412 F. Supp. 2d at 1118–22; *Kelly*, 336 F.3d 811 at 818–22; *see also* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012) (computer algorithm that identified and displayed thumbnails of video clips that were "related" to videos selected by user was closely related to, and followed from, storage itself, and was narrowly directed toward providing access to material stored at direction of users, fell within § 512(c) safe harbor protection).

²⁰⁷ *Kelly*, 336 F.3d at 819–22; *Perfect 10*, 508 F.3d at 1165.

²⁰⁸ *Perfect 10*, 508 F.3d at 1168; *Kelly*, 336 F.3d at 818; *Field*, 412 F. Supp. 2d at 1122.

²⁰⁹ Jackson, *supra* note 74, at 734. Indeed, the ability to link documents has revolutionized both information retrieval and reading itself. *Id.*

²¹⁰ Beal, *supra* note 67, at 711.

²¹¹ *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 761 (7th Cir. 2012); *cf. Perfect 10*, 508 F.3d at 1159–61 (providing list of locations where copyrighted works are performed is not tantamount to performing or infringing on those works); *In re Aimster Copyright Litig.*, 334 F.3d 643, 646–47 (7th Cir. 2003).

²¹² *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 339 (S.D.N.Y. 2000), *aff'd* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

²¹³ A link's URL may be an address or similar to the Dewey Decimal System, but a card catalogue does not take the patron to the book, deliver the book's content, or supply it if it has been checked out; an address of where copyrighted works may be found or performed is not the same as taxiing the viewer to the location or handing her a copy of the play; a footnote in an article does not provide a copy of the book cited.

A link is a mechanism of communication or transmission.²¹⁴ As most commonly understood by a computer user, a link is a designated line of text or image²¹⁵ that when clicked automatically reveals content on another webpage.²¹⁶ Hence, a link both “conveys information” and possesses “the functional capacity to bring the content of the linked web page to the user’s computer screen.”²¹⁷

In terms of its operation, a link is essentially a request-response communication protocol—specifically, HTTP, hypertext transfer protocol—by which online content is accessed and displayed to computer users.²¹⁸ The web is composed primarily of HTML (Hypertext Markup Language) documents²¹⁹ located on and transmitted from servers.²²⁰ A link is the Internet’s uniform communication and transmission process by which web browsers (requestors) and servers (responders on which content is located) communicate and transmit information.²²¹ This is accomplished automatically: inserting a link into a document inserts a code containing the URL or “web address” of the linked-to document (i.e., the server on which that document

²¹⁴ See Vangie Beal, *Link*, WEBOPEDIA.COM, <http://www.webopedia.com/TERM/L/link.html>, [http://perma.cc/74JY-KDLH] (“In communications, a link is a line or channel over which data is transmitted”); Tim Berners-Lee & Dan Connolly, *Hypertext Markup Language Version 2.0*, ACM DIGITAL LIBRARY, <http://dl.acm.org/citation.cfm?id=RFC1866>, [http://perma.cc/76TM-S3EU]; Tim Berners-Lee, *Making a Server, WC3*, <http://www.w3.org/Provider/ServerWriter.html>, [http://perma.cc/MUC7-6TH6].

²¹⁵ See *Link*, TECHTERMS.COM, <http://www.techterms.com/definition/link>, [http://perma.cc/TE7T-HW2R] (explaining a “link”); *Flava Works*, 689 F.3d at 756. An in-line (img-src) link uses an image rather than text. Commonly that image is of the linked-to material, such as a screenshot of a frame of a video or a thumbnail image of a photo. Framing, though sometimes used interchangeably with linking, refers to a specific type of img-src hyperlink that uses an image such as an opening frame of a video on the linked-to site. See *Flava Works*, 689 F.3d at 756.

²¹⁶ See, e.g., *Corley*, 273 F.3d at 455 (“A hyperlink is a cross-reference (in a distinctive font or color) appearing on one web page that, when activated by the point-and-click of a mouse, brings onto the computer screen another web page.”).

²¹⁷ *Id.*; *Perfect 10*, 508 F.3d 1155–56; Kelly, 336 F.3d at 816; *Link*, WEBOPEDIA.COM, *supra* note 215.

²¹⁸ See Berners-Lee & Connolly, *supra* note 215; Berners-Lee, *supra* note 215.

²¹⁹ The document is comprised of text interspersed with code or instructions. *Hyperlink*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Hyperlink>, [http://perma.cc/9LQM-ZJBW].

²²⁰ *Id.*; Berners-Lee & Connolly, *supra* note 215; Berners-Lee, *supra* note 215.

²²¹ *Hyperlink*, *supra* note 220.

is located)²²² and “a computer instruction that associates the link with the URL.”²²³ When a user clicks a link, her web browser automatically requests from the server the document specified by the URL,²²⁴ thereby accessing the linked-to content and displaying it.²²⁵ The viewer therefore sees or hears the content on the original site, “but does so without leaving the linking document.”²²⁶

This understanding of links as a request-response-display transmission mechanism or communication process, by which content is accessed and displayed, can be evaluated vis-a-vis the rights of reproduction, distribution, public performance, and public display.

Does a Link Copy?

It is clear that a link is not and does not copy. A link enables a viewer to access and see linked-to content on the original website (or host server)²²⁷ but does not reproduce or create any tangible, permanent version of it.²²⁸ In fact, the legislative history for the Copyright Act states that images on a computer screen or “transient reproductions” captured in the “memory of a computer” are not copies,²²⁹ and courts have held that a copyrighted work viewed on a screen is not a reproduction.²³⁰ Accordingly, a link does not

²²² *Flava Works*, 689 F.3d at 756; see also Beal, *supra* note 67, at 715–16 (regarding operation of the programming that allows one to “display that image on the site currently being viewed”).

²²³ *Corley*, 273 F.3d at 455; *Hyperlink*, *supra* note 220. “A ‘computer program’ is defined as a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101 (2012).

²²⁴ See *Flava Works*, 689 F.3d at 756; *Corley*, 273 F.3d at 455; Beal, *supra* note 67, at 737; see also Berners-Lee & Connelly, *supra* note 215; Berners-Lee, *Making a Server*, *supra* note 215.

²²⁵ See *Corley*, 273 F.3d at 455 (“The code for the web page containing the hyperlink includes a computer instruction that associates the link with the URL of the web page to be accessed, such that clicking on the hyperlink instructs the computer to enter the URL of the desired web page and thereby access that page”); see also *Flava Works*, 689 F.3d at 756; Beal, *supra* note 67, at 710; *Kelly*, 336 F.3d at 816.

²²⁶ *Kelly*, 336 F.3d at 816; *Flava Works*, 689 F.3d at 756.

²²⁷ See *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at *6.

²²⁸ Although creating the hypertext link requires typing or inserting the URL of the hosting site, this is not copyrightable content, but an address or fact. Beal, *supra* note 67, at 724.

²²⁹ H.R. REP. NO. 94-1476, at 53 (1976).

²³⁰ *Perfect 10*, 508 F.3d at 1169; *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* 907 F. Supp. 1361, 1378 (N.D. Cal. 1995).

implicate, let alone, infringe on the reproduction right.²³¹ Furthermore, because there is no direct infringement on the reproduction right, there can be no secondary infringement on the part of the linker.

Does a Link Distribute?

A link is not a distribution. A distribution requires that a material copy be disseminated or change hands.²³² Since viewing a copyrighted work online does not result in a copy being made, no copy can change hands. Consequently, a link does not infringe on the distribution right.²³³

If, after the accessing the copyrighted work, a viewer downloads or transfers it, there may be a reproduction or distribution *by that viewer*, but that is not caused by the link. Rather, it is an independent act committed by the viewer. With regard to secondary liability, the link is not a “but for” cause and does not affirmatively encourage that separate act of infringement. In fact, the nature of surfing the net is to browse content, not save and download it.

One caveat is that this traditional analysis presumes a tangible or permanent copy must be made to effect a distribution. Ultimately, this may not be true of the Internet. The Supreme Court has observed that methods of Internet communication are “constantly evolving and difficult to categorize precisely,”²³⁴ and the Second Circuit has recognized that the Internet permits instantaneous worldwide distribution of copyrighted material without ever creating a tangible copy.²³⁵ This view suggests that because clicking a link in the digital world makes a copyrighted work available to multiple people in multiple places on-line, inserting a link to content may be comparable to a distribution of tangible copies in the textual world.²³⁶

Does a Link Perform or Display?

Because a link is a request-response-display communication protocol or transmission process by which online material is accessed and made visible, it necessarily implicates the Transmit Clause of the Copyright Act. Pursuant to the clause, the rights “to perform” and “to display the copyrighted work

²³¹ *Ticketmaster*, 2000 U.S. Dist. LEXIS 4553, at *6; *Kelly*, 336 F.3d at 817.

²³² See *Kelly*, 336 F.3d at 817 (noting that to infringe on the distribution right, a reproduction must be made and distributed).

²³³ See *Perfect 10*, 508 F.3d at 1161–64.

²³⁴ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 851 (1997).

²³⁵ *Corley*, 273 F.3d at 453.

²³⁶ *Id.*

publicly” include the right to “transmit or otherwise to communicate [it] . . . by means of any device or process”²³⁷ As the mechanism or process by which online content is transmitted (hence displayed or performed), inserting a link to a copyrighted work transmits it (or is part of a process resulting in the display/performance of it).²³⁸ Links transmit content, so links *are* performances or displays (or both) of that content.

The Supreme Court in *Aereo* underscored that a transmission itself effects a display or performance.²³⁹ In that case, subscribers to Aereo’s cloud-based television service would peruse Aereo’s program guide, click a selection, and then Aereo would stream the program to the subscriber’s webbrowser.²⁴⁰ Although the system was inert until clicked by the viewer, and involved several steps (including cycling the content through a secondary location) before it reached the viewer, the Court held that transmissions occurred.²⁴¹ Even the dissent agreed that this process “fits the statutory defi-

²³⁷ 17 U.S.C. § 101 (2012).

²³⁸ In *Fortnightly Corp. v. United Artists Television, Inc.*, a CATV provider placed antennas on hills and used coaxial cables to carry the signals received to the television sets of subscribers. The system amplified and modulated the signals, but the Court ruled that the CATV provider “neither edited the programs received nor originated any programs of its own.” 392 U.S. 390, 392 (1968). Rather, a subscriber “could choose any of the . . . programs he wished to view by simply turning the knob on his own television set.” *Id.* The Court thus concluded that this did not constitute a performance by the CATV provider. *Id.* at 400. The Court “drew a line” that placed the originating broadcaster (who selected, procured, and propagated the programs) on one side, and anyone who received or enabled access to the broadcasts (be it a viewer or cable television operator) on the other. The former performed; the latter did not. *Id.* at 399–400. The 1976 Copyright Act’s Transmit Clause changed this; now the broadcaster, retransmitter, and viewer all “perform” or display.

²³⁹ *Aereo*, 134 S.Ct. at 2507–09 (holding that one who transmits a work to the public is displaying or performing that work publicly); *see also* 17 U.S.C. § 101 (to “transmit” is to communicate by any device or process whereby images or sounds are received beyond the place from which they are sent,” and to “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible”). Indeed, the legislative history of the Copyright Act removes any doubt: “any act by which the initial performance . . . is transmitted, repeated, or made to recur would itself be a ‘performance.’” H.R. REP. NO. 94-1476, at 63 (1976).

²⁴⁰ *Id.* Chloe Albanesiuis & Jamie Lendino, *Aereo: Everything You Need to Know*, PC WORLD, Apr. 22, 2014, *available at* <http://www.pcmag.com/article2/0,2817,2417555,00.asp>, [<http://perma.cc/8AQN-HCDV>].

²⁴¹ *Aereo*, 134 S. Ct. at 2511. Ultimately, the technology of how the content was delivered to the viewer was irrelevant. *Id.* at 2508. What was relevant was that “by means of its technology” Aereo’s system “receive[d] programs that have been re-

nition of a performance to a tee” because it “showed” the copyrighted content; it disagreed with the majority over who was responsible for the transmission, not whether there was one.²⁴²

With regard to how inserting a link effects a performance or display, the key is that by virtue of (or as a result of) a transmission of the copyrighted work, a display or performance has occurred or been otherwise communicated: when one links to a movie or script posted online and a computer user clicks that link, it causes the instantaneous display or performance of the content.²⁴³ Just like the viewers in *Aereo* who clicked a button corresponding to the television show, which then “activate[d] machinery that intercepts and reroutes” content over the Internet to the subscribers’ screens,²⁴⁴ computer users who click a link to copyrighted content activate machinery that locates and displays that content on their screens. This is a transmission. That the process involves HTML and multiple steps is irrelevant.²⁴⁵ Indeed, the Supreme Court has stated that a transmission is often accomplished through multiple steps, “a set of actions,”²⁴⁶ or “multiple, discrete transmissions.”²⁴⁷ While the dissenting justices in *Aereo* were persuaded by *Aereo*’s argument that it did not perform the copyrighted works²⁴⁸ because *Aereo*’s server automatically responded to subscribers’ clicks requesting content, the majority rejected this view.²⁴⁹

leased to the public and carr[ied] them by private channels to additional viewers.” *Id.* at 2506 (citing *Fortnightly*, 392 U.S. at 407).

²⁴² *Id.* at 2514 (Scalia, J., dissenting). In the dissent’s opinion, the viewers called all the shots, so the transmission was not a product of *Aereo*’s volitional conduct. *Id.*

²⁴³ “The Web was designed with a maximum target time to follow a link of one tenth of a second.” *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844, 849-53 (1997).

²⁴⁴ *Aereo*, 134 S. Ct. at 2507. In fact, much like a link shows nothing and transmits nothing until clicked, but once clicked automatically and immediately shows content, *Aereo*’s system remained inert until a subscriber clicked a program she wanted to watch. *Id.* at 2501.

²⁴⁵ Even if the HTML address, code, and the copyrighted content are considered separate components, they are, nevertheless, parts of a process that results in the transmission of the copyrighted content. In fact, the Copyright Act says that a display can occur directly (presumably by showing a copy or the original) *or* by “any other device or process.” 17 U.S.C. § 101 (2012). Inserting a link that transmits code and an Internet address is one such “other process” by which the work or a copy of it is shown.

²⁴⁶ *Aereo*, 134 S. Ct. at 2509.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 2514 (Scalia, J., dissenting). “[I]t is only the subscribers who ‘perform’ when they use *Aereo*’s equipment to stream television programs to themselves.” *Id.* at 2504 (explaining *Aereo*’s position).

²⁴⁹ *Id.* at 2507.

The notion that a link transmits or otherwise communicates, and thus can subject a linker to liability, is consistent with the DMCA. DMCA section 512 exempts network service providers and search engines which meet certain conditions from liability by reason of “linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.”²⁵⁰ This exemption presumes that linking to copyrighted material *can* infringe, for if there could be no liability from linking, there would be no need to exempt certain linkers. Additionally, the DMCA’s exemption only applies to certain entities.²⁵¹ While some linkers are exempt, others remain liable. In fact, that section 512 protection is lost when the entity either (a) has notice that linked-to content is copyrighted and that actions infringe, or (b) financially benefits from the act of linking and has the ability to control it.²⁵² If an entity can lose protection from liability, then, obviously, it can be liable for linking.

Does a Link Perform or Display “Publicly”?

Depending on the number of people who can access a link, the performance or display may be public. When a link is inserted into a website or online document accessible by the public, available to multiple users, or sent to a number of individuals, the link’s transmission is public. As noted in *Aereo*, it is not necessary that every viewer clicks or receives the content at the same time or on one piece of equipment (as they are theoretically able to do).²⁵³ This is a matter of aggregate numbers, not labels or membership privileges. In other words, that a site requires a subscription or payment does not make it private. If, by contrast, the link is only sent to a few friends or family members or is only available to a limited number of internal users, it can be deemed private.²⁵⁴

In contrast, because only a *public* performance or display infringes, generally a computer user who clicks on a link does not infringe. Recall that under the Transmit Clause, anyone who transmits or retransmits a copyrighted work performs or displays it. This means that a person who watches the broadcast of a copyrighted work also performs or displays it.²⁵⁵ Similarly, a computer user who clicks a link and watches or reads the copy-

²⁵⁰ 17 U.S.C. § 512(d).

²⁵¹ 17 U.S.C. § 512(d).

²⁵² 17 U.S.C. §§ 512(c)(1)(A)-(B).

²⁵³ *Aereo*, 134 S. Ct. at 2510.

²⁵⁴ *Id.*; see also *Cartoon Network*, 536 F. 3d at 134.

²⁵⁵ *Aereo*, 134 S. Ct. at 2500.

righted work is displaying or performing that work. To infringe, however, the display or performance must be “public.” An individual computer user who clicks a link and watches on her own screen is performing or displaying privately, not publicly.²⁵⁶ Therefore, there is no *public* display or performance, and no infringement.

Mixed Signals Prior to *Aereo*

Prior to *Aereo*, only a handful of courts had considered the copyright implications of linking, and most cases involved search engines that automatically produced links in response to user request, rather than sites or individuals who affirmatively inserted links. It is, therefore, important to review the vitality of these decisions in light of *Aereo*.

The Second Circuit has acknowledged that clicking on a link must be understood in relation to causing an instantaneous effect.²⁵⁷ That court addressed linking in a DMCA circumvention of technology case. The DMCA imposes liability on one who “presents, holds out or makes a circumvention technology or device available, knowing its nature, for the purpose of allowing others to acquire it.”²⁵⁸ After a number of defendants were enjoined from continuing to post “DeCSS” DVD decryption software,²⁵⁹ one posted links to hundreds of sites offering DeCSS and actively encouraged others to copy and disseminate the code.²⁶⁰ The trial court found that this violated its injunction, because by linking to sites providing the code, the defendant

²⁵⁶ For example, a US district court determined that ringtones on phones are not performances, because they are not public. Jacqui Cheng, *Judge: Ringtones Aren't Performances, So No Royalties*, ARSTECHNICA.COM (Oct. 15, 2009), <http://arstechnica.com/tech-policy/2009/10/judge-ringtones-arent-performances-so-no-royalties/>, [http://perma.cc/VHY9-Z5LW].

²⁵⁷ *Corley*, 273 F.3d at 451–52.

²⁵⁸ *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 325 (S.D.N.Y. 2000). The DMCA makes it unlawful for anyone to circumvent copy-protection measures intended to protect copyrighted material from unauthorized copying. 17 U.S.C. § 1201(a)(2).

²⁵⁹ Movie studios sued the defendants, alleging that posting software violated the DMCA. *Corley*, 273 F.3d at 440–41, 447–49. The plaintiffs sought to enjoin defendants both from posting DeCSS and from electronically linking their sites to others that had posted DeCSS. *Id.* at 436. See also Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1321–22 (2001).

²⁶⁰ *Corley*, 273 F.3d at 435–36.

made it available,²⁶¹ and the statute made it unlawful not only to provide the technology but also to otherwise traffic in it.²⁶²

In affirming,²⁶³ the Second Circuit explained that when dealing with computer code and the Internet, cause and effect must be analyzed differently than in traditional copyright cases.²⁶⁴ Indeed, the single click of a mouse “can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet.”²⁶⁵ The Second Circuit quoted the lower court:

There was a time when copyright infringement could be dealt with quite adequately by focusing on the infringing act. . . . [T]he digital world is very different. [A copyrighted work] can be sent all over the world. Every recipient is capable not only of decrypting and perfectly copying plaintiffs’ copyrighted DVDs, but also of retransmitting perfect copies of DeCSS and thus enabling every recipient to do the same. They likewise are capable of transmitting perfect copies of the decrypted DVD. The process potentially is exponential rather than linear. . . . These considerations drastically alter consideration of the causal link between dissemination of computer programs such as this and their illicit use.²⁶⁶

Consequently, the Second Circuit held the defendant liable for linking to the forbidden content. This focus on the operation and cause-effect of the link is consistent with *Aereo*.

Links to copyrighted content were also examined in the search engine cases discussed above, but the reasoning of those courts regarding transmissions was not endorsed in *Aereo*. In those cases, the plaintiffs complained not only about the image-links, but also that linking to their copyrighted content on their webpage infringed on the public display right, because the linking caused the content to be displayed via transmission on the user’s

²⁶¹ The court’s conclusion extended its reasoning that hyperlinking to sites that automatically commenced downloading DeCSS was the functional equivalent of transferring code, thus hyperlinks to pages that contain code (and with the option of downloading) were virtually the same. See Sableman, *supra* note 260, at 1324.

²⁶² See Sableman, *supra* note 260, at 1324. After all, users do not visit a site that posts a code in order to read the code, but to download the code. *Corley*, 273 F.3d at 446 (“computer code is not likely to be the language in which a work of literature is written. Instead, it is primarily the language for programs executable by a computer”). By contrast, when users visit a website that posts a screenplay or a handbook, they do so in order to read the content.

²⁶³ *Corley*, 273 F.3d at 429–30.

²⁶⁴ *Id.* at 451–52 (citing *Universal*, 111 F. Supp. 2d at 331–32).

²⁶⁵ *Id.* at 451.

²⁶⁶ *Id.* at 452 (citing *Universal*, 111 F. Supp. 2d at 331–32).

screen.²⁶⁷ In *Kelly*, the Ninth Circuit initially agreed that linking constituted a display, because it was a method, means, or transmission by which a copyrighted work was shown.²⁶⁸ In doing so, the court relied on the legislative history accompanying the Copyright Act stating that a projection of an image on a screen by any method, the transmission of an image by electronic or other means, or the showing of an image on a television screen or similar viewing apparatus connected with any sort of information storage and retrieval system would be a display.²⁶⁹ This is consistent with *Aereo*. Five months later, however, the court withdrew that opinion²⁷⁰ and refiled an opinion stating that that the lower court should not have ruled on whether linking constituted a display, because neither party had moved for summary judgment on that issue.²⁷¹

When the Ninth Circuit next considered the issue, in a group of lawsuits brought by Perfect 10 against Google and Amazon.com, it reached a different conclusion.²⁷² This time, the court held that a link did *not* display or transmit a copyrighted work, because it did not actually communicate or transmit any copyrighted image.²⁷³ Instead, it transmitted the HTML instructions (and an address where images are stored)²⁷⁴ that caused the browser to interact with the server storing the images (thereby causing them to appear on the user's screen).²⁷⁵ The court reasoned that "HTML instructions do not themselves cause infringing images to appear on the user's computer screen."²⁷⁶ Rather, it is the interaction between the user's web browser and the computer storing the copyrighted work that causes an image to appear on the user's computer screen:

²⁶⁷ *Perfect 10*, 508 F.3d at 1159.

²⁶⁸ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 945 (9th Cir. 2002).

²⁶⁹ H.R. REP. NO. 94-1476, at 64 (1976).

²⁷⁰ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) *opinion withdrawn and superseded on denial of reh'g*, 336 F.3d 811 (9th Cir. 2003). *Originally filed February 2002*, at 280 F.3d 934.

²⁷¹ The court remanded on that issue and, ultimately *Kelly* obtained a default judgment (against defendants that were no longer in business), but the issue of linking was never litigated. *Id.*

²⁷² *Perfect 10*, 508 F.3d 1146.

²⁷³ *Id.* at 1161.

²⁷⁴ *Id.* at 1146.

²⁷⁵ *Id.* at 1160–61. "Google's activities do not meet this definition because Google transmits or communicates only an address which directs a user's browser to the location where a copy of the full-size image is displayed. Google does not communicate a display of the work itself." *Id.* at 1161.

²⁷⁶ *Id.* at 1161.

Instead of communicating a copy of the image, Google provides HTML instructions that direct a user's browser website to publisher's computer that stores the full-size photographic image. Providing these HTML instructions is not equivalent to showing a copy. First, the HTML instructions are lines of text, not a photographic image. Second, HTML instructions do not themselves cause infringing images to appear on the user's computer screen. The HTML merely gives the address of the image to the user's browser. The browser then interacts with the computer that stores the infringing image. It is this interaction that causes an infringing image to appear on the user's computer screen.²⁷⁷

In addition, the court interpreted the right "to display the copyrighted work publicly" to require that a copy of the work, i.e., a "material object," be shown.²⁷⁸ It then reasoned that since Google did not store the full-sized images, it did not possess "copies";²⁷⁹ since it did not possess copies, Google did not and "could not communicate a display of the work itself."²⁸⁰ Consequently, the court held that the search engine links did not infringe. In a subsequent search engine linking case, a Nevada district court adopted the Ninth Circuit's reasoning to conclude that Google's links to an author's publicly available works did not violate his public display right.²⁸¹

To the extent that the *Perfect 10* cases have been interpreted to mean that linking does not infringe, they must be confined to automated links provided by search engines (and to the fair use of works). More importantly, they are at odds with *Aereo*. First, the Ninth Circuit artificially separated the steps of the transmission process, assigning liability to some, but not others. This is tantamount to concluding that a shooter who fires a loaded gun at a person is not responsible for any injury, because the shooter only pulled the trigger, which initiated a mechanical operation and interaction of elements that caused the ejection of a bullet that then went into the victim's body, so the *bullet* injured the victim. In any event, *Aereo* stated that the multiple steps in a transmission are, nonetheless, part of a process of transmission, and, therefore, a display or performance within the meaning of the statute.²⁸² Second, the *Perfect 10* holdings are premised on the notion that a

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 1160–61.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 1161.

²⁸¹ *Righthaven LLC v. Choudhry*, No. 2:10-CV-2155 JCM (PAL), 2011 WL 1743839 (D. Nev. May 3, 2011).

²⁸² The *Perfect 10* court's premise that one must possess a material copy in order to transmit or display it confuses the terminology in §106(1) and (2) with the rights granted by the statute. The Copyright Act gives a copyright owner the rights "to perform the copyrighted work publicly" and "to display the copyrighted work pub-

material copy must be made in order for a transmission to occur. Yet, neither *Aereo* nor the statute requires this. To the contrary, the House Report explicitly states that whereas a “reproduction” would require a tangible copy, a “display” would not,²⁸³ and that the display or performance rights might be infringed “even though nothing is ever fixed in a tangible form.”²⁸⁴ Consequently, the continuing authority of these holdings is questionable.

Nonetheless, one aspect of these decisions remains sound: they distinguish between automated search engines that generate links in response to user requests and individuals who locate copyrighted content and insert a link to it into a document or webpage.

A LINKER’S DIRECT LIABILITY FOR INFRINGING LINKS: DISTINGUISHING AUTOMATIC LINKING FROM VOLITIONAL LINKING

All links are not created equal. For the most part, links to content are either volitionally inserted by a person who has chosen the copyrighted content and linked to it (“volitional links”) or generated automatically, as by a search engine in response to a user request (“automatic links”). These differences are critical to assigning liability for infringement.

Direct liability requires a volitional act. Choosing specific copyrighted content and inserting a link to it, thereby making it available to anyone who clicks the link, is such a volitional act, but automatically generating a list of links in response to a third party command is not. Therefore, many entities and services lack the volitional action necessary to hold them directly liable for copyright infringement.

licly.” These do not limit rights to performances and displays of copies; to the contrary the Transmit Clause defines them to include the right to “transmit or otherwise to communicate a performance . . . [or display] to the public, by means of any device or process” §101. In fact, under the Ninth Circuit’s version, a television viewer of a performance would not be “performing” or “displaying”, because she would not possess a material copy of the episode. This is clearly incorrect, as the statute and the Supreme Court have stated that a viewer of a transmitted performance *is* performing. In fact, even *Aiken* and *Fortnightly* acknowledged that works could be performed or transmitted without possessing any copy of the work: The broadcaster “supplies his audience not with visible images but only with electronic signals.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 161 (1975) (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398–399 (1968)).

²⁸³ H.R. REP. NO. 94-1476 § 106 (1976).

²⁸⁴ *Id.*

Automatic Links: Search Engines

Generally, search engines and similar internet services that automatically produce a list of links would not be liable for copyright infringement, because there is no volitional action in choosing content and supplying the specific links. A search engine's bot automatically crawls the web locating, compiling, and cataloguing content. Then, and only in response to a specific user search request, it generates a list of links to content.²⁸⁵ A search engine does not think or assess the quality of linked-to content. This automaticity in collecting information and providing links precludes any finding of volitional action.²⁸⁶ Indeed, it is akin to other automated systems and providers (such as DVR or ISPs) that are not directly liable.

Even if there were a volitional act, the DMCA exempts from liability certain search engines, Internet providers, and similar information tools. Additionally, entities that do not fit within the DMCA safe harbor still have other statutory defenses. As noted, several courts have held that a search engine's linking and use of copyrighted works is fair use.²⁸⁷

"Volitional" Links

Unlike a search engine, an individual who chooses to insert a link into a document or website is engaged in decision-making and committing a volitional act directed at specific copyrighted content. Links do not automatically or surreptitiously insert themselves into online documents and websites. The linker must locate and choose content to which to link, decide to insert a link, determine where in the document or webpage to insert the link, and decide how to label and contextualize it.²⁸⁸ This process involves

²⁸⁵ With regard to works identified and linked-to by search engines, a set of widely recognized industry protocols have been adopted by which Web site owners can automatically communicate their preferences to search engines with "meta-tags" within the computer code (HTML). *Field*, 412 F. Supp. 2d at 1112. Thus, copyright owners who post works online can insert these preferences, thereby limiting search engine linking.

²⁸⁶ See generally *Aereo*, 134 S.Ct. 2498 (2014); "Direct Infringement," *supra*.

²⁸⁷ *Perfect 10*, 508 F.3d at 1165 (Google's use of copyrighted images in search engine was "highly transformative"); *Kelly*, 336 F.3d at 818-22; see generally "Defining Links and Linking," *supra*.

²⁸⁸ In fact, when a linker inserts a link, she knows exactly what the content is and has chosen how to designate that content. When a computer user clicks a link, the user does not have all of that information. A link labeled "the copyright lawsuit" could potentially link the viewer to pleadings, motions, an appellate decision, a newspaper article about the dispute, video of a deposition, or a CNN anchor reporting.

both choice and affirmative action in relation to showing the linked-to copyrighted work, and thus supplies the volitional action necessary for direct liability.²⁸⁹ Hence, a volitional link made available to members of the public is *prima facie* evidence of infringement.²⁹⁰ Nevertheless, a linker can avail herself of statutory defenses, most notably fair use.

Fair Use in Volitional Linking

Any copyright infringement claim is subject to certain statutory exceptions, most notably fair use.²⁹¹ Because this Article focuses on liability for linking to leaked scripts, television episodes, and similar creative works, it does not endeavor to provide an exhaustive analysis of the permissible uses of such works; rather, the principles of fair use are outlined here to help illuminate liability for linking to leaked works.

In determining whether the use of a copyrighted work is a non-infringing fair use, a court must weigh: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.²⁹²

(1) *Purpose and Character of the Link's Use of Leaked Materials*

With regard to the first factor, uses that are legitimately informational and factual, such as using copyrighted works for indexing, referencing, sourcing content, or corroborating facts, strongly favor a determination of fair use.²⁹³ News reporting and commentary on a work also favor fair use.²⁹⁴ That an event is worthy of news or deserving of critique, however, does not mean that copying or broadcasting a copyrighted work itself is news-

²⁸⁹ This is analogous to Aereo locating copyrighted content and sending it, via the Internet, to its subscribers. But, whereas Aereo's system was inert until the subscriber chose to watch a program, in this case, a link has already curated and located the content, and is awaiting transmission.

²⁹⁰ If a link is made available to only a small number of people, such as a spouse or a few friends, it is not public and thus does not infringe.

²⁹¹ 17 U.S.C. §§ 106, 107 (2006).

²⁹² 17 U.S.C. § 107 (2006).

²⁹³ See, e.g., *Harper & Row*, 471 U.S. at 563; *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

²⁹⁴ *Harper & Row*, 471 U.S. at 563.

worthy.²⁹⁵ The original expression within the work remains copyrightable.²⁹⁶ In other words, it may be newsworthy that a former president wrote a book in which he explains his past actions, but that does not render wholesale use of the book fair use. “News” is not a blanket protection.²⁹⁷ Therefore, the issue is “whether a claim of news reporting is a valid fair use defense to an infringement of *copyrightable expression*.”²⁹⁸ For instance, in *Harper & Row Publishers*, publishing the “heart” of a soon-to-be published book supplanted the copyright holder’s first publication right, not to mention eviscerated the market for it. Accordingly, though a portion of the copyrighted work was used in the context of, or under the auspices of, reporting, it was not fair use.²⁹⁹

It is also relevant whether the copyrighted work was used to supplant or exploit the original³⁰⁰ or if it was used in a way that is transformative,³⁰¹ that is, in a way that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³⁰² For example, a link within a law journal article to a cited article or a link in a news report to video of the incident reported is informative, and the authors use the original essentially as corroboration of or as a springboard for analysis in the new works. They do not intend to displace the

²⁹⁵ See *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002); see also *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998) (Although the purpose of Reuters is to report news, its use of copyrighted works was not transformative; Reuters copied and transmitted footage it to news organizations, but did not explain, comment on, or edit the content of the footage); *KCAL-TV Channel 9*, 108 F.3d at 1122 (“Although KCAL apparently ran its own voice-over, it does not appear to have added anything new or transformative to what made the LANS work valuable—a clear, visual recording of the beating itself”); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 307 (3d Cir. 2011) (“[N]ews reporting does not enjoy a blanket exemption from copyright).

²⁹⁶ See *Harper & Row*, 471 U.S. at 557.

²⁹⁷ See generally *Fargo & Alexander*, *supra* note 15, at 1101–04 (explaining the limits of claims to newsworthiness).

²⁹⁸ *Harper & Row*, 471 U.S. at 561 (emphasis in original). “[T]he news element—the information respecting current events contained in the literary production [or creative work]—is not the creation of the [work], but is a report of matters that ordinarily are *publici juris*; it is the history of the day.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

²⁹⁹ See *Harper & Row*, 471 U.S. at 550–51; see also *Wall Data Inc. v. L.A. County Sheriff’s Dep’t*, 447 F.3d 769, 778–82 (9th Cir. 2006) (copying software to avoid cost of purchasing additional copies was not a fair use).

³⁰⁰ *Napster*, 239 F.3d at 1015 (exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies).

³⁰¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁰² *Id.*

originals, but to say something beyond them or about them. In fact, by sourcing to the originals, the links credit to the author and present the unvarnished sources. This is consistent with fair use. On the other hand, copying and distributing an article to every incoming freshman (thereby obviating their need to purchase it) or retransmitting a news broadcast instead of producing one's own use the copyrighted works in their original forms, with no alteration, for their original purposes, are textbook examples of infringement.

Typically, when a television episode or script is leaked online, it is posted in full with no alteration. There is no intention to integrate it into some other work or use it in a way different than the original. To the contrary, the point of leaking (and then linking) is to reveal the original *as it exists* and to do so before the copyright owner does so. The purpose and character of the use is no different from how and why the original would be used, and usurps the creator's right to control the release and timing of the expression.³⁰³ This significantly undercuts any claim of fair use by those who link to such works. That a work has not yet premiered or been made publicly available also militates against fair use.³⁰⁴ For example, when *The Expendables 3* was leaked,³⁰⁵ the court granting the restraining order noted that the leak had "stripped Lions Gate of the critical right of first publication" and deprived the company of revenue.³⁰⁶

This reasoning also applies to news sites that link to copyrighted works. For instance, Gawker claimed that its use of the Tarantino *Hateful Eight* script was fair use, because it was central to Gawker's reporting the leak and Tarantino's cancellation of the film. There is, however, no absolute protection for news reporting³⁰⁷ and, in any event, the "news" item was not about the content of the copyrighted script, but that the script was leaked—

³⁰³ See *Harper & Row*, 471 U.S. at 564. The right of first publication is "the author's right to control the first public appearance of his expression." *Id.* This encompasses "the choices of when, where, and in what form first to publish a work." *Id.*

³⁰⁴ *Id.* at 564 (noting that the scope of fair use is narrower with respect to unpublished works because the author's right to control the first public appearance of his work weighs against the use of his work before its release). See also *FOX Broad. Co., Inc. v. Dish Network L.L.C.*, 747 F.3d 1060, 1069 (9th Cir. 2013).

³⁰⁵ See Gardner, *supra* note 5.

³⁰⁶ See Gardner, *supra* note 5; Preliminary Injunction at 2, *Lions Gate Films v. John Does 1-10*, No. 2:14-cv-06033, 2014 WL 3895240 (C.D. Cal 2014).

³⁰⁷ See Fargo & Alexander, *supra* note 15, at 1101-03.

a fact no one disputed³⁰⁸—and that Tarantino had canceled the film. Therefore, linking to the script did not corroborate the fact of the leak; it merely exploited the script’s availability for commercial advantage.³⁰⁹ In fact, Gawker did not endeavor to explain why providing the full script was critical to reporting the film’s cancellation or Tarantino’s rage. Simply that audiences might be interested to know what happens in the movie or TV show does not make revealing those works newsworthy or fair use.³¹⁰

(2) *The Nature of the Leaked Work*

In the context of linking to leaked entertainment properties, the second factor, the nature of the copyrighted work, also weighs against fair use. This factor acknowledges that “[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.”³¹¹ Television shows, scripts, and movies are creative works situated at the end of the spectrum receiving greater protection, and factual and historical works are situated at the opposite end of the spectrum, receiving lesser protection.³¹² As such, there is less justification for disseminating entertainment-oriented scripted works.³¹³

(3) *The Amount and Substantiality of the Copyrighted Work Used*

The third factor asks whether the amount and substantiality of the copyrighted work used, in relation to the work as a whole, “are reasonable in relation to the purpose of the copying.”³¹⁴ Although copying an entire work militates against fair use,³¹⁵ the extent of permissible copying varies with

³⁰⁸ Moreover, even if showing a portion of the script was justified as proof that the script was actually leaked or in the possession of the media, there is no justification for providing the entire work.

³⁰⁹ See *L.A. News Serv. v. Tullio*, 973 F.2d 791, 797 (9th Cir. 1992) (emphasizing that ultimately using copyrighted material for “research, scholarship, and private study” does not provide a shield of liability when a party nonetheless “willfully infringes the copyright . . . for purposes of commercial advantage”).

³¹⁰ See *Fargo & Alexander*, *supra* note 15, at 1106 (detailing the “difference between being interesting and being of public interest”).

³¹¹ *Napster*, 239 F.3d at 1016 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

³¹² *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy”).

³¹³ See *Kelly*, 336 F.3d at 820.

³¹⁴ *Campbell*, 510 U.S. at 586.

³¹⁵ See *Kelly*, 336 F.3d at 820 (copying an entire work militates against fair use); *but see* *Worldwide Church of God, Inc., v. Philadelphia Church of God, Inc.*, 227

the purpose of the use.³¹⁶ For example, in the case of a news article about *Survivor*'s participant contract, it makes sense to link to the entire contract in order to substantiate allegations and analysis: a contract must be read as a whole, and including only portions might distort the document's meaning or raise claims of misrepresentation. Additionally, as the nature of the document falls on the factual end of the spectrum, supplying the whole does not destroy the value of the work, and it does not reveal some spoiler or plot twist. By contrast, prematurely releasing the penultimate episode of *Survivor* in which the finalists are determined would eviscerate the episode's heart and have little purpose other than to release the content before the air date.

With a link, the entire copyrighted work (or the entire portion posted) is transmitted. This typically precludes a legitimate claim of fair use, unless it can be otherwise justified. As noted, when one links to and provides the public with a not-yet-broadcast *Doctor Who* episode or movie a few weeks before its premiere, there is little purpose to leak other than to be the first to release the work. Moreover, even in news reporting, it would be often difficult to justify using an entire creative work. As in Gawker's linking to the Tarantino screenplay, it is not simply that Gawker could report news of a leak without needing to provide the copyrighted film or television show, but that providing the copyrighted work does nothing to add to the reporting.³¹⁷ This belies fair use.

(4) *The Impact of the Link's Use on the Market for the Original*

The final factor, which the Supreme Court has called "the most important element of fair use,"³¹⁸ is "the effect of the use upon the potential market for or value of the copyrighted work."³¹⁹ This factor considers the extent to which the infringing use adversely impacts the potential market

F.3d 1110, 1118 (9th Cir 2000) (finding fair use despite the copying of an entire work).

³¹⁶ See *Campbell*, 510 U.S. at 586–87; *Perfect 10*, 508 F.3d at 1167 (in evaluating the amount of the work used, it is appropriate to consider why the work was used).

³¹⁷ That the leak was newsworthy and that the underlying facts and ideas of the script or television episode could be recounted does not make it fair use to make the entire work available.

³¹⁸ *Harper & Row*, 471 U.S. at 566.

³¹⁹ 17 U.S.C. § 107(4) (2006).

for the original³²⁰ or derivative works,³²¹ interferes with the marketability of the work, or fulfills the demand for the original.³²²

When an entertainment product is linked to and made available before its official release date, it not only substitutes for the original in terms of whether a viewer would pay to see it (either by purchasing a ticket, renting it, or buying a copy), but also can diminish potential audiences' interest in seeing the work in its intended form or forum. Especially with a movie or television episode, a viewer who watches a leaked version online has no reason to pay to watch. The court said as much in granting the injunction when *The Expendables 3* was leaked.³²³

This is also true of the unauthorized release of a television episode, although the economics are slightly different. Whereas most movies operate on a pay-to-see model, most television episodes do not.³²⁴ As a result, linking to a leaked film will have a direct negative effect on ticket sales, rentals, and DVD purchases, but linking to a leaked television episode will likely cause only a reduction in viewers. Additionally, in the multi-faceted litiga-

³²⁰ *Campbell*, 510 U.S. at 590.

³²¹ *Harper & Row*, 471 U.S. at 568.

³²² *Campbell*, 510 U.S. at 590; *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155–56 (9th Cir. 1986). Although this Article is concerned with unauthorized releases of copyrighted works meant to be kept secret, when a copyright owner posts a copyrighted work on a publicly available website for free, the owner obviously intends the public to see, hear, and even publicize it. To some degree this may imply a limited license for use, which functions as an affirmative defense to a copyright infringement claim. See *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995). Independently, in terms of fair use, a link to publicly available works will seldom have a negative economic impact on the market for that work. See generally *Kelly*, 336 F.3d at 820 (noting that since photographer had already put images on the Internet, before search engine used them, plaintiff's claim of infringement was not as strong, and defendant's fair use argument was stronger). To the contrary, linking may increase public awareness and popularity. This is the very model of YouTube-generated fame, where Internet content's going viral can increase the creator's profile and enable her to monetize her creative works. Indeed, comedy trio The Lonely Island, author Neil Gaiman, and Oscar-winner Trent Reznor all came out against SOPA and PIPA, proposed legislation in 2011 that would have given greater rights to copyright holders to remove uses of their content, noting that a free and open Internet has enabled them to reach out to fans, cultivate new audiences, and popularize their works. See Anderson, *Lonely Island*, *supra* note 10.

³²³ See Gardner, *supra* note 5.

³²⁴ See Kimberlianne Podlas, *Artistic License or Breach of Contract?: Creator Liability for Deceptive or "Defective" Documentary Films and Television Programs*, 33 LOY. L.A. ENT. L. REV. 67, 86 n.156, 96 (2013). Even subscribers to streaming services, typically do not pay per program, but for the service. *Id.*

tion against DISH, the court suggested that the copying of TV programs could undermine the copyright owner's ability to license these programs to streaming services such as Hulu, Netflix, or Amazon Instant Video.³²⁵

The impact on the market for a screenplay or script is somewhat different. For most audience members, reading a script is not a substitute for the visual, multi-sensory experience of seeing the TV show or movie. Consequently, linking to a leaked script might have little negative impact on a future film or the purchase value of the script. Furthermore, although a disclosure will necessarily reveal spoilers, that information within the work is not, itself, copyrightable—only the expression of it is. Therefore the “harm” of the public's awareness of the plot is not a cognizable harm for purposes of analyzing the impact on the market.³²⁶ Nonetheless, in the entertainment industry, scripts possess independent value as source material for films and entertainment properties. As a result, the release of a script may impact whether it is optioned, what price is paid to license rights in it, or lead to the cancellation of a film in pre-production. This likely explains why Tarantino made a point of telling the media that he often publishes his screenplays for substantial royalties. This is not to suggest that there is no harm or that this factor weighs in favor of fair use, but just that the harms are different or difficult to quantify.

THE LINKER'S SECONDARY LIABILITY FOR INFRINGEMENT

A linker who is not directly liable may, nonetheless, be secondarily liable for the acts of third parties. In fact, the dissent in *Aereo* opined that *Aereo* might be secondarily liable for the infringement of its subscribers,³²⁷ as did the Ninth Circuit in the *Perfect 10* search engine cases.³²⁸ To be clear, this Article does not argue that a volitional linker is a secondary infringer, but analyzes secondary liability as an alternative theory of liability. If a volitional link is not a transmission or the linker is not deemed a direct infringer, then the linker's potential secondary liability becomes relevant.

³²⁵ *FOX Broad. Co., Inc. v. Dish Network, L.L.C.*, 905 F. Supp. 2d 1088, 1105 (C.D. Ca. 2012).

³²⁶ See *Campbell*, 510 U.S. at 569 (explaining the relevance of substitution value and that a distinct market for a new work, even if disfavored by copyright author, does not negatively impact market for original).

³²⁷ *Aereo*, 134 S.Ct. at 2514 (Scalia, J., dissenting) (noting that *Aereo* could also be liable for other aspects of the service that were not presently before the Court).

³²⁸ *Perfect 10*, 508 F.3d at 1170–73, 1161 (“Google may facilitate the user's access to infringing images. However, such assistance raises only contributory liability issues”).

That linking contributes to the harm of a leak or benefits the linker does not by itself amount to contributory or vicarious infringement within the meaning of the Copyright Act.³²⁹ Rather, any secondary liability of the linker must be premised on a third party's act of direct infringement.³³⁰ The third parties who potentially infringe are the posting site (which originally posted the leaked work) and the clickers of the link to those materials.³³¹ Accordingly, a linker's secondary liability must be assessed in relation to direct infringement by the posting site and clicker of the link.³³²

Secondary Liability for Infringement

Infringement by the Third Party Posting Site

Assuming that the posting site infringes by having copied copyrighted material and displayed or performed it publicly by posting it, the linker is not a contributory infringer to those acts. Quite simply, the linker's act of linking is *subsequent* to and independent from the poster's acts. Consequently, the linker could not cause, enable, or induce the posting site's infringement. Conversely, the posting site did not rely on the linker to post the content, and it may not even know that the linker has linked. This is also true with regard to the poster's performance or display—it is accomplished before the linker ever enters the equation. Consequently, the linker cannot have materially aided or encouraged that the act. Additionally, though the linker performs or displays the posted content by linking to it, the linker is not assisting or contributing to the posting site's doing so. Instead, the linker is committing her *own* direct act of performing or displaying.

³²⁹ See *FOX Broad. Co., Inc. v. Dish Network, L.L.C.*, 905 F. Supp. 2d at 1097–98.

³³⁰ *Napster*, 239 F.3d at 1013 (“secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party”).

³³¹ The Linker's secondary liability cannot be premised on its own direct liability.

³³² Some copyright owners have misconstrued the doctrine of secondary liability and attempted to use it to hold parties responsible for acts that are not prohibited by statute, but are disfavored by a copyright owner or impede ancillary revenue streams. Accordingly, the Ninth Circuit has cautioned that “it is important that we not permit inducement liability's relatively lax causation requirement to ‘enlarge the scope of [copyright's] statutory monopolies to encompass control over an article of commerce’—such as technology capable of substantial non-infringing uses—‘that is not the subject of copyright protection.’” *Fung*, 710 F.3d at 1037–38 (9th Cir. 2013) (quoting *Sony*, 464 U.S. at 421).

With regard to vicarious infringement, the linking site may benefit from the posting site's leaking or posting of the copyrighted work, but vicarious liability requires that a secondary infringer obtain some benefit from the direct infringement and possess control or authority over the infringer. Here, there is neither. There is no evident monetary benefit by linking, even if it increases user traffic to a web site. People do not pay to read or cancel a subscription to a fan site or news site because it may sometimes link to infringing material that could simply be obtained directly from the posting site. When subscribers *do* pay for a news service or website access, the payment is for the service overall, not for links to infringing materials, specifically. Even assuming that the linker obtained some tangible economic benefit from the posting site's infringement, the linker possesses no legal or actual control over the posting site. Indeed, if a linker removes its offending link, it has no impact on the posting site's infringement. Accordingly, the linker is not vicariously liable for the infringement of the posting site.

Infringement by the Third Party Users Who Click Links

With regard to a computer user who clicks a link, viewing a copyrighted work on one's own computer does not infringe on either the reproduction or distribution right. Because these do not amount to direct infringement by the clicker, they cannot support secondary infringement on the part of the linker.³³³

If the clicker subsequently copies or distributes the copyrighted material, the linker has not proximately caused this, but rather it is an independent volitional act committed by the clicker. Additionally, because the link enables the clicker to see the content at its source, copying or downloading is unnecessary. There is no reason that the linker would presume that clickers would necessarily infringe or any evidence that the linker encouraged such acts. Therefore, the linker is not contributorily liable. In fact, any copying or distribution by the clicker is subsequent to and independent of the link. Moreover, the linker has no actual or practical control over the clicker, and receives no direct monetary benefit from the clicker's acts. At best, the linker informs clickers where they can locate copyrighted content, but this is tantamount to telling someone where to buy drugs or find counterfeit goods.³³⁴

³³³ See *Perfect 10*, 508 F.3d at 1169 (finding users viewing pages containing infringing images, but not "stor[ing] infringing images on their computers," does not amount to infringement).

³³⁴ If a website informed readers where they could locate the material, without inserting a link that transmitted material, it would be analogous to the person who

For example, myVidster is an online service on which users can “bookmark” Internet videos.³³⁵ When a user bookmarks Internet content, myVidster automatically creates a link (usually a “thumbnail” of a video’s opening screen shot) that other users can then click to watch the video.³³⁶ Flava Works, which produced videos hosted on websites behind a “pay wall,” discovered that some of its paying viewers had bookmarked its videos on myVidster,³³⁷ and sued myVidster for contributory infringement vis-à-vis non-paying viewers who accessed videos through bookmarks.³³⁸ Flava claimed that by providing the link, myVidster was encouraging people to circumvent Flava’s pay wall, thereby reducing Flava’s income. The court held that myVidster was not a contributory infringer of Flava’s exclusive right to copy and distribute its copyrighted works.³³⁹ While acknowledging that myVidster provided a connection between the server hosting the video and the computer of the myVidster user,³⁴⁰ the court explained that myVidster could not be liable for secondary infringement unless the viewers were liable for direct infringement. Although viewers were watching for free, viewing copyrighted content does not infringe on any copyright.³⁴¹ Rather, the court analogized, the viewers’ actions were akin to sneaking into a movie theater without buying a ticket or stealing a copyrighted book from a bookstore and reading it.³⁴² “That is a bad thing to do (in either case) but it is not copyright infringement.”³⁴³ In turn, the facilitator of that non-fringing conduct cannot be a contributory infringer.³⁴⁴ Moreover, unless those visitors copy the Flava videos they are viewing, “myVidster isn’t increasing the

gives directions to Fight Club or to the theatre performing infringing works. Like those people, the website would not be providing or transmitting copyrighted materials, so would not infringe. Consequently, it would not be directly or secondarily liable.

³³⁵ See *Flava Works*, 689 F.3d at 756.

³³⁶ *Id.* As with other links, the video is not housed on myVidster, but is viewed on the video’s host server. *Id.*

³³⁷ Under Flava’s terms of use, viewers who paid could watch the videos and download them to their computers for “personal, noncommercial use,” but agreed not to copy, transmit, or sell them. *Id.* at 756.

³³⁸ *Id.* at 754–56.

³³⁹ *Id.* at 760.

³⁴⁰ *Id.* at 757. It also noted that myVidster did not touch the data stream, so was not “transmitting or communicating” the content. *Id.* at 761.

³⁴¹ *Id.* at 757.

³⁴² *Id.* at 757–58.

³⁴³ *Id.* at 757.

³⁴⁴ *Id.* at 758.

amount of infringement due to copying.”³⁴⁵ Similarly, an employee of Flava who embezzled corporate funds would also be reducing Flava’s income, but would not be infringing Flava’s copyrights by doing so.³⁴⁶ The court opined that the direct infringers, about whom Flava had *not* complained, were actually Flava’s customers who copied and uploaded videos.³⁴⁷

With regard to infringing on public performance and public display rights, when the clicker views the content, that content has been transmitted and thus performed or displayed.³⁴⁸ Yet, as explained, this is not the linker’s enabling someone else’s direct act of transmission: it is the linker *directly* performing or displaying that content publicly (just like Aereo). Hence, the linker’s liability would not be based on a third party’s infringing act, but on its own infringing act. Of course, the clicker’s act of watching the copyrighted work *also* renders the clicker as one who directly performs or displays. Nonetheless, because a clicker typically watches on her own screen or in a non-public setting, the clicker’s performance or display is not public and thus does not infringe. Since there is no direct liability on the part of the clicker, there is no foundation for secondary liability on the part of the linker. Nevertheless, inasmuch as the link to the material transmits that material, it constitutes a public display of the work. Hence, post-*Aereo*, a linker could be directly liable.³⁴⁹

³⁴⁵ *Id.* at 757–58; see also *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 797 (9th Cir. 2007).

³⁴⁶ *Flava Works*, 689 F.3d. at 758.

³⁴⁷ *Id.* at 757. “A customer of Flava is authorized only to download the video for personal use. If he uploads it to the Internet, he creates a copy (because he retains the downloaded video on his computer and is now providing to myVidster users a copy) and is infringing.” *Id.*

³⁴⁸ *Aereo*, 134 S. Ct at 2506.

³⁴⁹ In some limited instances, the facts may support a linker’s contributory liability, but such cases are relatively rare. Secondary liability was assigned on the basis of linking where operators of a web site critical of The Church of Jesus Christ of Latter-day Saints posted copies of the copyrighted Church Handbook. When the Church sued, the defendant consented to an injunction enjoining it from posting the material, but then posted links to other sites that offered similar materials, publicized them, and instructed users how to obtain the materials. The court granted a second injunction prohibiting the defendant from posting these links. While the injunction can be defended as just, because the defendant’s linking subverted the purpose of the original injunction, its premise of liability is questionable. The court held that viewers of the sites directly infringed, because in order to view the copyrighted material, they made copies of it. In turn, the defendant could be held secondarily liable for those acts. *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1291–92 (D. Utah 1999).

CONCLUSION

Links are incredibly useful tools that have dramatically advanced information retrieval and the Internet. This utility, however, does not exempt them from the Copyright Act. To the contrary, under the Transmit Clause, a volitional link to a copyrighted work is a “transmission,” and thus a display or performance of the work. Although acknowledging this premise calls into question many online practices so common that they are given little thought, it does not expose everyone who clicks on or inserts a link to liability; nor does it render the information superhighway so perilous as to stall progress.

Nonetheless, as detailed in this Article, it will be difficult for a volitional linker to justify as fair use linking to a leaked entertainment work. This is true of fan and spoiler sites and media sites alike: a leak and its reverberations are certainly newsworthy, but disclosing the totality of the creative work leaked is not necessary to reporting. Indeed, had Quentin Tarantino taken the path of Lions Gate (regarding *The Expendables*) and pleaded that Gawker *directly* infringed on his *right to display* publicly the screenplay, rather than portraying Gawker as secondarily infringing on the reproduction or distribution right, his complaint would have had merit. Gawker would have been hard-pressed to justify its link as doing anything more than exploiting the leaked material. Consequently, linking as direct infringement of public performance or display rights is a viable legal strategy for creators and producers who discover that their works have been leaked online, as well as a salient threat of which linkers to such works must be aware.