Notes

* Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.: Fair Use, the First Amendment, and the Freedom to Link

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We are fortunate to live during these times of extreme technological advance. Convenience is gaining new meaning as our ability to access goods and information over the Internet1 reaches unprecedented levels. While such freedoms associated with the Internet are invaluable in our society, many now take these freedoms for granted. The development of the Internet has not only provided copious educational and technological opportunities, but also the opportunity to access and distribute materials protected by copyright law. Accompanying this new technological era is a general sense that the traditional rules governing copyright liability may not always apply where cyberspace2 is concerned—that “technology” somehow affords immunity.3

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1. The Internet has been described as "a network of networks." ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997). It is a "giant network which interconnects innumerable smaller groups of linked computer networks." Id. The Internet is an international system, allowing tens of millions of people to exchange information. See id. at 831. Information can be sent almost instantaneously to specific individuals, to a broader group of people, or to the world as a whole. See id.

2. The term "cyberspace" is often used to refer to computer communications generally, including the Internet and online services. See Trotter Hardy, Property (and Copyright) in Cyberspace, 1996 U. Chi. Legal F. 217, 217. Cyberspace has also been described as a “decentralized, global medium of communications ... that links people, institutions, corporations, and governments around the world." Reno, 929 F. Supp. at 831.

3. See, e.g., Electronic Frontier Foundation (visited June 24, 2000) <http://www.eff.org> (describing the site's mission as: (1) upholding rights to digital free expression from political, legal, and technical threats; (2) empowering people to maintain their privacy and control their digital identity; and (3) ensuring that systems are designed to respect people's
A current dilemma surrounding Internet copyright infringement concerns whether courts should impose liability for providing electronic links to copyright infringing materials on other sites. Case law addressing this issue is sparse, providing insufficient guidance for balancing new technology with traditional intellectual property law in the linking context. Should liability for unauthorized linking come at the expense of traditional freedoms of free speech and those historically associated with the Internet?

This Note analyzes the United States District Court for the District of Utah's decision in *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, prohibiting Web site operators from posting the URLs for three independent sites allegedly containing copyrighted materials. While the text directing third parties to the allegedly infringing materials in this case was not hot-linked, this situation is similar to cases involving various types of linking technology.

rights, such as free speech, privacy, and fair use); see also Lawrence Lessig, The Zones of Cyberspace, 48 STAN. L. REV. 1403, 1407 (1996) (discussing the self-regulation of cyberspace and how control in cyberspace is now exercised “through the ordinary tools of human regulation—through social norms, and social stigma; through peer pressure, and reward”).

4. For definitions and a discussion of the types of linking, see infra Part I.B.


7. A URL (Uniform Resource Locator) is the domain name of the server on which the page is stored and its file path. See ABA, WEB LINKING AGREEMENTS: CONTRACTING STRATEGIES AND MODEL PROVISIONS 53 (1997) [hereinafter WEB LINKING AGREEMENTS].


10. Hot-link (or hyperlink) refers to the connection from one hypertext document to another. See WEB LINKING AGREEMENTS, supra note 7, at 50. If the text were hot-linked, a visitor to the Web site could “click” on the links and connect immediately to one of the third party infringing sites, rather than being required to cut and paste the address. See ACLU v. Reno, 929 F. Supp. 824, 843 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997).

11. Links consist of highlighted references that give the user’s computer the location of other computer files located elsewhere on the Internet. See Dan L. Burk, Muddy Rules for Cyberspace, 21 CARDOZO L. REV. 121, 123 (1999). Framing occurs when the contents of a linked site appear in a window or “frame,” surrounded by the contents of the initial site. See Maureen O’Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 MINN. L. REV. 609, 633 (1998). The URL of the initial site continues to be displayed, rather than the URL of the linked site. See id. at 637.

No legal delineation has yet been made between referencing the URL’s of other sites and providing direct links to those sites. See In the Courts, 9 CYBERSPACE LAW. 27 (Dec. 1999). Perhaps this is because the two methods of accessing another site are similar in
Note briefly explores the history of the Internet, link technology, and the basic forms of protection afforded to copyrights in the United States. Part II discusses the district court’s decision in Utah Lighthouse. Part III explores the concept of contributory infringement and considers possible methods for analyzing links to illegally copied material that may be used to battle cyberspace piracy. It argues that ensuring the rights of copyright owners should not come at the expense of the freedoms historically associated with the Internet. Part III also assesses the benefits of allowing links, and the feasibility of monitoring infringing behavior. This Note concludes that not all linking to protected content should place the link provider at risk of direct or contributory infringement. In order to prevent a chilling effect on linking and use of the Internet in general, courts should require more than mere linking to impose liability for infringement. Suits alleging contributory liability for copyright infringement should not be used as pretexts for stifling criticism or any other form of protected speech, and injunctions should not be issued in such cases until a decision on the merits has been made.

I. Background

Over the past decade, tensions have risen between traditional copyright law and emerging technology. Debate has ensued over whether, and to what extent, cyberspace should be treated differently from conventional media. This problem continues, perhaps in part, because “[i]n the visionary polemics of the Internet gurus, the Copyright Act is an embarrassing relic of the hard-copy dark ages, which should be abolished altogether in the virtual utopia of the Internet.” Those who have been involved with the Internet for years are nowfrowning upon recent efforts to regulate this traditionally ungoverned territory.

12. "Piracy" refers to the “illegal printing or reproduction of copyrighted matter or to unlawful plagiarism from it and to the unlawful reproduction or distribution of property protected by patent and trademark law.” Black’s Law Dictionary 795 (6th ed. 1991).


15. Id.

A. The Internet and Its Origins

The Internet is a global computer network with over 200 million users.\(^\text{17}\) It is decentralized by design, and has been decentralized since its inception in 1969.\(^\text{18}\) Each host computer is independent, allowing its operators to choose between various Internet services.\(^\text{19}\) The World Wide Web ("Web") promotes the use of the Internet by helping individual users sort through the mass of available information.\(^\text{20}\) The Web is a series of documents stored in different computers throughout the world.\(^\text{21}\) Using a "hypertext"\(^\text{22}\) formatting language called hypertext markup language ("HTML"), the Web allows programs to display "HTML documents containing text, images, sound, animation and moving video."\(^\text{23}\) As stated in \textit{ACLU v. Reno},\(^\text{24}\) "[t]hough information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through [Web] protocols allows all of the information to become part of a single body of knowledge."\(^\text{25}\)

The Internet's history spans more than thirty years.\(^\text{26}\) It began in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA"), and was at that time called ARPANET.\(^\text{27}\) Initially linked only to computers and computer networks owned by the military, defense contractors, and university laboratories, the Internet later evolved to allow researchers across the country (and eventually


\(^{21}\) See \textit{id}.

\(^{22}\) Hypertext is a system for linking information together in a structured fashion. See \textit{WEB LINKING AGREEMENTS}, \textit{supra} note 7, at 7. Information can be linked based on a variety of criteria, including the similarity or relatedness of subject matter. See \textit{id} at 1. Once an object is selected, the user can see all the other objects that are linked to it and can move from one object to the next. See "Hypertext," \textit{Webopedia Online Dictionary and Search Engine} (visited June 19, 2000) <http://webopedia.internet.com/TERM/h/hypertext.html>. Hypertext systems are therefore particularly useful in organizing and browsing through large databases that consist of disparate types of information. See \textit{id}.

\(^{23}\) \textit{id}.


\(^{25}\) \textit{id} at 836.


\(^{27}\) See \textit{Reno}, 929 F. Supp. at 831.
worldwide) to access and use the supercomputers located at a few key universities and laboratories. Throughout this period, the network was a "self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communication without direct human involvement or control." The network was designed to automatically re-route communications if one or more individual links was damaged, so that research and communications could continue. The system encouraged creation of multiple links with each computer on the network to achieve a resilient communications medium. Similar networks began to develop during this period as well, eventually linking together to make up what is today known as the Internet or the "Net."

B. Linking Technology

When attempting to reach a particular Web site, an Internet user has several options. One such option consists of clicking on a hypertext link leading directly from one site to another. Links are short sections of text or image that refer to documents on remote sites. Use of these links obviates the need to memorize long URL

28. See id.
29. Id.
30. See id.
31. See id.
32. See id. at 832.
33. For purposes of this article, the term "linking" will be used in a general sense to refer to the various methods by which a viewer can quickly access information from other Web sites. For a thorough discussion of linking, framing, and related techniques, see Tsilas, supra note 5, at 85. See also Lydia Pallas Loren, The Changing Nature of Derivative Works in the Face of New Technologies, 4 J. SMALL & EMERGING BUS. L. 57 (2000) (arguing that courts should look to copyright law's fundamental principles in order to establish a set of rules for derivative works in digital media); Committee on Computer Law, Caching on the Internet and the Proxy Caching Notice Project: Avoiding an Internet Copyright Dilemma, 52 J. Mo. B. 968 (1997) (describing caching technology and analyzing whether caching is copyright infringement).

Ted Nelson is credited with inventing the hypertext database system (the basis for what we now refer to as linking) in the 1960s. See "Hypertext," Webopedia Online Dictionary and Search Engine (visited June 19, 2000) <http://webopedia.internet.com/TERM/h/hypertext.html>. Recently, British Telecom has claimed that it owns a patent (No. 4,873,662) on hyperlink technology. See Craig Bicknell, British Telecom: We Own Linking (visited Sept. 25, 2000) <http://www.wired.com/news/politics/0,1283,37095,00.html>. The company alleges it has owned the patent since 1989 and now wants to be paid. See id.

35. See id. at 836. When a user selects a site by clicking on the text or image, the user's Web browser reads the software code, finds the location on the Internet that matches the address, and requests a copy of the Web page. See Tsilas, supra note 5, at 85–86.
addresses. Links can be created without any assistance or knowledge from the owner of a linked site. In fact, Mr. Berners-Lee, the originator of the hyperlink, believes that there is no need to ask before creating a link to another site. Net etiquette or “netiquette” suggests that one send an e-mail message to the owner of the linked site notifying her that her site is being linked, but this courtesy may be an insufficient control mechanism as the community of Internet users grows increasingly diverse.

C. Copyright Infringement

1. The Copyright Act of 1976

The Constitution empowers Congress to legislate copyright and patent statutes. Among the many powers granted to Congress is the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The Copyright Act of 1976 (“Copyright Act” or “Act”), as amended, now governs copyright law in the United States. The Copyright Act is intended to provide an incentive to creators in the form of a monopoly in the expression of their ideas. It is not a monopoly in an idea itself, however, only in the way the idea is expressed. Registration is not required for copyright protection under the Act. Copyright protection is afforded as long as the expression is an “original work of authorship fixed in a tangible medium of expression.” An expression is “fixed in

37. See Web Linking Agreements, supra note 7, at 2.
40. See id.
42. U.S. Const. art. I, § 8, cl. 8.
44. See id.
45. See Leaffer, supra note 41, at 6. The term “copyright” connotes “a negative right, the right of the owner to prevent copying of his work.” Id. at 3.
46. See Michael Landau & Donald E. Biederman, The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage, 21 Hastings Comm. & Ent. L.J., 717, 723 (1999); see also 17 U.S.C. § 102(b) (1994) (stating that “in no case does copyright protection ... extend to any idea ... regardless of the form in which it is described, explained ... or embodied in [a] work”).
a tangible medium of expression" when its "embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."48

Section 101 of the current Copyright Act defines "copies" as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."49 There was once significant debate over whether viewing a document on one's computer was equivalent to making a copy.50 While some continue to assert that such viewing is not necessarily copying,51 the question was essentially settled when the Ninth Circuit, in MAI Systems Corp. v. Peak Computer, Inc.,52 concluded that copying results when material is transferred to a computer's Random Access Memory ("RAM").53 Therefore, by extension, copyright law applies to cases in which one places a document on the Internet without authority.

2. Direct Infringement

Copyright infringement entails ownership of a copyright by one person and unlawful copying by another.54 The United States Supreme Court, in Feist Publications, Inc. v. Rural Telephone Service,55 specifically enumerated the elements a plaintiff must demonstrate for a successful infringement claim: (1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.56 Direct copyright infringement therefore occurs when defendants make an unauthorized copy of a protected work. Copyright infringement is a tort for which all persons participating in the infringement

49. Id.
50. Representations stored for only a fleeting period arguably do not meet the requirement of 17 U.S.C. section 101 that the fixation be "for more than a transitory period." Id. (emphasis added).
52. 991 F.2d 511 (9th Cir. 1993).
53. See id. at 518; see also discussion infra Part III.A.1.
56. See id. at 358–59.
are liable. While lack of knowledge or intent may affect the remedy granted, neither is a defense to copyright infringement.

Infringement concerns frequently arise where linking is involved. While no reported cases forbid all linking outright, courts have proscribed linking under certain circumstances. Some commentators have argued that a user may be susceptible to a claim of direct infringement because she is making a copy of the protected material when she clicks on a link and downloads a Web page. A more liberal approach, however, suggests that "innocent" infringement will be allowed if the user is unaware that the downloaded material is protected. Yet determining such knowledge or intent can be extremely difficult where the Internet is concerned. There is little to prevent a person browsing the Web from claiming she was unaware that material was illegally copied.

Immunity from infringement suits may also exist if users can prove the material being copied was not protectable material under

58. See id.
59. See, e.g., Universal City Studios, Inc. v. Reimerdes, 55 U.S.P.Q.2d (BNA) 1873 (S.D.N.Y. 2000) (prohibiting linking to any Web site containing a decryption system called DeCSS which circumvents the protection scheme called Content Scramble System ("CSS") and allows CSS-protected motion pictures to be copied and played on devices (i.e., computer hard drives) lacking the licensed decryption technology); Ticketmaster Corp. v. Tickets.com Inc., 54 U.S.P.Q.2d (BNA) 1344 (C.D. Cal. 1999) (alleging copyright violations related to a practice known as "deep linking"); eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058 (N.D. Cal. 1999) (claiming links to auction items placed on defendant's site without authorization were infringing owner's copyright); Playboy Enters., Inc. v. Frena, 899 F. Supp. 1552 (M.D. Fla. 1993) (granting plaintiff's partial summary judgment motion due to defendant's operating a computer bulletin board service displaying unauthorized copies of copyrighted photographs). But see Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362 (E.D. Va. 1995) (awarding attorney's fees to defendant newspaper and granting its motion for summary judgment after concluding that the newspaper's publication of portions of plaintiff's copyrighted materials fell under the fair use exception to copyright infringement).
60. "Download" is a term often used to describe the process of copying a file from an online service to one's own computer. See "Download," Webopedia Online Dictionary and Search Engine (visited Sept. 3, 2000) <http://webopedia.internet.com/TERM/d/download.htm#>.
61. See, e.g., Tsilas, supra note 5, at 89. But see Samuelson, supra note 51, at 21 (questioning the interpretation of current law that electronic copies existing only in RAM are "fixed").
62. The Copyright Act provides a safeguard for innocent infringers where the infringer is not aware and "had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. § 504(c)(2) (Supp. IV 1998). In this situation, the court has discretion to reduce the award of statutory damages to a sum of not less than $200. See id. The court in its discretion may likewise "allow the recovery of full costs . . . [and] may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505 (1994).
the Copyright Act. Section 107 of the Act refers to material used "unlawfully." However, copying a work without the owner's consent does not necessarily mean it was copied unlawfully. To avoid potential liability, one may get the owner's permission to legally copy a protected work. Alternatively, a user may claim certain protections afforded by the Act itself, regardless of whether the owner's permission was obtained. One such protection is provided by the fair use doctrine, a defense that allows a secondary user to legally make copies of protected material without the owner's consent while avoiding infringement claims.

II. The Case: Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.

A. The Parties

On behalf of the Church of Jesus Christ of Latter-day Saints ("Mormon Church" or "Church"), plaintiff, Intellectual Reserve, Inc., moved for a preliminary injunction to prevent the Tanners, two long time critics of the Church, from posting particular Internet addresses on their Web site. The defendants' conduct pointed Internet users to three sites containing alleged pirated copies of the Church Handbook of Instructions ("Handbook"), a book relating to the affairs of the Mormon Church and distributed to Church members to allow them to administer Church affairs. Selections taken from the Handbook were originally included on the Tanners' Web site, along with information describing Church discipline and instructions for removing one's name from the Mormon Church's membership list. The Tanners received an electronic copy of the material from an

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64. Id.
65. Id.
66. Id.
67. Id.
68. See id. For a discussion of the fair use doctrine, see also infra Part III.B.1.
69. Intellectual Reserve, Inc. is a corporation that manages the Mormon Church's intellectual property. See Lesavich, supra note 9, at C9.
70. See id.
73. See Lesavich, supra note 9, at C9.
anonymous source. They said they were inspired by numerous requests over the years to put the information online.

B. Procedural History

In October 1999, the Mormon Church sued the Tanners for posting parts of the Church's Handbook on their Web site. Claiming that the Handbook was protected by federal copyright law, the Mormon Church filed a motion for a temporary restraining order ("TRO") to prohibit the Tanners from posting Handbook materials on their site. The court granted the TRO, which required the Tanners to remove all allegedly infringing materials from their Web site.

The Tanners later posted a notice on their Web site that the Handbook was back online. They included the addresses of three other Web sites containing the Handbook materials that the Tanners themselves were forbidden from posting. Apparently, no direct relationship existed between the Tanners and the people operating the third party sites. The Tanners did not provide the Web site operators with the copyrighted material, nor did they receive any compensation for referring viewers.

C. The Parties' Contentions

The Mormon Church contended that the Tanners would both directly infringe on the Church's copyright and contribute to infringement by others, unless the court granted a preliminary injunction. The proposed injunction would force the Tanners to remove not only those materials copying verbatim from the Handbook, but also the addresses of other Web sites where interested parties could find the materials. In their response to the motion for a preliminary injunction, the Tanners claimed that the scope of the proposed in-

74. See id.
75. See id.
76. See id.
77. See id.
78. See id. at C10. The Tanners posted 17 pages taken from the Church's two volume, 330 page Handbook, which constituted about 10% of the pages in that volume. See id. The total material posted on their Web site contained about 5% of the entire two volume Handbook. See id.
79. See Utah Lighthouse, 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999). The notice read: "Church Handbook of Instructions is back online!" Id.
80. See id. at 1292.
81. See id. at 1293.
82. See id.
83. See id. at 1291.
84. See id. at 1295.
junction was overly broad, contending instead that only those items directly infringing on the Church’s copyright, and not mere references to the other sites, should be prohibited.

D. The Court’s Rationale

The United States District Court for the District of Utah granted the Mormon Church’s motion for a preliminary injunction, determining that it was “in the public’s interest to protect the copyright laws and the interests of copyright holders.” Judge Campbell found that the Church was likely to establish that the third parties posting material on the three referenced Web sites directly infringed the Church’s copyright. Any viewers browsing the sites would be making copies of the protected work, and would thereby also be infringing. Because the Tanners were actively encouraging others to view these sites, they were likely engaging in contributory infringement. The Church could thereby demonstrate the requisite presumption of injury necessary for an injunction. The injunction required that the Tanners: (1) remove the allegedly infringing material from their Web site; (2) remove the addresses of other sites containing the material; and (3) refrain from reproducing or distributing hard copies of the material to others.

III. Analysis

While some copyright owners would probably prefer to view Utah Lighthouse as condemning the process of linking in general, the deci-

85. See id. at 1291.
86. See id. at 1294–95.
87. Id. at 1295.
88. See id. at 1292.
89. The term “browse,” as used by the court in Utah Lighthouse, means to call up or open a Web site onto a computer screen. See id. at 1292 n.3.
90. See id. at 1294.
91. See id. at 1295.
92. The Copyright Act allows a court to “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a) (1994). In determining whether a plaintiff is entitled to injunctive relief, a court will often consider the following factors:
(1) substantial likelihood that the movant will eventually prevail on the merits;
(2) a showing that the movant will suffer irreparable injury unless the injunction issues;
(3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and
(4) a showing that the proposed injunction, if issued, would not be adverse to the public interest.
Lundgren v. Claytor, 619 F.2d 61, 63 (10th Cir. 1980).
93. See Utah Lighthouse, 75 F. Supp. 2d at 1295.
sion is more limited. Because there has been no federal appellate court opinion on the issue to date, the overall legality of linking remains an open question. Instead, *Utah Lighthouse* is significant because it explicitly held that actively encouraging others to seek out infringing material on the Web (and providing the means to access it) will not be tolerated.94 However, it must be remembered that the Tanners were apparently using linking technology to circumvent the TRO requiring them to remove selections of the Handbook from their Web site.95 Thus, the decision, if upheld, should be read narrowly to prevent a chilling effect on one of the most valuable aspects of the Internet.96 Furthermore, *Utah Lighthouse* should be viewed as a warning of how copyright law can be misused to check otherwise protected expression.

A. Contributory Infringement

Liability for copyright infringement does not end with the directly-infringing party. Although federal copyright law does not expressly impose liability for contributory infringement,97 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.”98 As noted by the United States Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*,99 “an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who au-

94. See id. at 1294–95. Compare Universal City Studios, Inc. v. Reimerdes, 55 U.S.P.Q.2d 1873 (BNA) (S.D.N.Y. 2000). The defendants in Reimerdes engaged in what they termed “electronic civil disobedience” whereby they continued to support links to other sites offering the very material (the DeCSS computer program) they were prohibited from posting. Id. at 1876. The defendants were enjoined from linking to other sites with DeCSS because, according to the court, the defendants “obviously hoped to frustrate plaintiffs’ recourse to the judicial system by making effective relief difficult or impossible.” Id. at 1883. The court also noted that DeCSS was “created solely for the purpose of decrypting CSS.” Id. at 1888.

95. See Lesavich, supra note 9, at C9.

96. At the other extreme, however, it is important to note that a rule which tolerates overly permissive linking to infringing material could encourage and support mass piracy. See Carl S. Kaplan, *Assessing Linking Liability* (visited Oct. 6, 2000) <http://www.nytimes.com/2000/09/08/technology/08CYBERLAW.html>.

97. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984) (holding that the sale of copying equipment does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes).

98. Id. at 435.

thorizes the use of a copyrighted work without actual authority from the copyright owner.”

The standard for contributory liability was set in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* where the Second Circuit stated that liability for contributory infringement is proper when one “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Gershwin* involved an events promoter, Columbia Artists Management, Inc. (“CAMI”), which was held liable for contributory infringement because it “knowingly participated” in, and did not police, infringing conduct by its artists who had performed protected works without securing a copyright license. Affirming summary judgment in favor of the plaintiff, the Second Circuit concluded that CAMI was guilty of participating in the formation and direction of the artists’ activities to the extent that it “caused [the] copyright infringement.”

No contributory infringement liability can arise from encouraging or assisting a party to engage in an infringing act when that “party’s use of the work would not violate the Copyright Act.” Thus, to prevail on a claim of contributory infringement, the plaintiff must show that the underlying copying violates the Copyright Act. In other words, there must be direct infringement before a claim for contributory infringement can exist.


While many questions about copyright infringement still plague Internet users, it is now widely accepted that, for purposes of copyright law, transferring material to a computer’s RAM entails making a copy of the material. This is significant because if the copying is done illegally, it can lead to direct infringement. The Ninth Circuit, in

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100. *Id.* at 435 n.17.
101. 443 F.2d 1159 (2d Cir. 1971).
102. *Id.* at 1162.
103. *See id.* at 1163.
104. *Id.*
106. *See Subafilms, Ltd. v. MGM-Pathe Communications Co.,* 24 F.3d 1088, 1092 (9th Cir. 1994) (analyzing extra-territorial application of copyright laws in the context of unauthorized, domestic and foreign video distribution).
MAI Systems Corp. v. Peak Computer, Inc.,108 examined a company’s potential liability for former employees who left their jobs with plaintiff MAI Systems Corp. ("MAI") to join one of its competitors, defendant Peak Computer, Inc. ("Peak").109 After four of MAI’s employees left for Peak, several of MAI’s customers switched to Peak for servicing of their computers.110 MAI then filed suit, claiming, among other things, that Peak’s running of MAI software licensed to Peak customers constituted copyright infringement.111 The district court issued a preliminary injunction prohibiting Peak from infringing MAI’s copyrights in any manner and from “using, publishing, copying, selling, distributing or otherwise disposing of any copies or portions” of certain computer programs belonging to MAI.112

On appeal, Peak contended it used MAI’s software only “to the extent that the repair and maintenance process necessarily involve[d] turning on the computer to make sure it [was] functional and thereby running the operating system.”113 The Ninth Circuit relied on the district court’s conclusion that copying for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer’s RAM.114 The appellate court determined this was consistent with the lower court’s finding that “the loading of copyrighted computer software from a storage medium (hard disk, floppy disk, or read only memory) into the memory of a central processing unit (‘CPU’) causes a copy to be made.”115

Peak also argued that the “loading of copyrighted software [did] not constitute a copyright violation because the ‘copy’ created in RAM is not ‘fixed.’”116 The Ninth Circuit disagreed, however, concluding that MAI had adequately shown that the representation created in the RAM was “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more

108. 991 F.2d 511 (9th Cir. 1993).
109. See id. at 517. MAI used to manufacture computers and design software to run its computers, and, at the time of the lawsuit, continued to service its computers and software. See id. at 513. Peak maintained computer systems for its clients, a large number of whom used MAI computers. See id.
110. See id. at 513–14.
111. See id. Peak’s technicians often used MAI’s diagnostic software when they serviced their clients’ MAI computers. See id. at 518. The software was built into MAI computers and was loaded into the computer’s RAM when the machine was turned on. See id.; see also Leaffer, supra note 41, at 48.
112. MAI, 991 F.2d at 513.
113. Id. at 518.
114. See id.
115. Id.
116. Id.
than transitory duration," as required by the Copyright Act. Thus, MAI removed much of the ambiguity regarding when a copy is considered to be "fixed" for purposes of the Copyright Act.

2. Inducing Another to Infringe

Mere knowledge that protected material is being copied is not sufficient to warrant contributory liability. Courts tend to look for a deeper level of involvement on the part of the alleged contributory infringer. In Sony, the United States Supreme Court noted that under an earlier version of the Act, courts differed over the degree of involvement required to render a party liable as a contributory infringer. It has been argued that "the addition of the words 'to authorize' in the 1976 Act . . . merely clarif[y] that the Act contemplates liability for contributory infringement, and that the bare act of 'authorization' can suffice." Support for this position is found in the legislative history of the Act:

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

The strongest cases for contributory infringement generally involve a related defendant with actual knowledge of the infringement who comes close to directly participating in the infringement. Elektra Records Co. v. Gem Electronic Distributors, Inc. is a classic example of this type of contributory infringement. In Elektra, the defendant

117. Id.
118. See id.
120. See Elektra Records Co. v. Gem Electronic Distribrs., Inc., 360 F. Supp. 821, 825 (E.D.N.Y. 1973); see also Sony, 464 U.S. at 435 (discussing how contributory infringement is "merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another").
122. Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1093 (9th Cir. 1994).
124. As used here, "related defendant" refers to all situations where one can be held liable for the acts of another. See Leaffer, supra note 41, at 399.
125. See id.
music stores provided all of the necessary materials to allow store shoppers to make infringing copies of musical works. The defendants sold blank tapes, loaned shoppers original copies of the music, and provided access to machines for duplicating. The district court granted a preliminary injunction, finding the defendants had all but directly participated in the infringement. The defendants were not only aware of the infringing activity, but were actively encouraging the behavior.

*Sony* provides an example of a more tenuous link between the alleged contributory infringers and the infringing activity. In this case, the contributory infringement claim was based on merely providing the equipment necessary to engage in infringing activity. *Sony* concerned the rights of home viewers to tape television programs on their video tape recorders ("VTRs") for viewing at a later time ("time-shifting"). Universal's copyrights protected some of these programs. Universal claimed that Sony, as manufacturer of the recording technology, was contributorily liable for consumers taping copyrighted works off of commercially sponsored television. The United States Supreme Court disagreed, however, reversing the decision of the Ninth Circuit Court of Appeals. The Court held that sale of the VTRs to the general public did not constitute contributory infringement since the machine was capable of commercially significant non-infringing uses. It also determined that Universal had failed to demonstrate a likelihood of "nonminimal harm" to the potential market for their copyrighted works. *Sony* demonstrates the continuing uncertainty surrounding the level of involvement required before a court will find a defendant guilty of contributory copyright infringement. It does seem clear, however, that a defendant who comes close to directly participating in the infringement is in greater danger than one who keeps a fair distance.

The Tanners' level of involvement can be viewed in several ways. Like the court in *Elektra*, the court in *Utah Lighthouse* considered the

127. See id. at 823.
128. See id.
129. See id. at 825.
130. See id.
132. See id. at 418.
133. See id. at 419–20.
134. See id. at 420.
135. See id. at 421.
136. See id. at 456.
137. Id.
Tanners to have actively encouraged others to view copyright infringing materials by bringing attention to the Handbook materials available on other Web sites, thereby directly participating in the alleged infringement. On the other hand, the Tanners can be seen as providing information to educate others about the Mormon Church. By posting the addresses of Web sites with the allegedly infringing materials, the Tanners were providing sources in much the same way an author provides sources in a bibliography or footnote. The intensity with which they encouraged others to view the sites can be justified by a desire to inform.

B. Defenses to Contributory Infringement—Fair Use and First Amendment Considerations

In *Utah Lighthouse*, the court concluded that the requirements for a claim of contributory infringement were met. Surprisingly, however, the court did not address some viable defenses which would have worked in the Tanners’ favor. Both the fair use defense and the protection of the First Amendment would presumably have allowed the Tanners’ conduct to go unpunished. Instead, important options were left unconsidered.

1. Fair Use: Limitations on Exclusive Right

The fair use doctrine is perhaps the most important defense

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139. See id. at 1294.
140. See Lesavich, supra note 9, at C10.
141. Under section 106 of the Copyright Act an owner has the following exclusive rights in her copyrighted works:

- (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 works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

142. Under section 107 of Act, notwithstanding sections 106 and 106A, “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news,
to copyright infringement available.\textsuperscript{143} It allows a third party to use a copyrighted work in a reasonable manner without the owner's consent.\textsuperscript{144} Despite being codified in the Copyright Act, the fair use doctrine remains an "equitable rule of reason to be applied where a finding of infringement would either be unfair or undermine the progress of science and the useful arts."\textsuperscript{145}

Four criteria are weighed in a fair use analysis:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{146}

In addition to the factors enumerated, a court may consider other factors such as lack of good faith and industry custom or practice.\textsuperscript{147} More recently, courts have examined these factors in sequence, usually placing emphasis on the fourth factor, market effect.\textsuperscript{148} The factors are not always distinct from one another, so a court's analysis can involve significant overlap. In fact, the United States Supreme Court has noted that the factors are not to be treated in isolation, but rather are to be weighed together in light of the purposes of the Copyright Act.\textsuperscript{149}

In \textit{Utah Lighthouse}, the Mormon Church accused the Tanners of both direct and contributory infringement. However, even if the Tanners knowingly participated in the alleged infringing activity through their efforts to direct viewers to the infringing Web sites, the Tanners' actions could be protected as fair use.\textsuperscript{150} Several factors work in the Tanners' favor, particularly the first (purpose and character of use), third (amount and substantiality of portion used), and fourth (market effect). Industry custom and practice arguably favor the defendants as

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\textsuperscript{143} See Gorman & Ginsburg, \textit{supra} note 57, at 609.
\textsuperscript{144} See id.
\textsuperscript{145} Leafer, \textit{supra} note 41, at 434.
\textsuperscript{148} See Leafer, \textit{supra} note 41, at 433.
\textsuperscript{150} See Lesavich, \textit{supra} note 9, at C10.
\end{flushleft}
well. However, the discretion left to the court with respect to the good faith element arguably favors the Church.

Under the first factor, the purpose and character of the use is significant because the Tanners were arguably not copying with a financial motive. Instead, they were providing portions of the Handbook as part of their criticism of the Mormon Church. Mirroring the language of section 107(1) of the Act, this use could be viewed as being "for nonprofit educational purposes." The Tanners' Web site additionally provided instructions for removing one's name from the Church's membership list. The Tanners could potentially have argued that they were educating others about the Mormon Church and its practices.

There is a general presumption against the fair use defense when a challenged use is for commercial gain, although a commercial purpose will not conclusively negate a finding of fair use. Many infringement suits today involve copies thought to interfere with one's commercial enterprises. By contrast, the Church Handbook at issue in Utah Lighthouse was an internal handbook with a limited production. These factors therefore appear to benefit the Tanners because their motive seems to be more in the nature of criticism or comment rather than an attempt to exploit a copyright for financial gain.

The nature of the copyrighted work is also relevant, since public policy demands that certain types of works be more freely accessible to the public. Accordingly, the "fair use privilege is more extensive for works of information such as scientific, biographical, or historical works than for works of entertainment." The Handbook is just the type of material the fair use doctrine demands be more freely accessible. As former members and long time critics of the Mormon Church, the Tanners claimed to be educating others on Church practices and beliefs. Their Web site contained information related to their non-profit organization. The Tanners were not posting the materi-
als as part of a commercial endeavor, nor were they connected to the third parties later posting the infringing materials.\textsuperscript{162} The amount and substantiality of the portion used, in relation to the copyrighted work as a whole, also factors into a court's fair use analysis.\textsuperscript{163} The Tanners posted only a small portion of the entire Church Handbook on their Web site.\textsuperscript{164} The excerpts were used to explain Church practices and views, not to benefit the Tanners financially.\textsuperscript{165} The Mormon Church's objection to the material being posted likely stemmed from a desire to stifle criticism pertaining to its group. A copyright infringement suit provided a vehicle for curtailing this unfavorable discussion allegedly being encouraged by the Tanners.

The effect of the Tanners' use of the protected material upon the potential market for, or value of, the copyrighted work is also relevant. Since the Tanners were not profiting from their posted materials, the Mormon Church should have a more difficult case proving infringement. Presumably the Church was not selling the unpublished material\textsuperscript{166} for the exclusive purpose of making money. More likely, the material was distributed to explain Church practices and to encourage others to join the Mormon Church. Distribution of select portions by the Tanners would not likely affect the potential market for the Handbook unless there was a market for it in a traditional economic sense. More likely, the Tanners' activities could only lessen people's desire for copies of the Handbook if they disagreed with the Handbook's message. The Tanners were publicizing the Handbook in a way to allow people to come to their own decisions about its contents.

2. First Amendment Considerations: Preliminary Injunction—An Unlawful Prior Restraint?

Pursuant to the Copyright Act, courts may enjoin certain speech without violating the First Amendment.\textsuperscript{167} However, a court must first make a reliable determination on the merits that the speech falls

\textsuperscript{162} See Lesavich, \textit{supra} note 9, at C10; \textit{Utah Lighthouse}, 75 F. Supp. 2d 1290, 1293 (D. Utah 1999).
\textsuperscript{164} See Lesavich, \textit{supra} note 9, at C10.
\textsuperscript{165} See \textit{id.} The "information including how to remove a person's name from LDS church rolls was posted for nonprofit, educational purposes." \textit{Id.}
\textsuperscript{166} See \textit{id.}
within the "copyright exception." Links to infringing sites may pose problems in this respect if a court grants an injunction against linking before making a reliable determination on the merits. Premature injunctions would allow copyright protections to interfere with First Amendment rights. When a defendant raises a credible argument that her use of copyrighted materials is protected as a fair use, she is entitled to a full hearing on the merits of the argument before the imposition of a preliminary injunction.

Considering that both the Copyright Act and the First Amendment derive their authority from the Constitution, the rights that they provide often result in significant conflict. Much has been written about this perceived tension between First Amendment protections and copyright law. Because links contain mixed elements of expression and functionality, a chilling effect in the linking context could raise grave constitutional concerns. The Fifth Circuit has stated: "The judgment of the [C]onstitution is that free expression is enriched by protecting the creations of authors from exploitation by others . . . . The [F]irst [A]mendment is not a license to trammel on legally recognized rights in intellectual property." The Copyright Act therefore serves as an exception to the First Amendment right to free speech, but only in limited circumstances.

prohibiting another's use of a copyright owner's expression). The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

169. See id.
170. See id. at 213.
171. See, e.g., O'Rourke, supra note 11, at 647; see also Lemley & Volokh, supra note 168, at 239. In the preliminary injunction context, this tension could have important repercussions since the modern American legal practice is unquestionably more favorable to plaintiffs than to defendants, and it is even more favorable to plaintiffs in copyright cases than in most other contexts. See id. at 165.
172. See Kaplan, supra note 96.
Some commentators have noted that the use of a preliminary injunction\textsuperscript{175} to prevent copyright infringement constitutes a prior restraint\textsuperscript{176} if courts enjoin speech before a reliable determination on the merits has been made that the speech does in fact fall within the "copyright exception."\textsuperscript{177} If Congress and the courts restrict speech that falls within this exception, there is no First Amendment violation.\textsuperscript{178} If speech is restricted before a determination on the merits, however, First Amendment implications can arise. In this respect, preliminary injunctions against posting URLs or links to other sites could constitute a violation of the First Amendment. Such injunctions would seem particularly susceptible to being characterized as prior restraints.\textsuperscript{179} For example, in cases where a court grants a preliminary injunction without entering into a fair use analysis, a user could be barred from linking to material that is not protectable under the Copyright Act. In these circumstances, it should not matter what role the alleged infringers play in the supposedly infringing activity. Their actions should be protected regardless. The fact that some federal circuit courts have upheld preliminary injunctions without considering the First Amendment cannot be accepted as precedent for the proposition that such injunctions are constitutional.\textsuperscript{180} As stated by the Supreme Court in \textit{Waters v. Churchill},\textsuperscript{181} "cases cannot be read as foreclosing an argument that they never dealt with."\textsuperscript{182}

In \textit{Utah Lighthouse}, the Tanners did not receive a full hearing on the merits before the court issued a preliminary injunction. The court

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{175} This discussion refers to preliminary injunctions. Permanent injunctions, by contrast, are entered after a final determination that the speech is not protected, and are generally viewed as constitutional. See Lemley & Volokh, \textit{supra} note 168, at 169–70.
\item \textsuperscript{176} A prohibited prior restraint "is an infringement upon constitutional right to disseminate matters that are ordinarily protected by the First Amendment without there first being a judicial determination that the material does not qualify for First Amendment protection." \textsc{Black's Law Dictionary} 829 (6th ed. 1991).
\item \textsuperscript{178} See Lemley & Volokh, \textit{supra} note 168, at 212. But note that if the otherwise infringing activity furthers free speech interests, then the First Amendment should prevail. See Shipley, \textit{supra} note 167, at 996.
\item \textsuperscript{179} The United States Supreme Court has expressed concern about prior restraints, fearing that "communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}, 413 U.S. 376, 390 (1973).
\item \textsuperscript{180} See Lemley & Volokh, \textit{supra} note 168, at 239.
\item \textsuperscript{181} 511 U.S. 661 (1994) (plurality opinion).
\item \textsuperscript{182} \textit{Id.} at 678 (citing \textit{United States v. L.A. Tucker Truck Lines, Inc.}, 344 U.S. 33, 38 (1952)).
\end{enumerate}
\end{footnotesize}
failed to consider, among other issues, whether the actions could be protected as fair use. If the court had considered the prior restraint issue, the Tanners may have also succeeded on a First Amendment claim. In the future, courts should not issue preliminary injunctions without first undertaking a more rigorous evaluation of these possible defenses.

C. Suggestions After Utah Lighthouse

1. Limit Unwelcome Links, Not All

The controversy regarding unwelcome links has put the future of all linking in jeopardy. However, the problems experienced in a relatively small number of transactions should not restrict use for the hundreds of thousands that do not implicate such concerns. Links have been referred to as the “signature characteristic of the World Wide Web.” It has also been stated that “the power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.” Much of the Web’s appeal comes from its ability to instantaneously link one site to another, and, in most circumstances, linking does not lead to conflict. There is arguably as much of a social benefit to the freedom to link as there are associated costs. To protect their work, some copyright owners choose to use linking agreements to cut down on unwanted linking. Others view linking as beneficial because it provides extra traffic to the linked site.

Many believe cyberspace rules exist independently of traditional intellectual property law. Others note that copyright and trademark laws have been adapted since the beginning to meet the changing demands of technology. It would be unfortunate, in this respect, if

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183. See, e.g., Sandburg, supra note 5, at 1; see also Martin H. Sampson, Hyperlink at Your Own Risk, N.Y.L.J., June 24, 1997, at 1.
186. See O’Rourke, supra note 11, at 649.
187. See discussion infra Part III.C.2. The barrier to entry that could result from a requirement to seek permission before linking could itself operate almost like a prior restraint or undue burden on speech and should therefore be discouraged absent a compelling interest. See O’Rourke, supra note 11, at 654.
188. See O’Rourke, supra note 11, at 644.
189. See Edward Rothstein, Swashbuckling Anarchists Try to Eliminate Copyrights From Cyberspace (visited Oct. 6, 2000) <http://www.nytimes.com/library/tech/00/06/biztech/articles/10copyright.html> (discussing the “freedoms that were foundational” in the origins of the Internet as a model for aspiration).
190. See Bond, supra note 5, at 188.
numerous restrictions were placed on what was once envisioned as a forum for free exchange of information and ideas. The United States Supreme Court in *Sony* stated that “from its beginning, the law of copyright has developed in response to significant changes in technology.” The Court then went on to explain that “it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection.” These pronouncements demonstrate a flexible attitude toward issues involving the interplay between technology and intellectual property. Such news is encouraging because it suggests that future linking liability will be limited, and the majority of “unauthorized” links may still be permitted.

2. **Employ Technical Mechanisms to Enable a Site to Prevent Undesired Linking**

Regardless of one’s view on the appropriate level of regulation required for intellectual property in the cyberspace context, the focus must be on limiting only unwanted links. The troubles experienced in protecting some authors’ works should not produce an overall negative impact on the Internet. Where feasible, precautions should be taken to avoid such impact. In many cases links are provided solely to refer a user to other sources, not to exploit technology. Therefore, utilizing available technology to bar only unwanted linking is important. One method is for a programmer to write the Web page’s HTML code to recognize links from undesired sites and to refuse to process them. Another option is to require a password for entry into a site. Although some of these measures would add an extra step to visiting a Web site, thus cutting the efficiency of linking, many transactions could remain unmonitored by owners of the linked sites. In fact, Web site authors putting information on the Web often do so in hopes of gaining a wider audience for their material. Monitoring links to this type of material will remain unnecessary.

If these and other available methods do not provide lasting protection to copyright holders, it is the legislature’s responsibility to provide an alternative solution. Commenting on the judiciary’s reluctance to expand copyright protections without explicit legislative guidance, the Supreme Court in *Sony* stated: “Congress has the consti-
tutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."195 The Sony decision, however, dates back to 1984. At that time the legislature may have been able to keep pace with technological innovations. Today the pace of technology provides Congress an even greater challenge.

3. **Distinguish Fair Use Criticism from Commercial Exploitation**

People copy protected work for numerous purposes, some more laudable than others. The fair use doctrine attempts to protect one's right to the more worthwhile options. By balancing the need to induce authors to create with the public's interest in the dissemination of ideas, the fair use doctrine is solicitous of free speech interests.196 "The doctrine permits a defendant to reproduce some protected expression for a productive purpose such as criticism or news reporting."197 The defense is not usually allowed, however, when the defendant's use detracts from the use of the original, such as when it is undertaken for a commercial or profit-making purpose.198 When protected material is used in this manner, it is presumptively unfair to copy the material. It is therefore crucial to distinguish fair use criticism from commercial exploitation in the linking context.

Criticism of the Mormon Church's Handbook in *Utah Lighthouse* could arguably be considered fair use. "[A] copyright owner has no right to prevent a newspaper from publishing a devastating review of her new book, or even from using snippets of the book in the review to bolster the critique."199 By analogy, one could argue posting copyrighted materials should not be barred in situations like those presented in *Utah Lighthouse*, if the materials are used to "bolster [a] critique."200

There are valid arguments denouncing the exploitation of copyrights for commercial purposes. However, situations like those

197. *Id.*
198. *See* *id.*
presented in *Utah Lighthouse*, where there is very little possibility of profit from posting copyrighted materials on a Web site or linking to them, do not fall in this category. If courts continue to ban the use of material in this type of situation, there will be little hope of encouraging the free exchange of information on the Internet. Thus, distinguishing between criticism and commercial purpose is imperative to prevent a chilling effect on Internet use.

**Conclusion**

*Utah Lighthouse* provides important lessons for those who supply links. The Tanners appear to have used linking to deliberately dodge a previous injunction against posting allegedly infringing materials on their Web site. Linking was enjoined in this instance because it was perceived as an attempt to circumvent a court order. Thus, *Utah Lighthouse* should serve as a lesson that exploiting technology in order to avoid an injunction will not be tolerated. But, it should not serve as a signal that all linking will lead to contributory liability. Links provided in good faith should not pose serious problems, nor should the monitoring of links become a full time occupation.

*Utah Lighthouse* is an indication that where the Internet is concerned, First Amendment issues still remain problematic. Aside from the linking dilemma, the issue of criticism as fair use must be re-examined. Criticism has traditionally been, and should continue to be, protected. Enforcement of copyright laws in an uncertain environment should not interfere with this privilege.