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# AN OVERVIEW OF INTERNATIONAL JURISPRUDENCE ON EMBEDDED LINKING AND FRAMING

and related unfair-competition, passing-off and  
trademark questions

## 10 jurisdictions worldwide

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## INTRODUCTION

The Internet has become one of the most important channels to distribute and share content of whatever nature – whether that is plain text, images, videos or music. From the beginning, the possibility to link to other sites made it easy for publishers to integrate third-party content in their own offering. Meanwhile, simple linking has been spiced up – framing and embedding are both technical solutions to make third-party content appear as an integral part of your own website. From a legal point of view, these techniques, which are typical for the reference-based use of today’s Internet, raise difficult questions in particular in the fields of copyright and unfair competition law.

In recent years, various national jurisdictions saw court decisions on individual legal aspects of linking, deeplinking (i.e. linking to a specific sub-page rather than to the homepage), framing and embedding. In February 2014 the European Court of Justice ruled that links do not infringe copyright as long as the material is “freely accessible” on another website. The court decided that links do not reach a “new public” within the meaning of Sec. 3 (1) of the Directive 2001/29/EC because the content is already available to all internet users on the original website. While a German case regarding embedded videos is still pending the judges have expressed a rather technology-friendly approach with their recent ruling.

However, there still is a lot of uncertainty associated with embedding content from third-party websites. In this environment, it is crucial for publishers and content providers to know where the red lines are in individual jurisdictions – as what may be acceptable in Germany may already be inadmissible in the UK or France. Fieldfisher, together with various contributors from our international network, have

analysed the case law that is existing in this field of law, and prepared the following overview. We hope that this work will help you and your business in avoiding unnecessary risks when exploring the opportunities the Internet offers.

## EXECUTIVE SUMMARY

Even though the international case law picture is patchy and sometimes inconsistent, some guidelines deserve to be highlighted:

**Simple linking is admissible** in most jurisdictions under copyright and unfair-competition-law aspects. Some jurisdictions, however, see a potential copyright liability if the text of the link itself contains copyright-protected language. Deep-linking may also raise concerns in certain jurisdictions. In one jurisdiction (Netherlands) case law indicates that the fact that the material to which the link directed was not yet available to the public is decisive. This is consistent with the new ECJ judgement mentioned above.

**Embedding content** from a third-party source is the most debated issue at the moment. The legal situation can be regarded as unclear with a tendency that, before the Retriever case, embedding was regarded as **copyright infringement** in most jurisdictions and requires a license of the rights owner of that content.

From an unfair-competition/passing-off angle, in most jurisdictions there is a liability risk under specific circumstances, e.g. if the link is presented in the form of a registered trade-mark and the use is unfair or detrimental to the trademark; or if a trademark contained in a link or embedded content creates confusion about the relationship between the two sites.

## INITIAL QUESTIONS

1. Can it be a **copyright infringement** for a website or web application (the “Linking Site”) to provide a **simple link to another website** or web application containing legal content? I.e. the Linking Site refers the user directly to another website without any reproduction of copyright material on the server of the Linking Site.[1]
2. Can it be a **copyright infringement** for the Linking Site to **embed the copyrighted material of a third party** on the Linking Site without authorisation? I.e. there is a link on the Linking Site which refers the user to legal data on the third party’s server. The Linking Site dynamically generates a web page or stream on the user’s PC within the context of the Linking Site. There is no redistribution or hosting of content via the Linking Site.<sup>2</sup> Does it [2] make a difference if the user has to take action to see the content (e.g. a visual work may appear automatically but the user may need to click to download a sound recording)?
3. Are there any **trademark, unfair-competition or passing off issues** if logos or brand names are used to identify the third-party goods and services? Does it make a difference if there is a clear notification that the Linking Site and the embedded/linked site are unconnected third parties?

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<sup>1</sup> Please consider the reproduction right (Article 2 of the Copyright Directive 2001/29/EC) and the rights to communicate to the public and make available to the public (Article 3 of the Copyright Directive).

<sup>2</sup> Please consider the reproduction right (Article 2 of the Copyright Directive) and the rights to communicate to the public and make available to the public (Article 3 of the Copyright Directive).



## Recent Developments in the European Union

As pointed out in the introduction, the European Court of Justice (ECJ) has recently ruled that simple linking does not infringe copyright as long as the material is “freely accessible” on another website. In the case journalists of the Swedish newspaper “Göteborg Posten” filed a lawsuit against the media monitoring company Retriever Sverige that provides hyperlinks to newspaper articles to paying customers without the permission of the copyright owners.

The Swedish court of appeal in Stockholm submitted the case to the ECJ asking the judges in Luxemburg to interpret the European Union’s Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights. Specifically, the ECJ had to decide whether or not the simple link to articles of another website constituted an act of communication to the public and thus would violate the Directive.

Generally, only the copyright holder may communicate a work to the public or make it publicly available. Sec. 3 (1) of the Directive states, that authors are provided “with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Therefore, the crucial question the ECJ had to answer was, if links are an act of “communication to the public”. If so, website owners would need permission from the copyright owners, essentially jeopardizing the way the internet works: setting one link from one website to another.

The European judges found that permission is only necessary if the hyperlinks are directed at a “new” public. A public is “new”, the court said, if it “was not taken into account by the copyright holders when they authorised the initial communication to the public”. Because the articles have been freely accessible on the newspaper’s website without any paywall, the court ruled, the users of Retriever Sverige’s internet based service would not constitute a “new” public.

What is of particular interest regarding the implications for this international survey is the fact that the ECJ also ruled that there is no copyright infringement even if the user has “the impression that the work is appearing on the site on which the link is found, whereas in fact that work comes from another site”. This could imply that the ECJ not only meant to include hyperlinks but also other embedded content.

However, as there still is a similar case dealing with embedded YouTube videos pending with the court one should not draw too hasty conclusions about the matter. Until then the following overview will help with not getting lost in the different jurisdictions.



## OVERVIEW

	Simple linking	Embedded linking	Relevance of use of logos or brand names
<b>BELGIUM</b>	No copyright infringement, providing the links are not accompanied by reproduced text.	May constitute copyright infringement, but assessment is fact dependent.	May constitute copyright infringement, but assessment is fact dependent.
<b>CANADA</b>	The act of providing a simple link to copyright protected content, found on another website, does not constitute copyright infringement. (For example, providing a link to a photograph accessible via a photographer's website.) The general consensus regarding simple hyper-linking is that the owner of the copyright protected work has given an implied consent to the communication of the work through the posting of this work on a website.	Generally, embedding linking of copyright protected material does not constitute copyright infringement but analysis remains fact based as there may be terms of service agreements prohibiting the use of embedded links or framing. It does not make a difference if the user has to take an action to see the content.	If logos or brand names are used to identify third party goods and services, there could be trademark infringement, unfair competition or passing off issues related to linking or embedding, the outcome of which will depend on the application of the underlying basic principles to a given factual situation.
<b>DENMARK</b>	Generally, mere reference linking to main sites would not constitute a copyright infringement but it cannot be excluded depending on the specific circumstances that in rare cases mere reference linking could constitute a copyright infringement.	If copyright protected material is reproduced such use may constitute a copyright infringement. Further it may be regarded a communication to the public comprised by the exclusive right of the copyright holder.	E.g. use of a trademark as part of the link may constitute a trademark infringement/violation of the Marketing Practices Act.
<b>FRANCE</b>	No copyright infringement, except if the target site content is illegal.	Copyright infringement if the impression made on the user is a source of confusion.	Copyright infringement if there is a risk of confusion between the brands.
<b>GERMANY</b>	Simple linking and deep-linking does not constitute a copyright infringement.	Embedding/framing was regarded as admissible when done by a search engine if the rights owner did not undertake technical precautions against being found by the search engine. Inconsistent case law if embedding is done by normal websites.	Such use may constitute trademark infringement under certain circumstances but it will generally not constitute unfair competition.



	Simple linking	Embedded linking	Relevance of use of logos or brand names
<b>ITALY</b>	No case law. The prevailing position in the legal literature is that simple linking does not constitute a copyright infringement.	Framing has been considered a copyright infringement. High likelihood that the same assessment applies to embedding.	Linking may constitute an act of unfair competition if the user is unable to identify the source of information, or if confusion is created about the relationship between the Linking Site and the linked site. Disclaimer notices have no effect.
<b>NETHERLANDS</b>	Linking has been generally regarded as admissible; however recent case law shows that a link to material that has not been made publicly accessible can constitute a copyright infringement.	May constitute copyright infringement (communication to the public).	There may be a trademark infringement unless the Linking Site can invoke one of the trademark limitations under Directive 2008/95/EC.
<b>SWEDEN</b>	The legal question is subject to a request for preliminary ruling of the ECJ.	The legal question is subject to a request for preliminary ruling of the ECJ.	Information not available.
<b>UK</b>	Linking has been generally regarded as admissible; however recent case law indicates that if the link itself contains copyright-protected text a license may be required.	Potential liability of a website as secondary infringer.	There may be a passing off claim if a link creates confusion about the relationship with the linked site; or a trademark infringement unless the Linking Site can invoke one of the trademark limitations under Directive 2008/95/EC.
<b>USA</b>	Simple linking does not constitute an infringement if the link refers the user to the 'genuine article'. The fair-use doctrine may also apply in certain cases.	Inconsistent case law.	Criteria are whether the Linking Site profits from the links to another website, and whether confusion is effected to whom the linked site pertains.



### 1. Simple linking

No copyright infringement, providing the links are not accompanied by reproduced text.

**Relevant case law:** *Google Inc v Copiepresse et al*, Brussels Court of Appeal (9th Chamber) 5 May 2011.

**Findings:** In May 2011, the Belgian Court upheld an earlier 2007 decision which found that Google was liable for infringing the copyright of Belgian newspapers in French, through: (a) the provision of snippets of newspaper articles in its Google News service; and (b) links to cached copies of the articles in Google's general search results. The Court held that: (a) The reproduction of the press article titles and snippets would constitute copyright infringement (unless Google had included sufficiently original elements); (b) Google's cached copies of significant sections of newspaper articles constituted copyright infringement; and (c) the transmission of this content to the public infringed the rights holders' exclusive right of communication to the public. The Court rejected the 'fair use' exemption as Google News did not carry out any analysis or critique of the news articles, and the articles were not commented upon in any way. In addition, the cached links included works which were only available on the rights holders' sites for a fee. However, the Court did not find that Google's use of hyperlinks (which referred directly to the original site of origin) constituted copyright infringement, providing such links were unaccompanied by reproduced text.

### 2. Embedded linking

May constitute copyright infringement, but assessment is fact dependent: In the case below the administrator of the Linking Site could rightfully assume that implicit consent was given to embed the copyright-protected material on his website.

**Relevant case law:** *EBVBA Another Dimension of an Idea v X.*, Brussels Court of Appeal (15th Chamber) 19 March 2013.

**Findings:** In this case, the Brussels Court deemed that an answer to the question referred to the CJEU for preliminary ruling in *Nils Svensson (C-466/12)* ("If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29?") would be relevant to the case from a substantive point of view. However, since the Court ruled that there was no intention to commit a copyright infringement in accordance with article 80 of the Belgian Copyright Act, the substantive elements of the case did not need to be assessed.

In March 2013, the Brussels Court of Appeal ruled that the accused party (X.) did not demonstrate fraudulent intent (commercial purpose or pecuniary reward) when embedding copyrighted material on its website, more precisely by embedding a link to a Belgian short film uploaded on YouTube by a Russian provider. Since YouTube's general user conditions state that the person submitting content to this platform, agrees that the submitted content will not contain "any third party copyright material, or material that is subject to other third party proprietary rights [...]" (point 7.7 of Terms of Service of YouTube) and the person uploading or posting

content to YouTube, grants "to each user of the service, a worldwide, non-exclusive, royalty-free licence to access [this] content through the service, and to use, reproduce, distribute, prepare derivative works of, display and perform such content to the extent permitted by the functionality of the service and under these terms" (point 8.1.b of the Terms of Service of YouTube) and since the plaintiff claiming damages was aware of the copyright infringement by the Russian provider but failed to submit a complaint to YouTube in accordance with article 6 of the Terms of Service (the infringing content had been online for over a year), the accused party could reasonably assume that the content had been uploaded with the consent of the right holder.

It does not seem to make a difference whether the user has to take action to see the content or whether the content is generated automatically.

**Comment:** In doctrine, it is argued that a distinction must be made between links that exit the Linking Site (ordinary and deep links) and links through which the Linking Site embeds content of the embedded site (framing and embedded links). In Belgian case law, however, the distinction between a specific linking technique and the way it is perceived by the Internet user is not always clearly made. As a result, a specific linking technique is not always identified as being part of the correct 'technical' category. In most cases, issues of deep-linking are identified on a purely technical level. However, under the specific circumstances, since it was not immediately clear to the Internet user that the information displayed, mostly in a separate pop-up window (framing), was derived from a third party's website and only seemed to have been included in the Linking Site, this kind of technique could sometimes also be identified as an implicit form of



embedded linking (and vice versa).

**Relevant case law** (unpublished; interpretation based on doctrine): *W. Niemegeers/BVBA Akses Groep*, A.R. 04/4698, Brussels Court of First Instance 14 March 2006.

**Findings:** In this case, the Brussels Court of First Instance ruled that an insurance company by providing a deep link on its website to a PDF article of an attorney (Mr. Niemegeers) on investment-linked insurances committed a breach of Mr. Niemegeers' copyright. By clicking the link, another frame opened with the article as a PDF. Because of the fact that only a separate frame with the article concerned opened, the Court deemed that a user of the website got the impression that he was still consulting information from the Linking Site. The Court argued that this kind of linking could not be regarded as a simple link to the article, since it was not clear that the article was not created by f.i. an employee of the insurance company, nor that the article was published on another website than the Linking Site. The Court deemed that the link constituted a reproduction of the article, since the user could not only consult the article, but was also able to print it. The Court ruled that the reproduction right and the right of communication to the public of Mr. Niemegeers were infringed. The Court also ruled that the right of adaptation was infringed, since the article was used in a commercial context, as opposed to the legal context in which it was published by Mr. Niemegeers (in fact an infringement of the moral right of integrity to the work).

Relevant case law (unpublished; interpretation based on doctrine on framing and inline linking): *United Media/Ku Klux Klan* (no further details cited in doctrine).

**Findings:** Ku Klux Klan provided a link on its website which automatically reproduced an image from a comic book on which United Media, a Belgian association for the promotion and representation of media agencies, held the relevant rights.

### 3. Relevance of use of logos or brand names

#### **Fact dependent.**

In Belgian doctrine and case law, it is generally accepted that linking techniques such as framing and inline linking are not only embedding material of the trademark owner into their own website, but are also capable of creating confusion on the part of the public (in-fringement on the basis of article 2.20.1.d Benelux Convention on the Intellectual Property [hereinafter: Benelux Convention] (ex-article 13.A.1.d BMW) – use in the course of trade other than to distinct goods and services, creating an unfair advantage without a valid rea-son) and/or of causing unfair-competition and passing-off issues.

There is no published case law in Belgium on embedded links which can be regarded as trademark infringements.

**Relevant case law** (unpublished): *N.V. Moto's Deschouwer v. N.V. Honda Belgium, Honda Giken Kogyo Kabushiki Kaisha and GmbH Honda Motor Europe (North)*, Brussels Court of Appeal (8th Chamber) 5 June 2007 (this is a confirmation of the decision in *N.V. Moto's Deschouwer v. N.V. Honda Belgium, Honda Giken Kogyo Kabushiki Kaisha and GmbH Honda Motor Europe (North)*, Brussels Commercial Court 16 November 2004).

**Findings:** In this case, a motorbike dealer (Moto's Deschouwer) committed a trademark infringement – in addition to unfair competition charges – by providing a certain link on his website, linking to a 'promotions' page. Part of these promotions was a certain type of mo-torbike (Honda CBR 900) of which an image was displayed. The image itself was presented as a hyperlink. By clicking the link, a new page opened which displayed specific information on the Honda CBR 900, accompanied with Honda's trademarks, both the word sign 'Honda' and their registered logo. By consulting this webpage, the Internet user got the impression that the information was part from the website of Moto's Deschouwer, while in fact it was derived from the official website of Honda. Since the motorbike dealer was not an official Honda dealer, the Court did not accept its blatant use of the Honda signs. The Court ruled that the motorbike dealer, by embedding the information from Honda's website on his own website, created the impression that there was a commercial link between them and that he was therefore free-riding Honda's reputation. As a result, the Court did not only rule that Moto's Deschouwer committed a trademark infringement on the basis of article 2.20.1.d Benelux Convention, but also that it could be held liable for creating an environment of unfair competition, misleading the consumer about the origin of the goods.

**Relevant case law:** *Lexmark International NV v. Samson Computer NV*, Brussels Court of First Instance 22 August 2005 (proceedings with regard to the enforcement of a penalty payment).



**Findings:** In the context of an unfair competition issue, Lexmark International NV had dis-regarded a measure granted in a previous ruling in the favour of Samson Computer NV. In the advertisements on a new series of Lexmark Linea ink cartridges on its website (www.lexmark.be), Lexmark had referred to this particular cartridge as having a “surplus capacity of 65% in comparison to a standard ink cartridge”, without identifying the specific type of ‘standard’ cartridge that it was compared to. The advertisement consisted of an image, accompanied with the abovementioned text, displayed on the website of Lexmark International NV. After the ruling, Samson Computer NV had the continued infringement by Lexmark established by a bailiff. As a defence, Lexmark International NV argued that it could not be held liable for this infringement, since the image was in fact not part of its website anymore, but was derived from the website of a supplying company Add-On-Multimedia (www.imagebank.add-on-multimedia.fr). The bailiff established that an Internet user could consult the image from the website of Lexmark International NV (www.lexmark.be) by clicking a few pages (seemingly within this website), without notifying the user that he in the meantime had left the site and was consulting the image on the website of Add-On-Multimedia (www.imagebank.add-on-multimedia.fr). Lexmark’s opinion that an Internet user would notice that the image was displayed on another website, when printing it, after having it reviewed in a separate pop-up window, was refuted by Samson Computer NV. Samson Computer NV argued that an Internet user does not always print a webpage when consulting it and therefore would usually not notice that he was linked to another website. This view was shared by the Brussels Court of First Instance and Lexmark’s argument that it could not be held liable

for the (infringing) content of a ‘third’ party’s website was not accepted. As an administrator of the website (www.lexmark.be), Lexmark International NV had to be aware of the fact that it was deep-linking the infringing content. By providing a deep link – which was identified as such by the parties and the Court, but was in fact an embedded link – Lexmark International NV was embedding the information on these Lexmark Linea ink cartridges, displayed on Add-On-Multimedia’s website, on its own website and therefore had ‘internalized’ the advertisement of Add-On-Multimedia.

**Relevant case law:** *N.V. Honda Belgium, Honda Giken Kogyo Kabushiki Kaisha and GmbH Honda Motor Europe (North) v. N.V. Moto’s Deschouwer*, President Brussels Commercial Court 19 February 2004 (cease and desist proceedings).

**Findings:** One of the measures granted by the President of the Brussels Commercial Court held that Moto’s Deschouwer, as a non-official dealer of Honda motorbikes, was prohibited to further advertise his sales offer of Honda motorbikes when not specifically indicating that it was acting as an independent dealer of such motorbikes, and was only allowed to use the word trademark ‘Honda’ in a neutral font, refraining from using the sign ‘Honda’ in a similar font as would be typical for Honda and/or from using Honda’s registered logo.

It seems that a clear notification (f.i. a disclaimer on the linking and linked site), accompanied with a ‘simple’ use of a third party’s trademarks (f.i. by only referring to these trademarks in plain text), in some cases could be enough to overcome a likelihood of confusion. In Belgian case law, it is generally accepted that such a use in the course of trade of a third party’s trademarks, merely to inform the public about the goods one is selling or the services one is rendering,

can constitute a valid reason precluding any trademark infringement.





## 1. Simple linking

No copyright infringement.

**Relevant case law:** *Warman and National Post v Fournier* 2012 FC 803.

As per the teachings of the Supreme Court of Canada, more specifically in *Crookes v. Newton*, the Internet cannot function as intended without links, which are at the core of how the Internet operates. Generally speaking, a link can be considered as a footnote, or simply a reference pointing users to other sources of information. Therefore, a simple hyperlink does not, in and of itself, communicate a copyright protected work to the public, nor does it reproduce such a work.

As such, the act of providing a simple link to copyright protected content, found on another website, does not constitute copyright infringement (for example, providing a link to a photograph accessible via a photographer's website). The general consensus regarding simple hyperlinking is that the owner of the copyright protected work has given an implied consent to the communication of the work through the posting of this work on a website.

Furthermore, with regards to hyperlinking in the context of defamation but nevertheless relevant to the present discussion, the Supreme Court of Canada has specified that: "Hyperlinks thus share the same relationship with the content to which they refer as do refer-ences. Both communicate that something exists, but do not, by themselves, communicate its content."

## 2. Embedded linking

No copyright infringement for simple embedding of copyright protected material but analysis remains fact based as there may be terms of service agreements prohibiting the use of

embedded links or framing. It does not make a difference if the user has to take an action to see the content.

**Relevant Case Law:** *Century 21 Canada Ltd. Partnership v. Rogers Communications*, 2011 BCSC 1196, 96 C.P.R. (4th).

In the absence of a consistent case law on the subject, the general principles taught by the Court with regards to linking apply to embedding and, by proxy, framing. As such, it would generally not be considered copyright infringement to embed copyright protected material insofar as the copyright holder has made such content available online and the medium chosen to make available this work does not prohibit embedding or framing in its terms of service.

However, if embedding or framing is specifically prohibited under a 'browse wrap'- or 'click wrap'-type terms of use agreement, and that this agreement is found to be valid, any framing or embedding could be contrary to these terms of use and therefore constitute breach of contract and ultimately copyright infringement.

Furthermore, the type, format and extent of embedding/framing at issue will need to be studied. The selected material that is embedded or framed may be considered a derivative work under Canadian copyright law and moral rights issues would therefore become relevant if the work is modified in any way through such framing/embedding (ex: if only certain parts of the work are embedded).

## 3. Relevance of use of logos or brand names

**Fact based.**

**Relevant Case Law:** *Imax Corp. v. Showmax, Inc*, 2000 CanLII 14748 (FC)

**Findings:** The plaintiff argued that the arrangement of framing and linking caused the viewer to be likely to infer that Imax was responsible for, or was connected with Showmax, for the purposes of the proposed large-format Showmax theatre. The court was satisfied that inferences can be drawn from the evidence so as to conclude that it is reasonable for the plaintiff to allege the existence of confusion. For the purpose of showing a serious issue and irreparable harm, the Court considered the evidence of confusion clear and sufficient to support an inference of loss of 'name' goodwill and reputation. The application for an interlocutory injunction was allowed.

If logos or brand names are used to identify third-party goods and services, there could be trademark infringement, unfair-competition or passing-off issues related to linking or embedding, the outcome of which will depend on the application of the underlying basic principles to a given situation.

Linking or embedding may constitute trademark infringement in situations where it implies the use of a trademark registered by another person that create confusion as to the source of wares or services or that is likely to have the effect of depreciating the value of the goodwill attaching thereto. It may constitute unfair competition or passing off where it amounts to a manner to direct public attention to someone's wares, services or business in such a way as to be likely to cause confusion with the wares, services or business of another.

If there is a clear notification that the Linking Site and embedded/linked site are unconnected third parties, it could be considered a relevant fact but it not necessarily determinative of the outcome.



### 1. Simple linking

May constitute copyright infringement – fact dependent.

**Relevant case law:** *Danske Dagblades Forening v. Newsbooster ApS* (U 2003.1063 S – 19 February 2003).

**Findings:** The Danish Maritime and Commercial Court held that deep-linking constituted an infringement of the Danish Marketing Act section 1 on good marketing practices and the Danish Copyright Act section 71.

**Relevant case law:** *Home A/S v. Ofir A/S* (2 February 2006).

**Findings:** The Danish Maritime and Commercial Court held that a claimant real estate company had failed to establish a claim of copyright infringement against a company who ran an Internet search engine which copied some of the information relating to the claimant's real estate listings which appeared on the claimant's website. The Maritime and Commercial Court held that: (a) The information which was copied was not protectable under Danish law, and (b) the process of linking (in this case deep-linking) did not constitute an infringement of section 1 of the Danish Marketing Act in regard to good marketing practices. The Maritime and Commercial Court considered that the usual function of search engines was to provide deep links and that businesses which choose to provide information online must do so with the expectation that links will be made to their websites by third parties. It should be noted that the decision is based only on whether the use was compliant with the Danish Marketing Practices Act and the Maritime and Commercial Court thus did not make any specific decision in terms of the application of the Danish Copyright Act. The ruling does

however imply that it should be taken into consideration that links are to some extent necessary for the purpose of making the Internet work in practice.

**Findings:** Based on the case law referred to above (which are not in all respects consistent) and legal theory, the legal position pursuant to Danish law may be summarized as follows:

Mere reference links to legal copyrighted content (i.e. links to a main landing site and thus not links to sub-sites or other deep links to specific material) must generally be considered as legal in terms of the Danish Copyright Act.

Notwithstanding the aforesaid it should be noted that it cannot be excluded that reference linking depending on the specific circumstances may be considered to constitute an in-fringement of moral rights pursuant to section 3 of the Danish Copyright Act. In addition such reference linking may in rare circumstances constitute a copyright infringement (or trademark infringement) if the wording of the link itself infringes copyrights (e.g. if a copyright protected 'title' of a work is used) or trademarks (e.g. a trademark is used as part of the link).

With respect to deep links (i.e. links to sub-sites or specific parts hereof) Danish law remains unclear. One theory argues that deep links to copyright protected material will constitute a copyright infringement based on it being a communication to public which requires the consent of the copyright owner.

The other theory questions that a deep link by the Linking Site constitutes a separate communication to the public and argues that even if a deep link is considered a communication to the public then the mere nature of the Internet implies that the copyright owner must be seen

as having generally accepted deep-linking as it is part of the nature of the Internet that websites link to each other. I.e. that unless the copyright owner has specifically stated that linking is not permitted (and/or applied technical restrictions in this respect) then the copyright owner has implicitly accepted any linking. Thus, copyright owners will in practice – according to this theory – have to state on their websites that their copyright protected works must not be exploited by means of linking and may even have to try to hinder the use of the copyright protected work by application of technical measures.

For the avoidance of doubt it should be noted that based on case law (e.g. *KODA v. A U 2001.1572V* – 20 April 2001 concerning deep-linking to illegal sound recordings and *Pirate Bay U2010.2221H*) and legal theory deep links to material which in itself constitutes a copyright infringement will generally result in the Linking Site being liable.

### 2. Embedded linking

May constitute copyright infringement – fact dependent.

**Findings:** If copyright protected material itself is embedded and thus reproduced by the Linking Site and/or the user of the Linking Site, such use will as a general rule constitute a copyright infringement. E.g. linking to thumbnails displaying copyright-protected material may constitute a copyright infringement given that such thumbnails are reproductions.

Further it may be argued that such embedding constitutes a separate communication to the public, cf. the distinction between reference links and deep links.



It is not likely to have any influence on the possible liability of the Linking Site whether or not the user may have to take action to see the 'full' content.

### 3. Relevance of use of logos or brand names

May constitute copyright infringement - fact dependent.

**Findings:** Where the link is presented in the form of a trademark held by the owner of the website to which the link is made or a third party, there may be a trademark infringement if the use is deemed to be of a commercial nature.

It should be noted that Danish law does not as such include any 'fair use' doctrine.

Further, there may be a passing-off claim where any sort of link (reference link or deep link) is used in such a way that this creates confusion about the relationship between the two sites, e.g. by suggesting there is a commercial connection between the owners of the sites. There may be a greater risk of confusion with embedding/framing since this normally involves a seamless transition between the Linking Site and third party content (although web users are not always confused).

Further, use of logos and brand names as well as statements made in the context must comply with the Danish Marketing Practices Act in regard to good marketing practices, comparative advertising etc.

Generally, a notification at the Linking Site that parties are unconnected is not likely to have any significant influence on the assessment.



### 1. Simple linking

**Relevant case law:** Commercial Court of Paris, 26 December 2000, *SNC Havas Numérique and SA Cadres on Line v. SA Keljob*; Commercial Court of Nanterre, 8 November 2000, *Sarl Stepstone France v. Sarl Ofir France*; Court of First Instance of Nanterre, 25 March 2010, *Sté Ordinateur Express v. CBS Interactive*; Court of Appeal of Aix-en-Provence, n°04/192; Court of Appeal of Paris, 19 September 2001, *NRJ and Jean-Paul B. / SA Europe 2 Communication*.

**Findings:** Linking in itself is not considered as a copyright infringement by French jurisdictions, to the extent that the content of the target site is not illegal.

Thus, “the placement of hypertext links is presumed to have been implicitly authorised by any website operator” (Commercial Court of Paris, 26 December 2000, *SNC Havas Numérique and SA Cadres on Line v. SA Keljob*). “The purpose of Internet and its operating principles necessarily require that hyperlinks and links between websites can be freely made” (Commercial Court of Nanterre, 8 November 2000, *Sarl Stepstone France v. Sarl Ofir France*).

Regarding deep-linking, French jurisprudence has admitted that there was “no legal provision preventing the Linking Site to also place deep links – which redirects you to a specific page of the third party” (Court of First Instance of Nanterre, 25 March 2010, *Sté Ordinateur Express c/ CBS Interactive*).

However, it has been ruled that the placement of hypertext links towards websites offering illegal content – here, counterfeited video games – is deemed to be a contributory copyright infringement, as the Linking Site plays a role in the communication to the public of illegal content (Court of

Appeal of Aix-en-Provence, 10 March 2004). Similarly, it has been admitted that the Linking Site was held responsible for the content of the website “it had voluntarily and deliberately decided to be associated with” (Court of Appeal of Paris, 19 September 2001, *NRJ and Jean-Paul B. / SA Europe 2 Communication*).

### 2. Embedded linking

**Relevant case law:** Court of Appeal of Paris, 26 January 2011, *Google Images v. SAIF*; Court of Cassation, 12 July 2012, n° 11-13.666; Court of First Instance of Paris, 25 June 2009, *Société Générale des services aériens v. Easyvoyage*.

**Findings:** French jurisprudence has ruled that the copies of pictures on Google Images are not considered to be copyright infringement. In this case, the collecting society SAIF criticised Google Images for reproducing some pictures it held rights on without its prior consent. The Court of Appeal of Paris dismissed the SAIF and confirmed the legality of Google Images activity, considering the presence of copies of pictures on the server of Google as part of the basic role of a search engine.

However, the impression made on the user is a decisive criterion to determine whether embedding constitutes copyright infringement or not. Thus, it has been ruled (Court of Cassation, 12 July 2012, n° 11-13.666) that embedding copyright material from a third party without prior consent on the linking website is infringing because the Internet user is under the impression that the content is located on the linking website. However, it is unclear whether the fact that the user has to take action to see the content would have made a difference (perhaps if the Internet user was clearly

informed that it was directed toward another website).

Similarly, the Court of First Instance of Paris held that framing was infringing copyright if the impression made to the user could be a source of confusion. Easyvoyage had put in place on its Internet site [www.pressvoyages.com](http://www.pressvoyages.com), a link to recommend ‘voyanet.com’. However; upon clicking on it, a window opened relaying a set of two frames, one called ‘pressvoyages.com’ and the other situated just underneath ‘site2view’, which took over the home page of the site ‘voyanet.com’. The judges decided that by “representing on the website [pressvoyages.com](http://pressvoyages.com) the website [voyanet.com](http://voyanet.com) without the authorisation of the Société Générale Des Services Aériens, the copyright holder, copyright infringement was constituted.”

Again in this case, the criterion is the impression made on the user that the content is disclosed on the Linking Site.

### 3. Relevance of use of logos or brand names

**Relevant case law:** Court of Cassation, 25 September 2012, n°11-18110; Court of First Instance of Paris, 5 September 2001, *SA Cadremploi c/ SA Keljob*; Court of Appeal of Paris, 19 Octobre 2001, *Sarl Wolke Inks & Printers c/ SA Imaje*.

**Findings:** No infringement on the trademark is recognized when a competitor buys the trademark as key word in a paying search engine, to the extent that the basic user can easily know that the products and services subject of the advertising do not come either from the owner of the brand, nor from any company linked to her, but on the contrary, from a third party. In this case, the position of the link on



the webpage, in the heading “commercial link”, distinctive from the other natural results of the search engine, and the wording of the announcement, which only describes the promoted product in generic terms and without implicit or explicit reference to the brands, prevented the user from any confusion (Court of Cassation 25 September 2012, n°11-18110).

However, it has been ruled (Court of First Instance of Paris, 5 September 2001, SA

Cadremploi c/ SA Keljob.) that the placement of a hypertext link replicating the brand could be considered as copyright infringement when its use “is conducted for commercial purposes, and not in the sole non-profit aim of informing the user” and that the business which had placed the link “does not simply cite the brand as could be done in a guide, but uses it as part of the activity of surveying and selecting offers, of a use that directly competes with the activity exercised by that of the complainant, and that is covered by the registration of the invoked brand.”

Also, the Paris Court of Appeal (19 Octobre 2001, Sarl Wolke Inks & Printers c/ SA Imaje) has applied the criterion of the risk of confusion and concluded on the ground of article L. 713-6, b) of French Intellectual Property Code, that “the creation of a hyperlink which from the Internet address [counterfeiting the brand of a competitor], leads to the home page of the site [of the company which had placed the link], which markets identical or complementary products of those sold under the counterfeit brand” constitutes counterfeiting on the grounds that it “leads to a risk of confusion for the consumer” and that it “does not establish the necessary reference”.



### 1. Simple linking

No copyright infringement.

**Relevant case law:** Paperboy, Federal Court of Justice, Judgement of 17 July 2003 – I ZR 259/00.

**Findings:** In the Paperboy case, the court ruled that deep-linking to another website does not constitute an infringement of the copyright of the right's holder of the content published on the linked site. The court held that, by publishing a website without technical access restrictions, the owner of the website makes its content publicly available and allows access to the content, and therefore linking could not be regarded as an act of interference with the right's holders copyright. The court also held that the database right of the copyright owner would not encompass the right to link to the database, and the database right would also not be violated by extracting individual words or phrases that are required to provide the user of a search engine with an indication of the content that can be found behind the link. Further, the court finds that it is not an act of unfair competition if the Linking Site refers the user directly to a sub-page and circumvents the homepage of the right's holder.

### 2. Embedded linking

Case law is inconsistent.

**Relevant case law:** *Vorschaubilder I and Vorschaubilder II*, Federal Court of Justice, judgment of 29 April 2010 – I ZR 69/08 and judgement of 19 October 2011 – I ZR 140/1; Higher Regional Court of Düsseldorf, judgment of 8 November 2011 – I-20 U 42/11; Regional Court of Munich, judgment of 10 January 2007, 21 O 20028/05, MMR 2007, p. 260; Higher Regional Court of Cologne, judgement of 16 March 2012, 6 U 206/11.

**Findings:** The Federal Court of Justice held in the *Vorschaubilder* decisions that it constitutes an infringement of the copyright owner to replicate preview images in the context of Google's picture search; however this infringement would not be illegal because the copyright owner consented to the use of the material by publishing photographic images in the Internet without taking technical precautions to exclude the search engine from crawling his site (robots.txt). It must be noted though that this reasoning specifically referred to embedding by a search engine as an information society service and that it is highly unlikely that this reasoning would extend to embedded content that is made available on normal websites.

As regards embedding of content on normal websites, the position of the courts is indecisive. The Higher Regional Court of Düsseldorf found that embedding of photographic images in a blog so that the pictures appeared to be content of the blog must be regarded as an infringement of the photographer's copyright. The same assessment was applied by the Regional Court of Munich (judgment of 10 January 2007, 21 O 20028/05, MMR 2007, p. 260) in a case where a third-party website was framed in the Linking Site.

On the contrary, the Higher Regional Court of Cologne found that the access to infringing content by a frame was no communication to the public within the meaning of Sec. 19a German Copyright Act by which Article 3 of the Directive 2001/29/EC was implemented into German law. It referred to the decision of the Federal Court of Justice in *Paperboy*, according to which a communication to the public requires a certain control over the access to the protected work.

There is also the reference to the CJEU in Case C-348/13 *BestWater International* on whether embedding can be a

communication to the public. However, this has been stayed pending the result of the Swedish reference in *Svensson*.

### 3. Relevance of use of logos or brand names

Such use may constitute trademark infringement under certain circumstances but it will generally not constitute unfair competition.

**Relevant case law:** *Große Inspektion für Alle*, Federal Court of Justice, judgment of 14 April 2011, GRUR 2011, p. 1135, 1136; *Paperboy*, Federal Court of Justice, judgement of 17 July 2003 – I ZR 259/00.

**Findings:** In the case of *Große Inspektion für Alle*, the Federal Court held that if embedded content includes trademarks/ brand names of third parties, this might be regarded as an inappropriate use of the advertising function if the trademark/ brand name is not merely used as an identification of origin. The assessment would take into account all circumstances of the case, so that a mere notification that the Linking Site and the linked site are unconnected third parties would not be sufficient.

In the *Paperboy* case, the court ruled that deep-linking to another website does not constitute an unfair commercial practice. In the case of embedded content, there might be a risk that embedding/framing could be regarded as a misrepresentation if the embedded content/framed content appears to be part of the Linking Site and the reputation or goodwill of the linked site is inappropriately abused.



### 1. Simple linking

No copyright infringement.

**Relevant case law:** Italian courts did not expressly consider whether linking to websites displaying legal content may constitute copyright infringement.

**Findings:** The position of Italian academic circles is that providing a simple link to another website containing legal content is not to be deemed a copyright infringement because no effective exploitation of the copyrighted work is made.

We note that, in a case dating back to 2010, the Court of Milan stated that providing a link to another website containing illegal content is to be deemed a contributory copyright in-fringement because the Linking Site plays a role in the communication to the public of copyrighted content (Sky Italia v Davide Boizza and Telecom Italia s.p.a., Court of Milan, 20 March 2010).

### 2. Embedded linking

Case law is inconsistent.

**Relevant case law:** *Costa Acquarium sp.a. v I.Net 2 s.r.l.*, Court of Genoa, 22 December 2000.

**Findings:** In the Costa Aquarium case, the Court of Genoa held that framing another web-site's content constitutes a copyright infringement, provided that the relevant content may be considered a work protectable under the Italian copyright law. By way of analogy such a principle could be applicable in the linking case.

### 3. Relevance of use of logos or brand names

May constitute copyright infringement.

**Relevant case law:** *Fondazione Qualivita v Pagine.it s.r.l.*, Court of Rome, 9 June 2011.

**Findings:** The Court of Rome stated that the deep-linking to another website's content may constitute unfair competition whenever the user is not in a position to identify the actual provider of the information.

**Relevant case law:** *Artemide s.p.a., Artemide Italia s.r.l. v Ma. Sa.*, Court of Milan, 1 July 2010.

**Findings:** The Court held that simple linking to another website may constitute unfair competition because a likelihood of confusion may arise out between the Linked site and the Linking Site and the latter may take unfair advantage from the reputation of a third party's website.

**Relevant case law:** *Costa Acquarium sp.a. v I.Net 2 s.r.l.*, Court of Genoa, 22 December 2000.

**Findings:** The Court held that framing of other site's content constitutes unfair competition regardless the notice that the Linking Site is not connected with the Linked website.

**Relevant case law:** *Alnitec s.r.l. v Biaccabi s.n.c.*, Court of Crema, 24 July 2000.

**Findings:** The Court stated that providing a simple linking to another website may constitute unfair competition provided that this may create confusion among users, including a risk of association between the Linking Site and the Linked website.



### 1. Simple linking

Legal situation is unclear.

**Relevant case law:** Court of First Instance The Hague, 2 November 2011 (*Real Alternative*); Court of First Instance Amsterdam, 12 September 2012 (*Playboy/GeenStijl.nl*); Court of Appeal Amsterdam 15 January 2013 (*X/publishers*).

**Findings:** For a long time there was consensus that simple links did not constitute a copyright infringement. This consensus is for instance confirmed by the Court of Appeal Amsterdam in its NVM/Telegraaf decision of 21 December 2000 (both parties even conceded that a simple link did not constitute a copyright infringement). Nevertheless, there was some discussion whether simple links amount to a communication to the public of a work. Legal scholars agreed that simple links do not constitute a reproduction of a work.

Until recently, there was not much case law that particularly dealt with this issue. On 2 November 2011, the Court of First Instance The Hague ruled, in short, that the Linking Site technically does not provide the copyright-protected work. Therefore, there could not be a communication to the public or reproduction. This decision seemed to affirm that a simple link does not constitute an infringement. This changed by a decision of the Court of First Instance Amsterdam of 12 September 2012. The court in that case had to rule on the early publication of a link to unreleased Playboy photos by a third party. It found that a simple link in principle does not constitute a copyright infringement, i.e. a communication to the public. However, in that particular case the court considered it relevant that the photos were not otherwise accessible. Therefore, these particular circumstances did constitute an infringement. The court particularly focussed on the 'intervention' criteria as is provided by the CJEU.

The Linking Site has appealed this decision, this appeal is still pending.

Interestingly, the Court of Appeal Amsterdam, which will have to review the Playboy photo decision in appeal, already gave a decision on 15 January 2013 regarding this topic. In this case it concluded a priori that a link to online schoolbook answers cannot constitute a copyright infringement. Unfortunately, the Court of Appeal does not offer any additional considerations. Until further case law, the consequences of the Playboy photo case vis-à-vis 'schoolbook answers' ruling are unclear. It is expected that the Svensson preliminary ruling of the CJEU will provide the necessary guidance.

Please note that different courts often conclude that the Linking Site is liable on the basis of tort, even if no copyright infringement is found. For instance the Court of Appeal Amsterdam in the schoolbook answers case ruled against the Linking Site on the basis of tort.

### 2. Embedded linking

May constitute copyright infringement.

**Relevant case law:** Court of Appeal Den Bosch, 12 January 2010 (*MyP2P*); Court of First Instance The Hague, 19 December 2012 (*Nederland FM*).

**Findings:** The Court of Appeal Den Bosch and the Court of First Instance The Hague have held that this form of embedding can constitute a copyright infringement.

The Court of First Instance The Hague affirmed that this form of embedding cannot be considered a reproduction of the work by the Linking Site. However, there can be a communication to the public by the Linking Site if the Linking

Site is designed in such a manner that the radio streams linked are listened to within the framework of the Linking Site. In this way, the Linking Site makes the works available to a different public than was envisioned by copyright owners when they authorised placing the work on the site that the Linking Site embeds. The Linking Site intervenes by showing the content within a frame of its homepage. Although the decision mentions that embedding goes further than placing a simple link, both forms of linking are still related. It is therefore possible that the case law on simple links influences the future development of copyright infringements of embedding.

There is no case law on the difference between an automatic display of the visual work and the need to click a link. In the decision of the Court of First Instance The Hague the Linking Site required the user to click a radio station before the embedded radio stream started to play.

### 3. Relevance of use of logos or brand names

May constitute copyright infringement.

**Relevant case law:** Court of First Instance Leeuwarden, 30 October 2003 (*Batavus*).

**Findings:** Use of a trademark in a commercial sense often constitutes trademark infringement, unless the Linking Site could invoke one of the trademark limitations (harmonised by the Trademark Directive 2008/95/EC). The Linking Site could for instance argue that it is necessary to use the trademark for the link to indicate the intended purpose thereof. Such a defence can only be valid if it does not suggest a commercial relationship between the trademark owner and the Linking Site.





This issue was subject of a 2004 case, decided by the Court of First Instance Leeuwarden. The Linking Site (a former official distributor of the trademark owner) had placed a logo as a link on its website, that opened a frame (within the Linking Site) in which the trademark owner's website was consequently embedded. According to the Court of First Instance, the use of this trademark, in relation to the embedded site, created the suggestion that there was a commercial link between both parties.

Although this case is relatively old, it is likely that its reasoning still stands. Nevertheless, determining whether there is a suggestion of a commercial relationship is always dependent on the circumstances of the case. It could very well be that parties' previous relationship was a factor in the decision. In this respect, it is possible that clearly notifying that there is a link contributes to the conclusion that there is no suggestion of a commercial link (CJEU C-228/03, 'Gillette/LA'). There is, however, no specific case law on such a disclaimer regarding links that use trademarks (in its MyP2P decision of 22 March 2011 the Court of First Instance The Hague considered a trademark link claim, but found that the trademark owner had not sufficiently argued its claim).



## Sweden

### 1. Simple linking

Legal situation is unclear.

**Relevant case law:** *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (Case C-466/12).

**Findings:** In the recent case of Nils Svensson, the Svea Court of Appeal has requested a preliminary ruling from the CJEU as to whether a subscription search engine is committing copyright infringement by making the copyrighted work of an exclusive rights holder available to the public. Similar to the Meltwater facts, the defendant (Retriever Sverige AB) offers a subscription service providing access to newspaper articles via clickable links on its website, and in doing so provides a link to an article written by Swedish journalist, Nils Svensson, which had been published online.

One of the questions referred to the CJEU is whether a link can constitute an act of communication to the public, and whether a member state is able to give wider protection to exclusive rights holders by expanding the meaning of 'communication to the public' to cover more than is set out at Article 3(1) of Directive 2001/29/EC.

### 2. Embedded linking

Legal situation is unclear.

**Relevant case law:** *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* (Case C-466/12).

**Findings:** Again, this question remains to be answered. In the Nils Svensson case, the Court has also asked for clarification from the CJEU as to whether, when assessing the question of whether a link constitutes a communication to the public, any distinction should be drawn between a simple link (which takes the user directly to the third party website where the copyrighted content appears) and a link which displays the copyrighted content in such a way that gives the impression that the content is appearing on the Linking Site (i.e. embedding/framing).

### 3. Relevance of use of logos or brand names

Information not available.



### 1. Simple linking

Legal situation is unclear.

**Relevant case law:** *PRCA Ltd v NLA & Ors (Meltwater)* (2013) UKSC 18.

**Findings:** It has been traditionally thought unlikely that a simple link would constitute an infringement of copyright, particularly because no copy of the content is made on the server of the Linking Site. However, the recent case of *Meltwater* has cast doubt on this issue. *Meltwater* was providing clients with hyperlinks to newspaper articles. The hyperlink was formed from the headline of the article and, when users clicked on the hyperlink, they were taken to the article on the publisher's website. It was held by the Court of Appeal that, where the hyperlink in itself has sufficient copyright character to constitute a protectable work (which could include newspaper headlines), the link may be a separate case of copyright infringement.

When an end user clicks on this simple link and views the webpage content, it also makes a copy of the webpage on its computer and Internet cache. The lower Courts thought that this copying by the end-user was "more likely than not to infringe copyright". Therefore the owner of the Linking Site might be liable as a secondary infringer for the copy made by the end user (although, there is an argument that, in creating a website, the owner grants an implied licence for others to link to it).

On 17 April 2013, The Supreme Court in *Meltwater* disagreed with the lower Courts and gave a provisional opinion that the defence under Article 5(1) (transient/temporary copies) of the Copyright Directive applied to copies made by the end

users in viewing the webpage content (but not when material is downloaded or printed). However, it referred the question to the CJEU so that there can be a ruling with uniform applicability across the EU.

The *Meltwater* case did not specifically consider whether linking constituted a communication to the public.

### 2. Embedded linking

Legal situation is unclear.

**Relevant case law:** *PRCA Ltd v NLA & Ors (Meltwater)* (2013) UKSC 18.

**Findings:** This was not expressly dealt with in the *Meltwater* case. In a similar way to linking, an embedded site creates a copy of the copyright work on the user's computer and therefore, unless a licence can be implied (which is unlikely), there will be an infringement of the reproduction right. However, the Supreme Court in *Meltwater* confirmed that downloads are not temporary copies. Accordingly, if a user has to click on a link to download material, it is unlikely to have the benefit of the temporary copies exception.

**Relevant case law:** *Football Dataco v Stan James, Sportradar & Ors* [2013] EWCA Civ 27.

**Findings:** The Court of Appeal has recently confirmed that a site will be liable as a secondary infringer if the inevitable consequence of users clicking on a 'pop-up' was an infringement (in this case they were accessing material protected by database rights). The Court noted that this situation is different to a seller on Ebay or a photocopier user who can decide whether or not to infringe. In this case, the website owner is not a passive facilitator but is causing

each and every UK user who accesses his site to infringe. He should therefore be held responsible.

### 3. Relevance of use of logos or brand names

Fact dependent.

**Findings:** There may be a passing off claim where any sort of link (embedding or simple link) is used in such a way that creates confusion about the relationship between the two sites e.g. by suggesting there is a commercial connection between the owners of the sites. There may be a greater risk of confusion with embedding since this normally involves a seamless transition between the Linking Site and third party content (although web users are not always confused). Any notification that the sites are unconnected will help to avoid this sort of liability.

Where the link is presented in the form of a third party registered trademark, there may be a trademark infringement if the use is unfair, takes advantage of or is detrimental to the trademark. It might be difficult to suggest that the use is fair if the linking is unlawful for some other reason (e.g. copyright infringement).



## 1. Simple linking

No copyright infringement.

**Relevant case law:** *Ticketmaster Corp, and others v Tickets.com, Inc*, District Court of Central California, 27 March 2000.

**Findings:** In the Ticketmaster case it was held that simple linking itself did not violate US copyright law due to the fact that no copying is involved if the link refers the user to the 'genuine article'. The court also held that the 'fair use' doctrine permits the copying of non-protectable, factual information, which is what the defendant had been copying (i.e. purely factual information relating to the dates and venues of concerts and the fact that tickets could be purchased on Ticketmaster's website) and then presenting the information to users in its own standard format.

## 2. Embedded linking

Case law is inconsistent.

**Relevant case law:** *Leslie A Kelly v Arriba Soft Corporation*, US Court of Appeals for the Ninth Circuit, February 2002.

**Findings:** The US decision in the Arriba case held that embedding or framing of images from another site on a Linking Site violated the exclusive right of the right holder to display its works to the public.

**Relevant case law:** *Perfect 10 v Google*, 16 May 2007.

**Findings:** This more recent decision held that the framing of photographs by Google in its image search results was not copyright infringement. The court considered that the framed photographs were in fact links which simply allowed users to view on Google part of a web page from the site which had originally posted the photographs.

**Relevant case law:** *Flava Works v Gunter*, 2 August 2012.

**Findings:** Similarly to the Perfect 10 case, in the Flava Works case the US Seventh Circuit Court of Appeals denied the liability of websites which frame third party content. The defendant website myVidster.com, displayed the actual videos belonging to a third party in the context of its own site, although the videos were not hosted on the defendant's site but were simply 'linked and framed' from other parts of the Internet. It was held that the linking and framing of the videos did not constitute copyright infringement because myVidster.com did not host any infringing content or invite infringing links.

## 3. Relevance of use of logos or brand names

No copyright infringement.

**Relevant case law:** *Ticketmaster Corp, and others v Tickets.com, Inc*, District Court of Central California, 27 March 2000.

**Findings:** In the Ticketmaster case, there was no unfair competition or passing off, because: (a) the defendant was not profiting from its links to Ticketmaster's website, as ultimately it was Ticketmaster who would be making the ticket sales; and (b) the hyperlinks were to pages on Ticketmaster's website which were clearly marked with its logos.

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