

THE BREWING BATTLE: COPYRIGHT VS. LINKING

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I. INTRODUCTION

Imagine going to an online article, reading a citation of a tweet by President Trump, but not being able to see the tweet embedded within the article itself. Instead, you would have to navigate to Twitter's website to confirm that the tweet actually exists and that it came from the President himself. Next, imagine attempting to find a picture on the internet without Google Images showing an embedded preview of that image.¹

These tasks might seem rather unsurmountable without the convenience of previewing embedded images. Those are just two examples of what the internet would be like if copyright law rendered embedding illegal by labeling it an infringement of copyright holders' rights. Over the past few years in the United States and the European Union, judicial decisions and newly-passed laws have threatened free access to information on the World Wide Web by potentially limiting embedding practices. Such limitations may create a slippery slope to prohibiting other types of linking, which would severely curtail the ease of finding information on the internet for an average user.

This Note ultimately argues that we should aim to preserve content embedding on the internet in its current form. The negative consequences of stringent copyright protections in linking significantly outweigh their likely positive effects. Banning embedding on the internet will likely skew the incentive-access balance,² critically inhibit competitive practices on the internet, upset the settled expectations of the web and potentially, in the long term, lead to creation of "walled gardens."³ In order to account for the economic incentives currently given by copyright law to copyright holders, this Note also proposes a licensing scheme that would ensure compensation to

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1. According to Ben Ling, then Google's Director of Search Products, in 2010 Google Images had hundreds of millions of users. MG Siegler, *Google Image Search: Over 10 Billion Images, 1 Billion Pageviews A Day*, TECHCRUNCH (July 20, 2010), <https://techcrunch.com/2010/07/20/google-image-search/>.

2. Intellectual property protections assume a balance between incentives created through exclusive rights for authors and access to creative works that will spur further creation of content. *See infra* Section V.A.2.b).

3. *Escaping the Walled Gardens in the Clouds*, TECH-FAQ, <http://www.tech-faq.com/escaping-the-walled-gardens.html> (last visited Feb. 17, 2020).

authors, creators and copyright holders. Such a scheme would fill a void of economic incentives that copyright has not been able to fill.

Due to the magnitude of these potential negative consequences, this Note concludes with three recommendations. First, the legislature should address existing gaps in copyright law and allow an exception from copyright infringement for embedding on the internet. Second, the legislature should create a licensing system that will allow for economic reimbursement of authors and copyright holders, without putting a strain on the existing reference techniques.⁴ Finally, the Note advocates for courts to recalibrate how they consider the goals of copyright to better reconcile them with the need for an open and thriving internet.

To fully understand why such a licensing scheme is more desirable than the ever-expanding copyright regime, this Note lays out the necessary background on the interaction of copyright law and linking on the internet. More specifically, Part II of this Note discusses the goals of the internet and copyright law. It fleshes out the different motivations behind copyright protections both in the United States and Europe. Part III provides the necessary technological understanding of different types of linking on the internet. Part IV shows how these different types of linking are treated by the courts in different circuits in the United States and in light of the newly European Directive on Copyright in the Digital Single Market. Part V shows that the goals of the internet and copyright law can and should be reconciled, at least in the United States, and that such a reconciliation would have to account for the long-ignored access to information requirement of intellectual property protections.

II. THE INTERNET, COPYRIGHT, AND THEIR FUNDAMENTAL GOALS

A. THE GOALS OF THE INTERNET

The internet permeates all aspects of our lives as we know them today. Everything including banking, shopping and communicating depends on our access to the web. Just as the internet is integral to our everyday existence, free access to information on the web is fundamental to the internet's structure. The history of the internet is infused with the idea of access, both to technological information critical to its evolution (such as protocols), as well

4. "Reference techniques" is a phrase used throughout this Note to refer to linking, embedding, and other technological ways to reference materials on the internet, which allow for easy navigation on the internet.

as information for everyday users.⁵ One of the internet's visionaries, J.C.R. Licklider, conceived of the internet as "a globally interconnected set of computers through which everyone could quickly access data and programs from any site."⁶ The continual success of the internet and its development draws from its openness. The internet's interconnectivity is what facilitates that openness. And the ability to reference other sources through linking techniques is the main facilitator for that interconnectivity.

Before the existence of search engines, the internet was difficult to navigate.⁷ The information was available on the web, scattered across servers around the world.⁸ But it was difficult to locate.⁹ By indexing each site across the internet, search engines made information more easily accessible.¹⁰ Search engines helped forge a link between the internet's open information and the users searching for it.¹¹ Linking and other reference techniques quickly became one of the internet's key features that made the enormous amount of information not only available, but more importantly, discoverable to everyday users.¹²

The latest developments in copyright protection and linking in the United States and Europe, however, threaten to severely impede such reference techniques.¹³ More stringent copyright protections on the internet pose a threat to linking techniques as they exist today, thus undermining the way internet users find information. The destruction of fundamental reference techniques threatens the basic navigability of the web. If certain information becomes virtually unavailable due to how difficult it is to find, the internet will divide into silos. These silos, commonly referred to as "walled gardens,"¹⁴ would limit end users to only access particular type of information based on their starting point. Alternatively, the information, although theoretically accessible, would be rendered virtually undiscoverable.

5. See Bary M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts & Stephen Wolff, *A Brief History of the Internet*, 39 ACM SIGCOMM COMPUTER COMM. REV. 22 (Oct. 2009).

6. *Id.* at 23.

7. Steven Vaughan-Nichols, *Before Google: A history of search*, ENTERPRISE.NXT (Mar. 24, 2017), <https://www.hpe.com/us/en/insights/articles/how-search-worked-before-google-1703.html>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See *infra* Part IV for the discussion of the developments.

14. See *supra* note 3.

To understand the potential repercussions of strict copyright enforcement on linking, one must understand the basics of the technology and the legal background of these issues. To provide a holistic picture and understanding of the topic, the sub-sections below discuss how copyright law governs linking, the ideas behind linking, and how different jurisdictions have dealt with issues of copyright infringement in this context.

B. THE GOALS OF COPYRIGHT LAW

Some of the goals of copyright law and the internet seem fundamentally irreconcilable. The internet's openness and free access to information seems to go against copyright law as it been recently interpreted by the courts. The courts have become too preoccupied with copyright's grants of exclusive rights of ownership to the authors, while forgetting the second part of the equation: providing access to the public. According to the U.S. Constitution, the goal of all intellectual property protections is "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."¹⁵

Over time the court's interpretation of "progress" as pertaining to copyright has evolved to become synonymous with incentivizing content creation.¹⁶ Arguably, more content does not necessarily guarantee the quality of the content that promotes progress of the arts, just like economic incentives themselves do not guarantee the quality.¹⁷ However, in *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court settled the matter by stating that copyright protections should not rest on the evaluations of quality of particular piece of work.¹⁸ The Supreme Court noted that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the

15. U.S. CONST. art. I § 8, cl. 8.

16. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest most obvious limits.").

17. See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29, 34 (2011) (arguing that economic incentives provided by copyright protections do not actually promote creativity as "large numbers of creators have little hope of ever gaining the economic rewards promised by the intellectual property regime"); Orrin G. Hatch & Tomas R. Lee, "To Promote the Progress of Science": *The Copyright Clause and Congress's Power to Extend Copyrights*, 16 HARV. J.L. & TECH. 1, 3 (2002) ("This understanding — which views "progress" as encompassing not only an increase in quantity or quality of works, but also an improvement in the dissemination and preservation of works already in existence — finds support in founding-era usage of the constitutional language, in the structure of the Constitution, and in the historical exercise of the copyright power.").

18. *Bleistein*, 188 U.S. at 251–52.

worth of pictorial illustrations.”¹⁹ Accordingly, courts’ interpretations of progress have evolved to become synonymous with incentivizing content creation, without regard to the quality of the work itself.²⁰ Therefore, the overarching goal of U.S. copyright protections can be viewed as incentivization for continual production of content (whether measured by quantity or quality).

Regardless of its quantity or quality, content is the primary motive behind intellectual property protections, it is critical that more people should have access to art and information. The internet provides users with the ability to easily access the “sciences and useful arts,” thus fulfilling one of the constitutional principles.²¹ The connectedness of the internet is therefore critical to fulfilling at least one of the underlying constitutional principles of intellectual property protections.

Although economic incentives are likely to always be a mechanism for spurring the production of arts,²² they should not be the sole goal of copyright protections. Rather, copyright laws should aim to “promote” progress in the arts and sciences,²³ not protect the economic interest of the artists.²⁴ An equilibrium between those goals, however, can be reached by providing economic incentives that do not put limits on the public access to information.²⁵ Over the years, protecting the artist and incentivizing content creation have become so inherently intertwined they are often treated as one and the same. The internet, however, has made it possible to distinguish those goals.

On the other hand, copyright law in the European Union focuses on the rights of the creator to control how their works are used. This focus can be detrimental to linking because it tends to protect copyright at all costs.²⁶ The E.U. laws harmonize intellectual property protections across the E.U. member states, although each country continues to possess its own intellectual property

19. *Id.*

20. *See, e.g.,* *Drop Dead Co. v. S. C. Johnsons & Son, Inc.*, 326 F.2d 87, 92 (9th Cir. 1963); *Ansehl v. Puritan Pharm. Co.*, 61 F.2d 131, 134 (8th Cir. 1932).

21. *See* U.S. CONST. art. § 8, cl. 8.

22. Although authors might be willing to produce their work for free given other incentives, the production of movies, or creation of online newspaper content (as just two examples) would be impossible without financial backing that allows the organizations to pay its staff and keep the lights on.

23. U.S. CONST. art. I § 8, cl. 8.

24. *See* Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 203 (2008) (in which “Justice Story turned to the market as the sole arbiter of value” in *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845)).

25. *See infra* Section V.C.

26. *See* International Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341; 1161 U.N.T.S. 3 [hereinafter *Berne Convention*].

protections.²⁷ Nonetheless, E.U. copyright law continues to embrace the strong presence of authors' rights in copyrightable material, despite copyright's growing economic importance.²⁸ A prime example is the protection of authors' moral rights—a set of rights that, in part, protect the authors' right of attribution and prevent the artwork from derogatory treatment.²⁹

While U.S. intellectual property protections focus mainly on promoting content creation, both the United States and Europe rely on economic incentives to motivate content creation. But in the United States, the separation of economic incentives and content creation seems possible, by providing other motivations for creation.³⁰ The European Union's focus on authors' moral rights makes such a separation almost impossible, because it considers the exclusive rights of the author one of the primary goals of copyright protections, emphasizing the need to reward authors for their efforts in creating their works.³¹

III. TECHNICAL BACKGROUND ON LINKING

Armed with a basic understanding of the underlying goals of the copyright law both in the United States and the European Union, this Part discusses different forms of linking on the internet. These differences are critical to understanding why copyright jurisprudence has primarily focused on embedded links rather than ordinary or deep links.

For the purposes of this Note, the linking on the internet can be categorized into three basic types: ordinary, deep, and inline (also known as embedding).³² The goal of all three types is to direct users to material that is pertinent, but not necessarily hosted on the website they are browsing at the

27. EU COPYRIGHT LAW: A COMMENTARY 8 (Irina Stamatoudi & Paul Torremans eds., 2014).

28. *Id.* at 15.

29. Jonathan Bailey, *U.S. vs. Europe: Moral Rights*, PLAGIARISM TODAY (June 12, 2006), <https://www.plagiarismtoday.com/2006/06/12/us-vs-europe-moral-rights/>.

30. See Margaret Chon, *Postmodern Progress: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 105 (1993) (stating that the Supreme Court has recognized that “provision of incentives to authors and investors will not always coincide with the underlying objectives of [incentivizing progress]”).

31. In Europe, the protection of authors moral rights (rights that include the right to the integrity of the work) is incorporated into Article 6bis of the Berne convention. Berne Convention, *supra* note 26.

32. W3C Consortium, “Deep Linking” in the World Wide Web, W3C (Tim Bray ed., Sept. 11, 2003), <https://www.w3.org/2001/tag/doc/deeplinking.html>; Richard Stim, *Linking, Framing, and Inlining*, NOLO, <https://www.nolo.com/legal-encyclopedia/linking-framing-inlining-30090.html> (last visited May 5, 2020).

moment.³³ I refer to the website that is embedding material as the “embedding website,” and the website being linked to as the “source website.”

Ordinary and deep links appear very similar to the end user.³⁴ Both look like interactive text within a website.³⁵ When the user clicks an ordinary or deep link, the link sends the user to the source website.³⁶ The key difference between the two lies in where the user is directed.³⁷ Deep links direct the user to a page other than the home page of the source website, while ordinary links send the user to the source website’s homepage.³⁸

For example, a link that directs a user to a specific product on the Amazon website, instead of directing them to www.amazon.com, is a deep link. Deep linking is more controversial in the world of copyright law, as it often bypasses the main pages of the source website that might include advertisements or other ways of earning money.³⁹ It is however, fundamental to finding information, as it allows the website creator to direct the user to the exact content they are referencing.⁴⁰ This saves the user the trouble of trying to find that same information on the source website. Imagine a user who finds a list on a website of “Top 30 best Christmas gifts from Amazon for 2019” but every time they click a link from that website, it directs them to the Amazon home page, instead of to the exact item they were interested in. Chances are they will quickly give up on such a list of ordinary links, and instead move onto a list that contains deep links to the specific products that they’re interested in purchasing. The information provided by such a list will be inefficient at providing access to the desired information.

The third type of linking is by far the most controversial in the copyright world. Unlike the other forms of linking, inline linking, commonly referred to as embedding, does not redirect the user to a different webpage to view the copyrighted content. Instead, inline links embed the copyrighted material from another website into the web page that the user is viewing.⁴¹ For example, when a user views pictures on Google Images, those pictures are embedded in

33. See Richard Stim, *supra* note 32.

34. See W3C Consortium, *supra* note 32.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003) (first decision in United States pertaining to deep linking of copyrightable material where plaintiff argued that deep links of images caused them economic harms).

40. See W3C Consortium, *supra* note 32.

41. Ross Bagley, *Rules on Copyright Infringement for Inline Linking Developing in the United States and Abroad*, IPWATCHDOG (Nov. 12, 2019), <https://www.ipwatchdog.com/2019/11/12/rules-copyright-infringement-inline-linking-developing-united-states-abroad/id=115691/>.

Google's website. It is only after the user clicks on one of the images multiple times that they get redirected to the website where the image originated. Those images are thus not only embedded but also function as deep links to the source pages. Search engines are not the only services heavily reliant on embedding. News articles, hobby websites like Pinterest and Reddit, and coding repositories such as Github also rely on the ability to embed content on their sites.

For the convenience of legal distinction this Note further divides Embedding into two subcategories. Although at a first glance these subcategories do not appear any different to the end user, they are fundamental to understanding how copyright law has been applied differently across jurisdictions in the United States.⁴² The copyrighted materials in both types of embedding appear to be part of the website. However, the difference lies in who is hosting the material.⁴³ From the example above, the picture shown on Google Images can be either linked to via the source website ("image source linking"), or it can be copied to the server of the embedding website, which the user is viewing ("server storage embedding").⁴⁴

This can be analogized to the Mona Lisa in the Louvre Museum. Imagine another museum wanted to display the Mona Lisa without stealing it or renting it from the Louvre. In the digital world they could embed the picture via one of the two options: server storage embedding or image source linking. The second museum could image source link by setting up cameras in the Louvre and live streaming the painting into their own museum. Thus, the embedding museum would never have to make a copy of the Mona Lisa. The embedding museum would simply create a direct link to the painting in its original form.

As a second option, the embedding museum could create a copy of the painting, put it in their basement and live stream the painting onto their display. Creating a copy of the work is analogous to server storage embedding. Although this type of linking is relatively rare, and the difference is imperceptible to the viewer, it has created a tension in the U.S. courts about copyright infringement.⁴⁵ While content source linking is a popular practice (for example, tweets embedded in news articles), server storage embedding is virtually unused. It was essentially eradicated by current legal regimes, as it

42. *See infra* Section IV.B.

43. *See infra* Section IV.B.2.

44. Both "image source linking" and "server storage embedding" are not technical terms, but rather terms created in this Note for ease of understanding and explaining current legal distinctions.

45. *See infra* Section IV.B.1.

constitutes copyright infringement.⁴⁶ This is also a key differentiation between embedding as it happens on the internet today, and illegally downloading and reposting copyrightable materials. While server storage embedding and source linking at a first glance seem indistinguishable to the end user, only image source links provide deep linking functionality that links back to the source website.

This Note focuses on the importance of protecting content source linking (from now on also referred to as embedding) as it stands today. Unlike server storage embedding, content source linking continues to serve as a deep link for the source website. The server storage embedding does not fulfill that function, because it does not have the ability to send the end user back to the source website. Unlike server storage embedding, image source linking allows the user to find the origins of the embedded materials, thus allowing the source website to obtain ad revenue. But what does embedding offer that cannot be substituted by other forms of linking?

There are three major advantages that embedding offers over any other type of linking on the internet. All these advantages benefit the end users, but some of them also provide benefits to authors, copyright holders, and website providers. The first and most obvious benefit of embedding is the convenience it provides for the user. Embedded materials provide only pertinent pieces of the source website included in the embedding website that the user is reading. That allows the user to easily review and comprehend all the information, without ever having to open a separate window. Embedding therefore saves users time and prevents information overload.

Second, links are easier to break—meaning the source page changes and the established link no longer points to the correct page—than embedded material, because the embedded information is static, meaning it will not change after embedding without additional action from the embedding website.⁴⁷ Therefore, links are more likely to incur higher maintenance costs for the website providers. Additionally, if a link breaks, the copyrighted material is not receiving as many views as it would if it was embedded, providing both better access for the end user and exposure for the author.

46. See *infra* Section IV.B.1.

47. Jeyakanth, *Difference Between Linking and Embedding*, DIFFERENCEBETWEEN.NET, <http://www.differencebetween.net/technology/software-technology/difference-between-linking-and-embedding/> (last updated Aug. 1, 2017).

Finally, embedding content can increase engagement, which is beneficial for authors, users, and website providers.⁴⁸ Embedding makes posts stand out to the user and provides clarity for the purpose of the embedded content.⁴⁹

IV. CURRENT INTERPRETATIONS OF LINKING AND COPYRIGHT LAW

Copyright law in America is constantly evolving.⁵⁰ It is defined in the Copyright Act of 1976 and its subsequent amendments, including the Digital Millennium Copyright Act, the Semiconductor Chip Protection Act of 1984, the Vessel Hull Design Protection Act, and others.⁵¹ The continuous changes and amendments to copyright law show that the legislature recognizes that copyright law does not adapt well to unprecedented technologies, and therefore cannot be effective while remaining static. The latest addition to copyright protection, the Music Modernization Act (MMA), further demonstrates the continuing need to adapt old standards to newly developing technologies.⁵² This Part focuses on the details of copyright infringement and how it relates to linking and embedding. It addresses the recent circuit split in the United States, and the Tax Link Directive from the European Union.

In the United States, copyright law protects “original works of authorship,” “fixed in a tangible medium.”⁵³ This includes music, literary works, pictures, graphics, sculptures, audio-visual works, sound recordings and architectural works.⁵⁴ Copyright protects the expression of ideas, but not the ideas themselves.⁵⁵ It also grants authors, for a limited time, a set of exclusive rights to reproduce, prepare derivative works, distribute copies, publicly perform, and publicly display their works.⁵⁶ Copyright is automatically given to the author of an original work without any registration.⁵⁷ If the copyright

48. BigCommerce Essentials, *What is embedding and when to do it on Facebook and Twitter*, BIGCOMMERCE, <https://www.bigcommerce.com/ecommerce-answers/what-is-embedding/> (last visited Mar. 17, 2020).

49. *Id.*

50. For example, see the newest advancement in the copyright realm, the Music Modernization Act. *See* Orrin G. Hatch-Bob Goodlate Music Modernization Act, H.R. 1551, 115th Cong. (2018).

51. Copyright Act of 1976, 17 U.S.C. §§ 101–1332 (2012).

52. *See* 17 U.S.C. § 115.

53. *Id.* at § 102.

54. *Id.*

55. *Baker v. Selden*, 101 U.S. 99 (1879); *see also* *CDN Inc. v. Kapes*, 197 F.3d 1256, 1261–62 (9th Cir. 1999).

56. 17 U.S.C. § 106.

57. United States Copyright Office, *Copyright in General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html> (last visited Feb. 7, 2020).

holder's copyrights are infringed, the Copyright Act allows for injunctions,⁵⁸ equitable relief,⁵⁹ damages,⁶⁰ attorney's fees,⁶¹ and criminal penalties.⁶²

Copyright protections are not boundless, however. They are limited by such concepts as the first sale doctrine,⁶³ fair use,⁶⁴ various safe harbors,⁶⁵ and many more.⁶⁶ The fair use doctrine is an affirmative defense to infringement that is especially relevant to the internet. Courts consider the following four elements when determining whether a would-be infringer's use of copyrighted material was "fair": (1) the purpose of use was not of commercial nature; (2) the nature of the copyrighted work used was more factual than imaginative; (3) the amount of copyrighted material used is not disproportionate; and (4) the effect on the copyrighted materials potential market is minimal.⁶⁷ When considering the fair use elements, courts also focus on whether the use of copyrighted material was transformative.⁶⁸ This approach virtually eliminates the possibility for embedding to constitute fair use, as embedding displays the information in an unaltered form from its original source, and although the use can sometimes be transformative,⁶⁹ that is unlikely to happen often.

A. COPYRIGHT INFRINGEMENT AND ITS APPLICATION TO LINKING AND EMBEDDING

The main controversy at the intersection of copyright law and linking is whether linking infringes the copyright holder's right to exclusive control over their works. To prevail in an infringement lawsuit, the plaintiff has to show

58. 17 U.S.C. § 502 (allowing for both preliminary and permanent injunctions).

59. On top of injunctions, the Copyright Act also authorizes a seizure order, which allows for impoundment of all the copies of the infringing product. *See* 17 U.S.C. § 502.

60. 17 U.S.C. § 504 (allowing the author to recover for either actual damages and defendant's profits, or statutory damages).

61. 17 U.S.C. § 505.

62. The Copyright Act provides for criminal penalties for "willful and for profit" copyright infringement. *See* Copyright Act of Jan. 6, 1897, ch. 4, 29 Stat. 481.

63. 17 U.S.C. § 109.

64. *Id.* § 107.

65. For example, the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512 provides a safe harbor from third-party liability for online service providers (OSPs).

66. For example, built into the Copyright Act are exceptions for public broadcasters, libraries, and software backup. 17 U.S.C. §§ 108, 110, 117.

67. Stanford University Libraries, *Measuring Fair Use: The Four Factors*, STANFORD UNIVERSITY, <http://fairuse.stanford.edu/overview/fair-use/four-factors/> (last visited Feb. 7, 2020).

68. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV 1105, 1111 (1990).

69. *Kelly*, 336 F.3d at 818.

under 17 U.S.C. § 106 that their exclusive rights in a copyrighted work were violated.⁷⁰

Central to this debate is § 106(5)⁷¹ which grants the copyright owner an exclusive right to “display the copyrighted work publicly.”⁷² The concept of publicly displaying the work is defined in 17 U.S.C. § 101, and requires a showing of the work (1) “at a place open to the public,” or by (2)

transmit[ting] or [. . .] communicat[ing] a performance or display [. . .] to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.⁷³

So, in the Mona Lisa example in the Section above,⁷⁴ live-streaming the paintings would fulfill the public display requirement of 17 U.S.C. § 106.

To further understand the relationship between copyright infringement and linking, the following subsections provide an overview of potential defenses to internet copyright infringement, and how each type of linking has been treated in the copyright infringement jurisprudence. The first Subsection illustrates the potential repercussions of strengthening or weakening copyright protections. It shows that the protections currently offered by copyright law are inadequate. The second Subsection discusses which types of linking practices U.S. courts are most likely to consider copyright infringement.

1. Potential Defenses to Copyright Infringement

Although the current copyright regime provides some level of protection to linking practices on the internet, this Section shows that those protections are neither sufficient nor efficient at protecting fundamental reference techniques. The main controversy with online linking is whether it violates the copyright holders’ right to control public displays of their works. This right is violated when the author can show that their exclusive rights in a copyrighted work were violated.⁷⁵ Currently, there exist two main defenses that could be utilized to avoid liability for embedded copyrighted content: (1) the DMCA’s § 512 safe harbor defense and (2) licenses (both express and implied).⁷⁶

70. 17 U.S.C. § 106 (2012).

71. *See infra* Section IV.B.

72. 17 U.S.C. § 106.

73. *Id.* § 101.

74. *See supra* Part III; 17 U.S.C. § 106.

75. 17 U.S.C. § 106.

76. *Id.* § 512.

In their article “Embedding Content or Interring Copyright: Does the Internet Need the ‘Server Rule?’” Jane C. Ginsburg and Luke Ali Budiardjo lay out these two defenses, arguing that they could be utilized to protect embedding from infringement.⁷⁷ They argue that the aforementioned defenses could protect would-be infringers, minimizing the impact of a change in how copyright protections on the internet are viewed by the courts.⁷⁸ According to their argument, potential infringers could shield themselves from liability using these two defenses, leaving the internet unable to utilize linking to a large extent as we know it today.⁷⁹ But because their interpretations are vulnerable to the whims of the courts, neither of these two defenses seems very promising at protecting embedding. Even if § 512 safe harbors or licenses were promising defenses, relying on them to justify embedding is undesirable in the long run.

DMCA § 512 limits the liability of internet service providers for online copyright infringement.⁸⁰ Although DMCA § 512 does not absolve online service providers of any copyright infringement liability, it creates safe harbors based on the type of services a website provides.⁸¹ A website provider can receive a safe harbor protection from copyright infringement as an intermediary if they fulfil certain requirements of the DMCA.⁸² Amongst other things, these requirements demand that ISPs have no knowledge or financial benefit from the infringing activity and that they comply with any takedown notice served by the copyright holder.⁸³ This provides no room for protection for embedding materials on the internet, especially if the embedding activity cannot be separated from the advertising activity of the embedding website. Therefore, the content distributors could not seek safe harbor under DMCA

77. See generally Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the “Server Rule”?*, 42 COLUM. J. L. & ARTS 417 (2019). For more information on the server rule, see *infra* Section IV.B.1.

78. *Id.* at 474.

79. *Id.*

80. 17 U.S.C. § 512(l).

81. 17 U.S.C. §§ 512(a)–(d).

82. The website service provider, for example, must:

adopt[] and reasonably implement[], and inform[] subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and accommodate[] and do[] not interfere with standard technical measures.

17 U.S.C. §§ 512(i)(1)(A)–(B). Additionally, the online service provider is also required to (1) not receive a financial benefit from the infringing activity; (2) not have knowledge or awareness of the infringing material; (3) upon receiving notice of infringement act “expeditiously to remove or disable access to” the infringing material. 17 U.S.C. §§ 512(c)(1)(A)–(E).

83. 17 U.S.C. §§ 512(c)(1)(A)–(E).

§ 512(c)–(d)⁸⁴ if they knowingly embedded copyrighted material or they did not comply with the takedown request from the copyright holder.⁸⁵ Additionally, in order for this defense to provide the appropriate breadth of immunity⁸⁶ to leave the reference techniques widely available, the courts would still have to determine: (1) if every type of linking was meant to be protected under DMCA § 512, and (2) what constitutes a “service provider.”⁸⁷

If the courts deemed that embedding cannot be protected under the safe harbor created by DMCA § 512, the defense could not be used in the vast majority of linking-copyright infringement cases. On the other hand, if the courts answered the first question affirmatively, while narrowly defining the term service provider, the defense would only be available to large providers of online services, while exposing smaller internet sites and their owners to potential copyright liability.⁸⁸ The availability of this defense therefore relies on a judicial decision on whether the defense is applicable in these types of cases and to what degree. Leaving this up to courts that currently cannot agree on how to treat law on the internet would likely lead to a circuit split, without addressing the underlying issues. And because the internet is so fundamental to individuals’ everyday lives, the rights of access to information on the web should be consciously determined by the legislature, rather than left to a piecemeal evolution in the courts.

The second potential defense is express and implied licenses. In order to be covered by licenses, a website provider would have to obtain express written or implied permission to do something.⁸⁹ An express licensing system would allow the copyright owners to determine what type of sharing they are willing to expose their content to. Although some websites already account for express licenses in their Terms of Service,⁹⁰ a new licensing system that would account for display rights would still have to be developed. An implied license to embed materials, although particular to each site responsible for content

84. DMCA § 512(d) limits liability “. . . for infringement of copyright by reason of the [service] provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link . . .” 17 U.S.C. § 512.

85. Ginsburg, *supra* note 77, at 474.

86. An appropriate breadth of immunity is one that would keep the information on the internet at least as easily accessible as it is today.

87. 17 U.S.C. § 512.

88. Ginsburg, *supra* note 77, at 453–54.

89. *See, e.g.,* United States v. Univis Lens Co., 316 U.S. 241, 249 (1942) (implying a license as “an incident to the purchase of [an article]”).

90. *See Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Feb. 9, 2020) (“. . . you grant [Twitter] a worldwide, non-exclusive, royalty-free license . . . to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content . . .”).

creation, could be utilized by the defendant in copyright infringement if a copyright license could “be implied from conduct.”⁹¹

Two potential types of conduct could imply a license on the internet: (1) posting content on the internet, or (2) not opting-in to using currently available technology to block linking.⁹² The courts, however, are unlikely to embrace the first conduct as a standard due to the broadness of its implications. If courts were to embrace such a standard, anytime anyone posted copyrighted work on the internet, the copyright holder would lose their copyright protections. The latter standard, although more likely to be adopted, would cause a dramatic shift in copyright by creating an opt-in, rather than automatic, system for copyright protections. Currently, copyright is granted automatically.⁹³ But by requiring the authors to affirmatively protect their work on the internet, the copyright protections could only be automatically lost, not granted.

These defenses are not likely to provide the necessary amount of coverage to truly preserve reference techniques for several reasons. First, relying on DMCA safe harbors likely requires adjudication by the courts, which will put new strain on the already congested judicial system.⁹⁴ Second, the current system creates an institutional advantage for large, established companies who have the funds to defend or pursue these kinds of suits.⁹⁵ Third, although licensing systems do not necessarily require adjudication, the negotiation of individual express licensing systems between each ISP and copyright holder would simply be impractical. Overall, it is better to adapt the law to current practices on the internet, than to “Frankenstein” the existing law into something that will provide the protections necessary for the internet’s continued connectedness.

91. MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03(A)(7) (2006).

92. Ginsburg, *supra* note 77, at 469–70.

93. COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html> (last visited May 6, 2020).

94. Currently, reference techniques such as embedding are protected by the judicially created “server rule” which requires a copy to be made of a copyrighted work, to constitute infringement on the internet. Therefore, the adjudication necessary to settle DMCA safe harbors claims would create an additional set of cases for the court to address, which currently does not fall into that realm. *See infra* Section IV.B.1.

95. *See, e.g.,* Adrian Covert, *Apple and Google Spent More Money on Legal Fees Than R&D Last Year (And Google Apparently Thinks Apple Wants It That Way)*, GIZMODO (Oct. 8, 2012), <https://gizmodo.com/apple-and-google-spent-more-money-on-legal-fees-than-r-5949909>; Jeremy Horwitz, *Apple’s former top lawyer: \$1 billion budget enabled high-risk strategies*, VENTUREBEAT (June 10, 2019), <https://venturebeat.com/2019/06/10/apples-former-top-lawyer-1-billion-budget-enabled-high-risk-strategies/>.

2. *How Are Different Types of Linking Treated?*

Generally, U.S. courts have held that simple and deep linking do not constitute any copyright infringement.⁹⁶ In *Ticketmaster v. Microsoft*, Ticketmaster sued Microsoft for bypassing their home pages with deep links, arguing that such an action diluted its value.⁹⁷ Microsoft brought up several defenses, including that Ticketmaster had breached an accepted internet custom that allows linking to other people's sites.⁹⁸ The case eventually settled on confidential terms. A later, similar case, *Ticketmaster Corp. v. Tickets.com, Inc.*, picked up the issue. There, the district court had to determine whether the defendant's deep linking constituted an unauthorized public display of the plaintiff's event pages.⁹⁹ The Ninth Circuit held in favor of deep linking, while pointing out that copyright does not protect facts.¹⁰⁰

While deep and ordinary links redirect the end user to the source website, clearly letting the user know that they are being shown content from another site, embedding makes the information appear as part of the embedding website. Thus, often the embedded information does not appear any different than non-embedded information. It is precisely because of this inability to distinguish between linking and source website information that the majority of jurisprudence in the United States focuses on embedding.

B. POTENTIAL EMBEDDING CIRCUIT SPLIT

Although copyright law in the United States has undergone many changes, it has largely failed to adapt to the internet age. Unable to find consensus, courts developed two approaches for addressing the interaction of copyright infringement with one of the internet's most central tools. The Ninth Circuit and district courts in the Second and Fifth Circuits are at odds with each other, which is likely to lead to a circuit split. Sooner or later the Supreme Court or the legislature will have to resolve these differences. Over the years, the Ninth Circuit embraced the so called "server test,"¹⁰¹ while the district courts in other circuits recently advocated for the "incorporation test."¹⁰² The two tests are

96. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2002).

97. *Microsoft's Link to Ticketmaster Site Spurs Trademark Lawsuit*, Computer & Online Industry Litigation Reporter, at 24087 (May 6, 1997), <https://cyber.harvard.edu/metaschool/fisher/linking/linking/link3.html>.

98. *Id.*

99. *Ticketmaster Corp. v. Tickets.Com Inc.*, 2 F. Appx 741, 741 (9th Cir. 2005).

100. See *Feist Publications, Inc v. Rural Telephone Service Co.*, 499 U.S. 350, 358 (1991) (holding that addresses and telephone numbers do not have copyright protection, because they are mere facts).

101. See *infra* Section IV.B.1.

102. See *infra* Section IV.B.2.

diametrically opposite. In the competition for survival between the two tests, the server test should persevere, as it fits already settled expectations about internet linking.

1. *Ninth Circuit and the Server Test*

The Ninth Circuit's server test is a bright line rule for copyright infringement in linking. In *Kelly v. Arriba Soft*, the Ninth Circuit ruled that deep linking from thumbnails was not infringement because it was highly transformative and therefore fell within the purview of fair use.¹⁰³ In *Perfect 10 vs. Amazon*, the Ninth Circuit again considered whether an image search engine's use of thumbnails could be considered fair use.¹⁰⁴ Once again, the court found the use of thumbnails highly transformative, thus finding fair use.¹⁰⁵

In *Perfect 10*, the court also addressed embedding by creating the heavily-relied-upon "server test," which states that embedding does not violate the copyright holder's right to public display unless the copyrighted material was stored on the server of the embedding website.¹⁰⁶ Thus, in order to show infringement of their public display right under the server test, the plaintiff would have to show that server storage embedding took place (akin to making a copy of Mona Lisa before live streaming it).¹⁰⁷ The server test has also been embraced by the Seventh Circuit in *Flava Works vs. Gunter*,¹⁰⁸ and was largely accepted as the law of the land in the United States until 2017.¹⁰⁹

2. *District Courts and the Incorporation Test*

Since the ruling in *Perfect 10* came down in 2007, most of the internet was built around the server test.¹¹⁰ However, recently district courts in both the Fifth and Second Circuits rejected the server test to some degree. In 2017, the Northern District of Texas rejected the server test in *Leader's Institute, LLC v.*

103. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

104. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).

105. *Id.* at 1165.

106. *Id.* at 1159.

107. *Id.*

108. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 756 (7th Cir. 2012).

109. Jeffrey Neuburger, *New York Court Rebuffs Ninth Circuit's Copyright "Server Test." Finds Embedded Tweet Displaying Copyrighted Image to Be Infringement*, PROSKAUER (Mar. 2, 2018), <https://newmedialaw.proskauer.com/2018/03/02/new-york-court-rebuffs-ninth-circuits-copyright-server-test-finds-embedded-tweet-displaying-copyrighted-image-to-be-infringement/>.

110. For example, YouTube allows the video creators that post to its website to prevent their videos from being embedded. *Restriction embedding*, YOUTUBE, <https://support.google.com/youtube/answer/6301625?hl=en> (last visited Feb. 9, 2020).

Jackson by distinguishing *Perfect 10* and rejecting the idea that a copy of copyrighted material is required for public display.¹¹¹

The Southern District of New York likewise rejected the server test in favor of the so-called “incorporation test.”¹¹² In *Goldman v. Breitbart*, Goldman posted a photo of Tom Brady to his Snapchat.¹¹³ One of Goldman’s friends then posted the photo online, and it went viral as Twitter users began reposting it.¹¹⁴ The tweets which included the photo were picked up by some news organizations and embedded in their online stories.¹¹⁵ Goldman sued nine of those news organizations claiming copyright infringement.¹¹⁶

The court ruled in favor of the photographer, stating that “liability should not hinge on invisible, technical processes imperceptible to the viewer.”¹¹⁷ The court did not address the fact that embedding creates a deep link to the source website, which is clear to the user looking for the source. The “incorporation test” would find infringement anytime a website incorporates or embeds the copyrighted material without a license from the copyright owner. This broad sweeping ruling can “radically change linking practices, and thereby transform the Internet as we know it.”¹¹⁸ The Second Circuit thus far has denied an interlocutory appeal.¹¹⁹ At the time of writing it is unclear whether the issue will be taken up on appeal.¹²⁰

The server and incorporation tests are radically different and clearly in juxtaposition to each other. The Southern District of New York’s approach protects copyright holders’ right of exclusive ownership. It also renders

111. *Leader’s Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514 (N.D. Tex. Nov. 22, 2017).

112. Eric Goldman, *In-line linking May Be Copyright infringement - Goldman v. Breitbart News*, TECH & MKT. L. BLOG (Feb. 16, 2018), <https://blog.ericgoldman.org/archives/2018/02/in-line-linking-may-be-copyright-infringement-goldman-v-breitbart-news.htm> [<https://perma.cc/Y25K-2Y64>].

113. *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 586–87 (S.D.N.Y. 2018).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 595.

118. Brief for the Electronic Frontier Foundation and Public Knowledge as Amicus Curiae Supporting Defendants at 12, *Goldman v. Breitbart*, 302 F.Supp.3d 585 (S.D.N.Y. 2018) (No. 17-CV-3114).

119. Adam R. Bialek, *SCOTUS Showdown Will Have to Wait as Second Circuit Denies Petition to Review SDNY Rejection of Server Test for Copyright Infringement*, NATIONAL LAW REVIEW (July 19, 2018), <https://www.natlawreview.com/article/scotus-showdown-will-have-to-wait-second-circuit-denies-petition-to-review-sdny>.

120. Leila Knox, *Second Circuit Punts on In-Line Linking Appeal*, JDSUPRA (Aug. 15, 2018), <https://www.jdsupra.com/legalnews/second-circuit-punts-on-in-line-linking-39813/>.

embedding without a license illegal on the internet, which will result in dramatic changes to the web's structure.¹²¹ In contrast, the Ninth Circuit's approach allows the flexibility necessary to preserve embedding on the internet. The server test also accommodates settled expectations both of consumers and companies whose businesses rely on embedding to quickly display all necessary information.

C. LINKING AND EMBEDDING IN EUROPE

Although the United States and the European Union try to fulfil different goals through their intellectual property protections,¹²² Europe has moved in a very similar direction to the recent district court decisions in the Second and Fifth Circuits. The newly passed Directive on Copyright in the Digital Single Market attempts to enlarge and strengthen the rights of copyright holders to the detriment of linking on the web.

1. *Directive (EU) 2019/790 Background*

On April 17, 2019, the European Parliament passed the Directive 2019/790 (the "Directive"), adopting stringent copyright protections that threaten internet linking.¹²³ The new law contains two articles which extend copyright protection for embedded works.¹²⁴ According to the European Council, the goal of the Directive is to broaden previous copyright protections by reducing the "value gap" between profits for copyright holders and internet platforms.¹²⁵

During the legislative process, the Directive has spurred much debate. The Directive's opponents included major tech companies, internet users, and human rights advocates, while the proponents included media organizations, newspapers and publishers.¹²⁶ The parties opposing the Directive were concerned with its potential to inhibit freedom of speech on the internet, and the possibility it turns large tech companies into the copyright police.¹²⁷ In an open letter to the European Committee in 2017, the opponents of the

121. *See supra* Section II.B.

122. *Id.*

123. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 Relating to Copyright on the Digital Single Market, 2019 O.J. (L 130) 92.

124. *See supra* Section IV.C.2.

125. Council of the European Union Press Release, Copyright Rules for the Digital Environment (May 25, 2018).

126. *See* Letter from David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (June 13, 2018); *Protests greet Brussels copyright reform plan*, BBC NEWS (June 15, 2018), <https://www.bbc.com/news/technology-44482381#>; *Letter by 9 News Agencies* (Dec. 2017), <https://perma.cc/8T9N-X7PK>.

127. Palais des Nations, *supra* note 126.

Directive warned of the dangers that this new law could bring.¹²⁸ They were concerned about the creation of uncertainty that would incentivize the monitoring roles of ISPs and the potential communication blocking that ISPs would have to do, “if they are to have any chance of staying in business.”¹²⁹ At the same time, the Directive’s proponents argued it decreases the difference in earnings between copyright holders and ISPs.¹³⁰

The Directive came into force on June 7, 2019, and member states have until June 7, 2021, to adopt it within their borders.¹³¹ The actual effects of the Directive on the member states are yet unknown, but it is likely to turn European courts into a hotbed of linking- and human rights-related litigation.¹³²

2. *Articles 15 and 17*

Article 15 (Draft Article 11) gives print publishers a year-long direct copyright over “online use of their press publication by information society

128. The opponents included Human Rights Watch, Reporters Without Borders, Creative Commons, Electronic Frontier Foundation, Max Planck society, and many more. *See* Mallory Locklear, *Digital rights groups speak out against EU plan to scan online content*, ENGADGET (Oct. 17, 2017), <https://www.engadget.com/2017/10/17/digital-rights-groups-against-eu-scan-online-content/> (noting that mandates similar to Article 13 have been twice rejected by the Court of Justice before); *see also* Eileen Hershenov, *How the EU copyright proposal will hurt the web and Wikipedia*, WIKIMEDIA FOUNDATION (June 29, 2018), <https://blog.wikimedia.org/2018/06/29/eu-copyright-proposal-will-hurt-web-wikipedia/> (discussing how “[the] proposed new copyright package in the European Union is a threat to our fundamental right to freely share information,” and outlining the specific effects it might have on Wikipedia); Katie Collins, *Article 13: Europe’s hotly debated revamp of copyright law, explained*, CNET (Mar. 25, 2019), <https://www.cnet.com/news/article-13-europes-hotly-debated-eu-copyright-law-explained/> (describing how great the potential impact of the directive can be “[a]n organized campaign against Article 13 warns that it’d affect everything from memes to code, remixes to livestreaming”).

129. Open Letter from Civil Liberties Union for Europe and European Digital Rights et. al., to President Juncker et. al. (“Article 13 of the proposal on Copyright in the Digital Single Market include obligation on internet companies that would be impossible to respect without the imposition of excessive restrictions on citizens’ fundamental rights”).

130. *See* Council of the European Union Press Release, *supra* note 125.

131. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 Relating to Copyright on the Digital Single Market, 2019 O.J. (L 130) 92, <https://perma.cc/9HAJ-RZP7>.

132. *See* Dawn C. Chmielewski, *YouTube CEO Susan Wojcicki Warns Against “Unintended Consequences” Of EU’s Article 13*, DEADLINE (Nov. 12, 2018), <https://deadline.com/2018/11/youtube-ceo-susan-wojcicki-warns-unintended-consequences-article-13-1202500444/>; Sam Forsdick, *European Parliament votes against ‘publisher’s right’ copyright law changes as Facebook warns of ‘unintended consequences,’* PRESSGAZETTE (July 5, 2018), <https://www.pressgazette.co.uk/european-parliament-votes-against-publishers-right-copyright-law-changes-as-facebook-warns-of-unintended-consequences/>.

service providers.”¹³³ Before the Directive went into effect, publishers in Europe had to rely on authors to assign them the copyright before they could invoke copyright protections.¹³⁴ In addition to limiting the protection to only last one year, Article 15 also includes exemptions for copying an “insubstantial” part of a work and copying required for scientific or academic research.¹³⁵ Both exceptions remain rather poorly defined and ambiguous.

Article 17 (Draft Article 13) requires for-profit “online content sharing service providers” to implement “effective and proportionate measures” to prevent the availability of unlicensed copyrighted material.¹³⁶ What constitutes “effective and proportionate measures”?¹³⁷ The article mentions removing unlicensed works “expeditiously” and demonstrating that the website provider made “best efforts” to prevent the future availability of such works.¹³⁸ Article 17 carves out an exception for private cloud storage services, non-profit online encyclopedias, and non-profit educational or scientific repositories.¹³⁹ But large parts of how this Article will be applied remain ambiguous similarly to the exceptions in Article 15.¹⁴⁰

As both Europe and the United States seem to move towards more stringent copyright protections for embedding on the internet, the following sections discuss potential ramifications of both strengthening and loosening those copyright protections.

V. ANALYSIS OF INTERPLAY BETWEEN COPYRIGHT LAW AND LINKING ON THE INTERNET

As shown above, at least some of the goals of copyright law and the internet seem to be different. The former prioritizes exclusive rights, while the latter promotes freedom to access content without restrictions. This Part focuses on evaluating the potential consequences of favoring either of these goals and shows that it is possible to reconcile them.

133. Council of European Union Press Release, *supra* note 125.

134. Policy Department for Citizens Rights and Constitutional Affairs, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, at 15 (Sep. 15, 2017), [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf).

135. *Copyright Rules for the Digital Environment*, *supra* note 125.

136. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 Relating to Copyright on the Digital Single Market, 2019 O.J. (L 130) 92, <https://perma.cc/9HAJ-RZP7>.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* Section IV.C.2 (discussing Draft Article 11).

A. CONSEQUENCES OF STRINGENT COPYRIGHT PROTECTION IN LINKING ON THE INTERNET

If the United States chooses to embrace the emerging incorporation test rather than the Ninth Circuit's server test, the consequences for the internet are likely to be dire. Such a decision will essentially eliminate the ability to embed on the internet because it will create copyright infringement liability for embedding. This Section discusses how the likely positive impacts of such protections are significantly outweighed by their negative impacts.

1. *Positive Effects of Stringent Copyright Protections in Linking on the Internet*

The positive aspects of establishing stronger copyright protections on the internet include: (1) creating a clear vehicle for reimbursement of authors' creative efforts;¹⁴¹ (2) empowering authors to create a culture on the internet that respects their authorship rights;¹⁴² and (3) incentivizing continuous content creation by the authors.¹⁴³

Although the first two effects seem generally desirable, they do not fulfil the fundamental goals of intellectual property protections in the United States and should only be a secondary consideration.¹⁴⁴ Intellectual property protections such as copyright are meant to incentivize "progress in science and useful arts."¹⁴⁵ On the internet this can be achieved in two ways. First, internet can promote progress by encouraging the creation of more new content, focusing on the output quantity. Second, the internet can incentivize further creation by providing access to information that will spur the creation of new quality content (independent of quantity).

Both of these incentives can be encouraged on the internet without the strong enforcement of copyright holders' rights. The idea that the exclusive rights, granted by copyright protections, incentivize authors to create comes from the non-digital world, where each physical copy of individual pieces of work could have been sold for monetary gain.

This assumption, however, no longer holds true on the internet. Amongst other reasons, it's likely impossible to keep track of all the copies of one's own work to the same degree as in the non-digital world due to its sheer size and

141. SFWA, <https://www.sfwaworld.com/other-resources/for-authors/writer-beware/copyright/> (last visited May 8, 2020).

142. Ginsburg, *supra* note 77, at 477.

143. James Campbell, *Authorship, Incentives for Creation, and Copyright in the Digital 21st Century*, 1, 6–7, <https://asistdl.onlinelibrary.wiley.com/doi/pdf/10.1002/meet.1450430168>.

144. *See supra* Section II.B.

145. U.S. CONST. art. I § 8, cl. 8.

openness. And the policing of one's copyrightable material can become extremely difficult and expensive.¹⁴⁶ Thus, although stringent copyright protections could protect copyright holder's rights to a certain degree, they are likely to only favor those copyright holders who have the means to police their own work. Furthermore, in the current copyright system, if a copyright holder is successful in policing their copyrighted material, they are still not economically rewarded unless they choose to pursue litigation.

Although economic incentives should not be the primary concern of copyright law, they are still critical to drive creation of quality art on the internet. Access to information, after all, is meaningless if no new works will continue to be created due to lack of funds. Publication houses, newspapers, film studios, and many others require an ability to collect money to keep their lights on, in order to continually produce new "sciences and useful arts."¹⁴⁷ While fully acknowledging the importance of economic compensation for the work that authors and copyright holders often put into their works, this Note suggests that enforcement of copyright should not be the way we achieve such compensation. Instead, copyright holders could rely on licensing schemes, similar to the ones seen in the music industry, to obtain monetary compensation for their works.¹⁴⁸

2. *Negative Effects of Stringent Copyright Protections in Linking on the Internet*

Stronger online copyright protections have few beneficial effects, but their negative consequences would be disastrous for many industries. Strengthening copyright protections on the internet would not only upset settled industry expectations and prioritize the needs of copyright holders over the public, it would largely favor established artists and ISP giants, and in the worst-case scenario create absolute barriers to access of information.

a) *Upsetting Settled Expectations*

Proponents of more stringent copyright protections worry that embedded links will drive down content creation by preventing copyright holders from

146. Once information is released on the internet it is difficult to control who has access to it (unless it's behind a paywall). If anyone can gain access to information anyone can post it anywhere on the web—monitoring such activity can be extremely time consuming. Some services help copyright holders with such tasks, but the user has to actively go search for copyright infringements. Furthermore, legal enforcement of copyright can also be expensive. See Yang Sun, *Copyright Law Enforcement in Online Environment*, (2015), <https://ssrn.com/abstract=2432987>.

147. *Id.*

148. See *infra* Section V.C.

being fully compensated for their work. But embedding has been a largely accepted practice since the decision in *Perfect 10* over a decade ago.¹⁴⁹ And content creation on the internet has continued to thrive.¹⁵⁰ Therefore, embedding practices on the internet have not stalled progress, but likely further facilitate it by giving easy access to inspiration for the end users. This trend shows that copyright protections for embedding are not necessarily needed to incentivize content creation on the internet, but just the opposite. By making material more difficult to find, they may act as a hurdle in the creative process.

b) Shifting the Incentive-Access Balance

To many, it might seem strange that authors would be incentivized to create content even without strong copyright protections. But the internet has exponentially expanded the potential economic markets available to copyrightable material, yet copyright law has not addressed this change.¹⁵¹ Intellectual property protections assume a balance between incentives created through exclusive rights for authors and access to creative works that will spur further creation of content (the “incentive-access balance”).¹⁵²

The internet profoundly shifted that balance by expanding the economic possibilities for copyrighted materials and at the same time creating an easier access to information for countless individuals.¹⁵³ By exponentially increasing the audience for works, the internet allows copyright holders and authors to make less compensation per each view of their work, while also exposing them to the benefits of new, previously unreachable, audiences.

Stringent copyright protections in linking will limit access to information, as copyrightable material will be more difficult to share. The restriction of embedding on the internet might seem insignificant due to the availability of deep and simple linking. But would a user view an embedded image, tweet or video if it required them to navigate to another website? The more information is buried, the less likely it is to reach the eyes of the end user. Thus, decisions to strengthen copyright holders’ exclusive rights often ignore the access side

149. See *supra* Section IV.B.1.

150. See Alice Klat & Jayant Bhargave, *Content democratization & How the Internet is fueling the growth of creative economies*, PWC GLOBAL (Jan. 5, 2017), <https://www.strategyand.pwc.com/gx/en/insights/content-democratization.html>.

151. COMM. ON INNOVATIONS IN COMPUTING AND COMM’N, FUNDING A REVOLUTION: GOVERNMENT SUPPORT FOR COMPUTING RESEARCH 180–81 (1999).

152. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”).

153. See COMM. ON INNOVATIONS IN COMPUTING AND COMM’N, *supra* note 151, at 169, 180.

of the balance that should be struck in intellectual property protections. This in turn diminishes the access to arts and sciences that is at the very heart of intellectual property law. Enforcing stringent copyright protections in embedding will once again push that balance in favor of the copyright holder, without accounting for the need to access to information, which is so crucial to stimulating future creativity.

Limiting embedding can also create dire consequences for authors. As mentioned above,¹⁵⁴ image source embedding as used by Google Images also serves as a deep link to the source website.¹⁵⁵ Without the availability of embedding, which at least provides some level of credit to the source website, users are more likely to turn to illegal downloads and uploads,¹⁵⁶ which would be harder for authors to track. And since the culture on the internet has largely ignored copyright holders' exclusive rights and instead facilitated free use of copyrightable material,¹⁵⁷ the average internet user is unlikely to be stopped by copyright protections. This is especially true in terms of images available on the internet, as they do not have the equivalent of Netflix for videos or Spotify for music, to which users can turn. In terms of copyrightable images, restricting embedding is equivalent to the removal of streaming services for music and would likely push us back to the time of Napster.¹⁵⁸

c) Working Against the “Little Guy”

The impact of banning embedding on the internet would not be limited to large companies that heavily rely on embedding practices, or authors that loathe them. Small businesses are also likely to be impacted due to the

154. See *supra* Part III.

155. If a user clicks on the image after expanding it, although the image is embedded, it takes the user to the website from which the image originates.

156. The internet from its conception has been used and often viewed as a tool for exercise of the freedom of speech, and granting access to fundamental rights, this created a culture of entitlement of access that users often rely on to justify to illegally download music or movies. See SULA WONG, EITAL ALTMAN & JULIA ROJAS-MORA, INTERNET ACCESS: WHERE LAW, ECONOMY, CULTURE AND TECHNOLOGY MEET 477 (vol. 55 issue 2 2011). The individuals are therefore likely to continue using copyrighted material for as long as they can get away from it.

157. See Kit Walsh, *Copyright Law Versus Internet Culture*, EFF (Feb. 24, 2017), <https://www.eff.org/deeplinks/2017/02/copyright-law-versus-internet-culture> (describing how internet culture depends on remixing copyrighted content via “fan fiction,” “Photoshop battles,” “fan music videos,” “redubbing and resubbing,” “reaction videos,” and more).

158. See Alex Suskind, *15 Years After Napster: How the Music Service Changed the Industry*, DAILY BEAST (July 12, 2017), <https://www.thedailybeast.com/15-years-after-napster-how-the-music-service-changed-the-industry>.

favoritism that already exists.¹⁵⁹ Smaller businesses or start-ups are far less likely to have legal teams or funds necessary to protect themselves from copyright infringement litigation.¹⁶⁰ Thus, stringent copyright protections around embedding would drive small businesses to avoid practices that could land them in court. That would ultimately make their large competitors more attractive to end users, because they would offer a wider range of services. In turn, the inability to use certain technologies by small businesses has the potential to stifle business growth and further propagate the monopolies held by large ISPs.

When discussing the need for more stringent copyright protections in embedding practices, many emphasize the need for small authors to “make a living.”¹⁶¹ But how is a small author who cannot make a living supposed to hire a decent lawyer to enforce their copyrights?¹⁶² Putting aside the fact that a lot of small authors are not themselves copyright holders and instead assign their rights to a third-party, the costs of such a lawsuit would often be prohibitive to any small entity. This is especially so when suing an ISP giant like Google, who is likely willing to throw money at the problem until it goes away.¹⁶³ This not only makes it essentially impossible for a small copyright holder without proper funding to succeed in such a suit, it further creates a discrepancy in the use of embedding between the internet giants and their smaller competitors while essentially providing a remedy only for the rich.

Fair use and DMCA § 512 takedown notices are not enough to address the gap. The availability of the fair use defense typically hinges on the noncommercial use of the copyrightable material.¹⁶⁴ Since a lot of websites posting copyrightable materials receive money through advertising, they are unlikely to fall within the protection of fair use due to their commercial

159. Jonathan Bailey, *5 Ways Copyright is Screwing Smaller Creators*, PLAGIARISMTODAY (Oct. 20, 2010), <https://www.plagiarismtoday.com/2010/10/20/5-ways-copyright-is-screwing-smaller-creators/>.

160. C. Daniel Baker, *Many Small Businesses Don't Seek Legal Help Despite Risks*, BLACKENTERPRISE (Oct. 25, 2013), <https://www.blackenterprise.com/small-businesses-need-legal-help/>.

161. See *Oversight of the U.S. Copyright Office: Hearing on H.R. 113-116 before the Subcomm. On Courts, Intellectual Property, and the Internet*, 113th Congress 2 (2014) (statement of Mary Rasenberger on Behalf of the Authors Guild).

162. Cost of litigating such a case can go well into six figures. See *How much does it cost to pursue a copyright infringement claim*, TRAVERSE LEGAL, <https://www.traverselegal.com/blog/how-much-does-it-cost-to-pursue-a-copyright-infringement-claim/> (last visited Feb. 8, 2020).

163. Some of those cases might settled in favor of the author. However, settlements for many of these companies can create a dangerous precedent, and thus the companies are likely to want to avoid them.

164. 17 U.S.C. § 107.

nature.¹⁶⁵ The DMCA § 512 takedown notice is also a problematic remedy for this problem, because although it would protect copyright holders' exclusive rights, it disregards the access side of the incentive-access balance equation by preventing end users from having any access to the copyrightable content.

If the roles are reversed, however, and it is the "little guy" who infringes a copyright of a large copyright holder, the copyright holder will have the resources under the current regime to enforce their exclusive rights. This once gain favors the larger party against the "little guy," both in terms of small copyright holders and small website providers, as with the DMCA § 512 takedowns discussed above. Strong copyright holders' rights, particularly in a regime which favors large parties, can so heavily distort the incentive-access balance that it can entirely cut end users off from access to content.

d) Creation of Walled Gardens

As shown above, more stringent copyright protections would further skew the delicate incentive-access balance that has already been heavily tilted in favor of the copyright holders. The most dangerous and extreme consequence of stringent copyright protections is the potential for so-called "walled gardens"—a term used broadly in the tech world to signify a system where the service provider has the ability to limit access to content, applications, and other platforms.¹⁶⁶ The slippery slope of prohibiting one form of linking creates a precedent of willingness to compromise our access to information. This, in turn, would disrupt the functioning of the web¹⁶⁷ and potentially infringe on basic human rights such as rights of freedom of expression and opinion.¹⁶⁸

3. *The Effects of the European Directive*

The policies favoring stringent copyright enforcement on the internet, such as those established in Europe through Directive (EU) 2019/790,¹⁶⁹ would largely have the same effects as those established in the United States

165. See 17 U.S.C. § 107 (1).

166. *Escaping the Walled Gardens in the Clouds*, *supra* note 3.

167. Imagine that every time you tried to access any copyrightable material (a picture, a music video, an article) you'd have to go through paywalls—the cost for simple research on internet would become prohibitive to an average user. In scholarly research many of the websites rely on such paywalls (for example, JSTOR). Students and faculty therefore rely on their Universities' subscriptions in order to utilize such services. In the face of too many restrictions on the access to information, the internet would stop being the great equalizer and instead become another elitist institution.

168. See *supra* Section II.A and Part IV.

169. See *supra* Section IV.C.

through recent court rulings.¹⁷⁰ And the Directive is not without its critics—it has already been challenged. Poland has filed an action for annulment with the Court of Justice of the European Union, alleging that such laws would bring “unwanted censorship” on the internet.¹⁷¹

Of special concern to Poland is Article 17, which is likely to have a “chilling effect”¹⁷² on online expression. Article 17 encourages even the smallest web services “to do everything they can to stop users [from] uploading copyrighted content without authorization,” if the ISPs want to avoid direct liability for infringement.¹⁷³ If this form of censorship was not daunting enough, the type of filtering technology necessary to accommodate Article 17 is extremely expensive if not currently technologically infeasible.¹⁷⁴ These costs are likely to be prohibitive to smaller ISPs, thus once again stifling competition and promoting monopolistic practices.

The consequences of Article 15, which grants print publishers a year-long direct copyright over materials they publish, are far less theoretical than those of Article 17. The ideas behind Article 15 have been tested by both Germany and Spain, where referrals to major newspapers plummeted when Google simply withdrew embedding of certain news sources that wanted to enforce the “link tax.”¹⁷⁵ When major newspapers in Germany demanded payment for their copyrighted content, Google simply ceased to use their content in Google News, causing dramatic drops in readership of source websites.¹⁷⁶

One way to address the imbalance in the relationships between the ISPs and news providers would be for the world to uniformly adopt the “link tax” that was passed in the European Union. This would force the ISPs to comply

170. *See supra* Section IV.C.2.

171. *See* Andrew Liptak, *Poland has filed a complaint against the European Union’s copyright directive*, THE VERGE (May 25, 2019), <https://www.theverge.com/2019/5/25/18639963/poland-european-union-copyright-directive-filed-complaint-court-of-justice> (Articles 15 and 17 of the Directive “would be ripe for abuse by copyright trolls and would make millions of mistakes. The technology simply does not exist to scan the internet’s content in this way.”).

172. *See* David Meyer, *Tech Industry and Activists Still Hope to Sink New EU Copyright Rules*, FORTUNE (Feb. 14, 2019), <https://fortune.com/2019/02/14/eu-copyright-directive-trilogue-deal/>.

173. *Id.*

174. *See generally* Felipe Romero-Moreno, ‘Notice and staydown’ and social media: amending Article 13 of the Proposed Directive on Copyright, 33:2 INT’L REV. L. COMPUTS. & TECH. 187, 189 (2019).

175. *See* David Meyer, *EU Lawmakers Are Still Considering This Failed Copyright Idea*, FORTUNE (Mar. 24, 2016), <https://fortune.com/2016/03/24/eu-ancillary-copyright/> (“Referrals to Springer properties such as *Bild* plummeted by as much as 80% and the publishers quickly retreated, granting Google a temporary exemption from having to pay them.”).

176. *Id.*

and work with copyright holders to find a mutually beneficial arrangement. Such a resolution, however, is both unlikely to happen and undesirable because it would further skew the copyright incentive-access balance. It would likely lead to reduced access to copyrightable material on the internet, as it provides copyright holders with all the power, and does not consider the rights of end users to access information at all.

On the other hand, if no one outside of the European Union adopts the link tax, the ISP giants will remain largely unaffected by copyright limitations. Only the companies of countries with stringent protections are likely to suffer economic downturn when their services are underutilized. As the German example shows, newspaper organizations and publishers, which often are at the forefront of advocating for stringent copyright protections, are likely to suffer if they try to enforce their rights while the laws are not uniform across the internet.¹⁷⁷ Furthermore, according to experts, such a link tax is also likely to cause a shutdown of small media companies across Europe and turn the internet into a “tool of surveillance.”¹⁷⁸

B. CONSEQUENCES OF NO COPYRIGHT IN EMBEDDING ON THE INTERNET

Understanding the consequences of not providing copyright protections is also key to appreciating the licensing solution proposed in this Note. The internet was dreamt up as a tool for free access to information.¹⁷⁹ The logical question to ask, then, is what would happen if no or limited copyright protection existed for embedded links on the internet. Would content creation cease entirely? Maybe, but it is very unlikely. Would the potential loss of economic incentives affect the amount and type of content created? The answer to this question is far more likely to be yes.

177. See *EU Lawmakers Are Still Considering This Failed Copyright Idea*, *supra* note 175.

178. Some of the brightest minds of technology and the pioneers of the internet such as Mitch Kapor, Tim Berners-Lee, Vint Cerf, Guido van Rossum, James Cornin, and Desiree Miloshevic (amongst many others) warn that “Article 13 takes an unprecedented step towards the transformation of the Internet, from an open platform for sharing and innovation, into a tool for the automated surveillance and control of its users.” See Danny O’Brien & Jeremy Malcolm, *70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal*, EFF (June 12, 2018), <https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal>.

179. See *supra* Section II.A; see also Alex Hern, *Tim Berners-Lee on 30 years of the world wide web: We can get the web we want*, THE GUARDIAN (Mar. 12, 2019), <https://www.theguardian.com/technology/2019/mar/12/tim-berners-lee-on-30-years-of-the-web-if-we-dream-a-little-we-can-get-the-web-we-want> (discussing the initial intent for the internet to be accessible, interoperable and open).

The internet has permeated our society and lives to such degrees it is almost impossible to avoid it. Copyright holders could try to stop the linking and embedding of their works on the internet, however, the type of exposure that an author can get through others reposting their work is unmatched virtually anywhere else.¹⁸⁰ Exposure is desirable, because it has the potential to generate additional revenue for the copyright holders.¹⁸¹

It is this motivation for publicity (for shares and likes) that makes embedding such a powerful tool. Although theoretically the same level of exposure could be achieved through simple or deep linking, the convenience of embedding is more likely to draw the attention of end users.¹⁸² Additionally, modern embedding functions as a deep link to the source website. In the absence of embedding, internet users who are often unaware of copyright restrictions are more likely to download the copyrighted material and upload it back without giving any credit to the creator.

The issue with embedding in the current scheme, however, is that it is can be difficult for copyright holders to monetize all of their exposure. Without the users clicking on embedded content, copyright holders cannot collect the advertisement revenue they often rely on.¹⁸³ Unlike the current scheme, the licensing system proposed in the next Section ensures that copyright holders will get reimbursed for their embedded works.

Finally, limiting copyright protections would help fulfill the basic human right of freedom of opinion and expression, which includes the freedom to information and ideas.¹⁸⁴ Access to the internet is crucial to fulfilling one of the most basic human rights. In 2016, the U.N. Human Rights Council released a nonbinding resolution emphasizing the importance of access to the internet by all members of society and condemning “measures to intentionally prevent or disrupt access to or dissemination of information online.”¹⁸⁵

180. See, e.g., Arjun Kharpal, *Pop stars the Internet made famous*, CNBC (Apr. 23, 2015), <https://www.cnbc.com/2015/04/21/popstars-the-internet-made-famous.html> (showing pop stars that became famous thanks to the internet).

181. *Id.*

182. See Dan Taylor, *The Advantages & Disadvantages of Object Linking & Embedding*, TECHWALLA, <https://www.techwalla.com/articles/the-advantages-disadvantages-of-object-linking-embedding> (last visited Aug 8 2021).

183. See *Kelly v. Arriba Soft Corp.*, *supra* note 39. Although some will likely click on the embedded materials, there is no way for copyright holders to assure that every user that sees their material embedded on another website, chooses to click on the embedded material, and thus gets redirected to the source website.

184. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

185. U.N. General Assembly, *The promotion protections and enjoyment of human rights on the Internet Statement*, United Nations General Assembly 1, 4 (June 27, 2016), https://www.article19.org/data/files/Internet_Statement_Adopted.pdf.

Although the resolution itself was initiated to address issues of silencing dissidents by cutting off access to the internet, the identified principle can also be applied to copyright law, if such is enforced to the extreme.¹⁸⁶ The removal of copyright protection on the internet is likely to further promote the equal access to information by all members of society, by preventing the creation of “walled gardens.”¹⁸⁷

That same system, however, would to some degree undermine the compensation model that currently exists for content on the internet. And it is this economic aspect of reimbursing copyright holders that is the most problematic in a world of no copyright protections. Although the equal access to information and clearly set expectations have the potential to equalize (at least to the greatest degree possible) the economic playing field both for small and large ISPs, lack of copyright protections could prevent some of those organizations from monetizing their content. Businesses would still be able to monetize on the embedded material through the publicity that embedding provides, and ad revenue.¹⁸⁸ These two sources of revenue are significantly smaller than the ones currently available on the internet.

The removal of copyright protections for linking practices on the internet affects the production of content only to a certain degree, while also promoting basic human rights. Although this Note does not advocate for a complete removal of copyright protections for linking on the internet, understanding the extreme views on copyright protections on the internet allows the reader to fully appreciate the balance struck in the proposed licensing resolution. The goal of that licensing system is to return to the original intent behind incentivizing progress by giving authors and copyright holders a certain level of protection, while keeping in mind the public need for access to their works. The remaining sections, therefore, attempt to reconcile the potential consequences of copyright protections and the goals of the internet while addressing existing law.

C. PROPOSED LICENSING REGIME RECONCILING THE GOALS OF THE INTERNET AND COPYRIGHT LAW AND ADDRESSING THE INCENTIVE-ACCESS BALANCE

As this Note has shown, neither the European nor American systems properly balance the access and incentive goals of copyright. As both the

186. *See id.*

187. *See supra* Section V.A.2.d).

188. For example, YouTube allows a content poster to profit from ads in the video even if the video is not viewed in the platform. For more information, see *How Youtube Ad Revenue Works*, INVESTOPEDIA, <https://www.investopedia.com/articles/personal-finance/032615/how-youtube-ad-revenue-works.asp> (last visited Mar. 31, 2020).

European Union and United States continue on the trajectory of increasing copyright holders' exclusive rights in linking on the internet, we have to make a choice between reconciling the goals of the internet and copyright or continuing to put them at odds with each other. A licensing system akin to the one outlined below could strike the right balance.

The ultimate goal of copyright law in the United States is to drive progress in society through content creation and access to art and information,¹⁸⁹ while the goal of the internet is to provide free and open access to that very content.¹⁹⁰ These goals can be reconciled by removing the assumption that the only way to incentivize content creation and economic reimbursement to copyright holders is through copyright enforcement. The pervasiveness of embedding on the internet and the continual production of content, show that there are other factors that continue to drive authors to produce on the internet. However, it is important to account for the economic needs that will continue to drive the production of content.¹⁹¹

Instead of relying on threat of copyright litigation, the internet could follow the lead of the music industry.¹⁹² Congress could create a licensing scheme that allows businesses to pay a certain range of prices, dependent on their size, to embed copyrighted material. Such a scheme should prohibit the collection of monetary reimbursement from noncommercial website holders that do not generate a profit from the website they are running and create caps for small businesses and startups that would allow them to compete with their wealthier counterparts. This would prevent copyright from stifling small businesses and non-profit online ventures and allow for true, noncommercial hobby websites to continue to thrive.

In order for such a licensing scheme to be successful, the government would have to set up a non-profit to facilitate licenses between online service organizations and copyright holders.¹⁹³ The copyright holders would then be reimbursed based on the licensing fees paid to the non-profit. This would protect small artists, while also driving the price of licensing down for big business, because of their ability to bargain for a price to access all copyrighted material. Large ISPs also would not have to worry about negotiating separate agreements with anyone who puts copyrighted material on the internet. This

189. *See supra* Section II.B.

190. *See supra* Section II.A.

191. *See supra* Section V.A.1.

192. *See* Kevin R. Fish, *Restaurants, Music Licensing, and the United States Copyright Code*, 5:1 J. FOOD SERV. BUS. RES. 119, 121–25 (2002) (discussing the music licensing industry's facilitation of licenses).

193. Such an organization could mirror BMI, SCAP, or SESAC from the music licensing industry. *Id.* at 123.

type of approach would make it easier for big businesses to buy into a licensing scheme.

On its surface, the licensing system may seem similar to the resolution suggested in recently passed European Directives. There is, however, one key distinction between the licensing system proposed in this Note and the European Resolution. The licensing model provides a balance between incentives for copyright holders and the need to access copyrighted information by end users, which has long been ignored in copyright regulation.¹⁹⁴

The emphasis of the proposed licensing system would focus on making sure that materials are widely accessible and that copyright holders get reimbursed for their work. The licensing system would not, however, permit the copyright holders to cherry-pick where their work is available, or to serve takedown notices to remove their works whenever they wish to withhold them from the public.

The proposed licensing system would also work better for the European Union in spite of the fact that it emphasizes authors' exclusive rights.¹⁹⁵ The question of reconciling the goals of copyright and the internet in the European Union is much more complicated because of that emphasis.¹⁹⁶ It will be virtually impossible to find a solution that accommodates both the need for author control, and the free and open access to information on the internet.

The European Union, therefore, finds itself at critical crossroads. If it continues to favor copyright protections over openness of the internet, Europe will likely stifle the enormous economic potential of the web. At the same time, Europe is pushing away large, established ISPs by creating a form of liability that does not exist for those ISP's anywhere else. Europe could, however, build in moral rights (but not absolute rights of control) into the outlined licensing system. This would allow the copyright holders to receive reimbursement and make sure they are able to exercise a certain level of control, while still providing its citizens the same level of access that they have grown accustomed to.

194. See PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE 71 (2d ed. 2011) (arguing that access has lost out to exclusive rights of copyright holders and that this should change).

195. See PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 15–16 (2014).

196. See *supra* Section II.B.

VI. CONCLUSION

The recent developments in online copyright protections in the United States and Europe are worrisome at best. They go against the fundamental spirit of the web and have the potential to render reference techniques, such as embedding, too expensive to be used. This in turn endangers the ease of access to information as we know it today.

In the United States, a battle is emerging between the server and incorporation tests. As the district courts continue to push for a potential split by embracing one of the two tests and circuit courts remain silent on the issue, they create uncertainty, likely inhibiting the economic and cultural growth of internet. That is why it is crucial for the legislature to take up the issue as soon as possible. By passing the Music Modernization Act,¹⁹⁷ Congress has already recognized the need to adapt current intellectual property protections to the digital world. Congress is in a better position than the courts to resolve this issue in a way that preserves the goals of the internet in light of copyright laws. The legislature could protect linking from copyright liability while still providing economic reimbursement for the efforts of copyright holders, by creating a licensing system specific to copyrighted works on the internet.

In the European Union, Directive (EU) 2019/790 clearly favors stricter copyright protections in linking practices on the internet.¹⁹⁸ Although its consequences are yet to be seen, the European Union is likely to shortly become a hotbed of linking and embedding issues. If the United States and Europe continue to take different approaches to embedding, the world might find itself in a precarious position. This in turn, is likely to continue to spur internet innovation in the United States, while creating a larger gap between technology innovation in Europe and the rest of the world. By adopting the proposed licensing system, the United States could once again become a leader in internet regulation and lead the world in creating a solution to the currently inevitable clash between copyright and the internet.

197. *See supra* Section III A.

198. *See supra* Section IV.C.