



What's in a link?

English law issues with linking online

Linking between webpages is so common that many of those who place a link to a third party webpage probably give little thought to the legal risks of doing so. This is perhaps due to a common belief that linking is risk-free because the link is merely providing access to material stored elsewhere.

However, might a person be legally liable for linking to:

1. copyright material?
2. defamatory material?
3. other unlawful material (e.g. material that breaches privacy or confidentiality, is in contempt of court, incites racial or religious hatred, is obscene, or encourages acts of terrorism)?
4. a webpage that itself links to unlawful material?

(Click to view sections)

This article only considers liability arising from the link itself and not, for example, liability for content surrounding or in the link (e.g. copied headlines), or caching. The various parties potentially responsible for linking (e.g. the person who placed the link and the owner of the website featuring the link, if different) are referred to below as “the linker”.

This article deals first with copyright and then with issues relating to defamation and other types of unlawful material.

When could linking amount to copyright infringement?

We consider that, in certain circumstances, a link could amount to copyright infringement. Placing a link, of itself, is unlikely to amount

to copying as the linked website has not been reproduced. However, linking could still potentially give rise to three infringing acts (which are analysed below):

1. making the copyright work available to the public by electronic transmission;
2. authorising internet users to infringe; and/or
3. joint tortfeasorship with the acts of internet users.

Making the copyright work available to the public

Under UK copyright law, a copyright owner has the exclusive right to communicate their copyright work to the public, which includes making their work available to the public by electronic transmission so that members of the public may access it from a place and at a time individually chosen by them¹. This “making available” right includes making a work available over the internet.

Usually the person who places a copyright work on the internet will have made it available (whether they do so with or without the copyright owner’s consent). Could it be argued that a person who links to that work is also making it available?

Case law² indicates that a link to a work that is already readily available to the general public on the internet is unlikely to be making that work available. We consider that a link is only likely to be considered to be “making available” if it somehow makes the linked copyright work available to a “new public” that could not otherwise access it or could not access it so easily. This could apply if, for example, the link circumvents a paywall, thus allowing non-subscribers to access subscriber-only content.

¹ Section 20 of the Copyright, Designs and Patents Act 1988

² E.g. *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SL* [2006] ECR I-11519 (case C-306/05); *Twentieth Century Fox v Newzbin Limited* [2010] EWHC 608 (Ch)



It could also apply (as was the case in *Twentieth Century Fox v Newzbin Limited*³) if the link allows internet users to access a consolidated version of a single work (e.g. a film) that would otherwise be split into many different files (each containing e.g. a part of the film) that would be very time-consuming for an internet user to locate, access and consolidate.

Authorising internet users to infringe

A further potential argument is that a linker is authorising internet users to do an act with the linked work to which the copyright owner has not expressly or impliedly consented (e.g. copying it, on the basis that the internet user technically copies the linked content onto their computers when clicking on the link). The House of Lords has held that “an authorisation means a grant or purported grant, which may be express or implied, of the right to do the act complained of” and that authorisation is more than mere facilitation⁴.

Generally speaking, authorisation is unlikely to apply where the linked copyright work is freely available on the internet with the copyright owner’s consent, provided the linker does not purport to grant internet users the right to do more with the work than the copyright owner is permitting (e.g. authorising internet users to commercially exploit a work where this is prohibited in the linked website’s terms of use⁵).

Where authorisation may be more significant is with links to infringing content, such as pirate copies of films or music. The courts would probably look at all the circumstances to see whether the linker authorised internet users to, for example, copy. The linker’s knowledge and intention and the overall context of the link are likely to be important. For example, an encouragement alongside the link to internet users to “Click below to see the latest cinema releases of your choice – for free!” may be enough to create the impression of granting the necessary rights. On the other hand, a disclaimer making it clear that the linker does not have the authority to grant any rights in the linked work and warning about the risk of copyright infringement may bring the linker onto the right side of the line, provided the disclaimer is not merely a superficial attempt to conceal the true purpose of providing the link (see the *Newzbin* case referred to above).

Joint tortfeasorship with the acts of internet users

Under English law, a person who procures an infringement of copyright by inducement, incitement or persuasion, or who participates in a common design to infringe, is jointly and severally liable with the infringer⁶. A linker could therefore potentially be held to be a joint tortfeasor with an infringing internet user, such as one who is watching a pirate movie or listening to pirated music. If the linker has merely facilitated the primary infringement, they are unlikely to be liable. They must have so involved themselves in the tort as to make it their own.

The court is likely to take into account similar factors as for authorisation. Joint tortfeasorship is unlikely to arise with a link to a copyright work that is freely available on the internet with the copyright owner’s consent. However, it may apply where the linker is, for example, operating a business that enables its customers to easily access infringing works such as pirate movies via its links⁷.

Conclusion on copyright

In general, a link to a copyright work that is freely available on the internet with the copyright owner’s consent is unlikely to amount to copyright infringement. We think the main areas of risk for copyright infringement are linking to a work:

1. that is not freely available to everyone and, by linking to it, the linker is making it available to a “new public” – for example, where the linker makes subscriber-only content available to non-subscribers by circumventing a third party’s paywall, or where the link is to a consolidated version of a work (e.g. a film) that would otherwise only be accessible through many different files that would be very time-consuming for an internet user to locate, access and consolidate; or
2. where the linker is authorising internet users to do an act with the linked work to which the copyright owner has not expressly or impliedly consented – for example, authorising internet users to copy an infringing / pirate copy of a work, or commercially exploit a work where this is prohibited in the linked website’s terms of use. The linker’s knowledge and intention, and the context of the link (e.g. any enticements or disclaimers), would probably be relevant in determining liability.

3 [2010] EWHC 608 (Ch)

4 *CBS Songs Ltd v Amstrad Consumer Electronics* [1988] 2 All ER 484

5 Where the linked website’s terms of use contain a prohibition on linking, linking to the website could, depending on the circumstances, potentially give rise to contractual issues.

6 See *CBS Songs Ltd v Amstrad Consumer Electronics* [1988] 2 All ER 484

7 This was the case in *Twentieth Century Fox v Newzbin* (see above)



When could linking give rise to liability for defamation?

We consider that, in certain circumstances, linking can give rise to liability for defamation. The key issue is whether a linker is publishing, or participating in the publication of, the linked defamatory material. Publication at common law is a question of fact. It depends on the circumstances of each particular case whether or not publication has taken place. Publication requires a degree of “*knowing involvement*”⁸ in the publication of the defamatory material (although it is not necessary for the publisher to know that the material is defamatory or even be aware of the defamatory material, as with, for example, the position of an editor and publisher of a newspaper who are responsible for its journalistic content). Mere passive involvement (e.g. supplying computer equipment or giving access to a network used to make the publication) would not be enough.

The English law case which appears to provide the closest analogy to linking is the 1894 libel case of *Hird v Wood*⁹. The defendant, Mr Wood, was sitting silently on a stool by the roadside and continually pointing at a nearby sign to attract the attention of passers by to it. The sign contained defamatory remarks about the claimant, Mr Hird. There was no evidence as to who had written the words on the sign or put it beside the road. At first instance, the judge held that there was no evidence of publication by Mr Wood. The Court of Appeal disagreed, finding that, by drawing attention to the sign, there was enough evidence of publication that ought to have been left to the jury.

Some caution is needed with the *Hird v Wood* decision. While it is from the Court of Appeal, it predates the internet by nearly a century and was a preliminary decision rather than final judgment following a trial. Nevertheless, it could be argued, by analogy, that a link resembles Mr Wood’s pointing finger and the linked webpage resembles the sign, and so a link (by “pointing” to content) would amount to publication of the linked defamatory material.

Distinctions can, however, be drawn between Mr Wood’s pointing finger and linking. These include:

1. **Active encouragement.** Mr Wood was actively encouraging passers by to look at the sign, whereas a link may be relatively passive (e.g. a mere bibliographic footnote at

the bottom of an article). The *Hird v Wood* analogy perhaps works best where the link is accompanied by a call to click on the link.

2. **Approval.** By his actions, Mr Wood appeared to be approving the defamatory remarks. A linker, on the other hand, may clearly disapprove of what is said on the linked webpage, or may have intended to link to different material on the webpage (e.g. to the main article on a webpage where the defamatory material is in readers’ comments which appeared after the link was placed).
3. **Proximity.** Mr Wood was sitting next to the sign. They were in the same place and both could be seen at the same time. A link, however, is in a different “place” in cyberspace to the linked webpage. The link takes the internet user to the new webpage, albeit very quickly, and this transfer will usually be apparent to the internet user from, for example, the new URL or webpage.

Conclusion on defamation

Our view is that linking can potentially give rise to liability for defamation because a link to defamatory material could, depending on the circumstances, amount to publication of that material. The linker would need to have had the necessary degree of knowing involvement in the publication, and in assessing this the court is likely to consider the linker’s knowledge and intention in placing the link and the context of the link.

In practice, we think a linker is more likely to be liable where, from the context of the link, it is apparent that the linker has seen the defamatory content and is actively encouraging internet users to look at it. This would be comparable to the *Hird v Wood* scenario. An example could be: “*I can’t believe what sports players get up to. Read this for the latest about John Smith!*” [underlined text links to defamatory article].

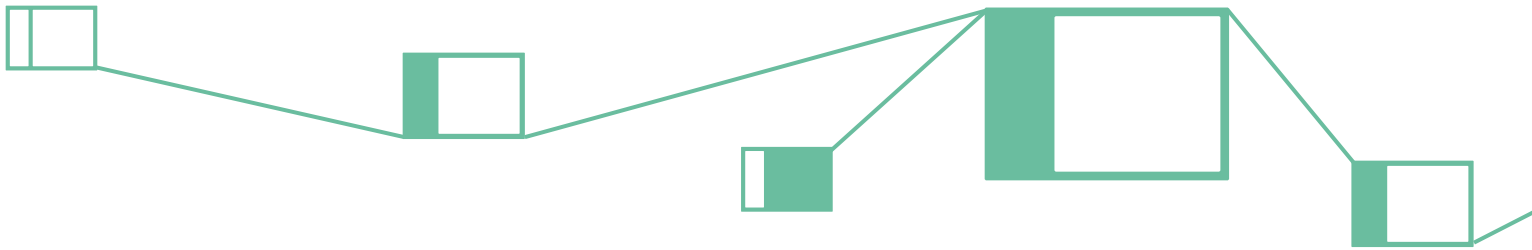
At the other end of the scale, a linker could potentially lack the necessary knowing involvement if the link is a mere bibliographic footnote, without any enticement to internet users to click on the link, or if the linker has inadvertently linked to some defamatory material without having seen or read it, for example because the material is contained in user comments which appeared after the link was placed. Similarly, a link generated by a purely automated search engine system without any direct human involvement would not normally amount to publication¹⁰.



⁸ *Bunt v Tilley* [2006] EWHC 407 (QB) at para 23

⁹ [1894] 38 S.J. 234 (CA)

¹⁰ See *Metropolitan International Schools v Google* [2009] EWHC 1765 (QB)



In practice, therefore, journalists and publishers should avoid linking to defamatory material without considering if there is a substantive defence available.

When could a linker be liable for linking to other types of unlawful material?

In our view, a linker could in certain circumstances be liable for linking to other types of unlawful material, such as content that breaches privacy or confidentiality, is in contempt of court, incites racial or religious hatred, is obscene, or encourages / induces acts of terrorism. While there is no English case law directly on this question, we think the analysis of when a linker could be held liable / guilty is likely to be the same as for defamation. If the main purpose of the link is to disseminate or refer readers to the unlawful material, then the linker is more likely to be found liable / guilty.

Could a linker be liable for linking to a webpage that links to unlawful material?

It seems reasonable to assume that a "secondary" link (i.e. a normal link on the linked webpage) would usually be too remote for the linker to be liable. The linker would have no control over such secondary links. Further, the linker's intention would generally be to point internet users to the linked webpage, not to websites linked from that page (to which the linker could have linked directly if it had wanted). It appears unlikely that a linker would be held liable for, for example, publishing content when that content is not immediately accessible from its own webpage.

Conclusion

In summary, while linking is generally unlikely to infringe copyright except in a few specific situations, linking to defamatory, private or other unlawful material could potentially expose the linker to legal liability.

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Key Contacts



Timothy Pinto
Senior Associate
+44 (0)20 7300 4287
t.pinto@taylorwessing.com



Mark Dennis
Associate
+44 (0)20 7300 4107
m.dennis@taylorwessing.com

Timothy Pinto and Mark Dennis are solicitors in Taylor Wessing's Trade Marks, Copyright and Media Group.

www.taylorwessing.com

Berlin Brussels Cambridge Dubai Düsseldorf Frankfurt Hamburg London Munich Paris Beijing[□] Shanghai[□] Warsaw[△]

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