

# An Ethical Evaluation of Web Site Linking

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**Abstract:** As the World Wide Web has grown in popularity, the propriety of linking to other web sites has achieved some prominence as an important moral and legal issue. Hyperlinks represent the essence of Web-based activity, since they facilitate navigation in a unique and efficient fashion. But the pervasive activity of linking has generated notable controversies. While most sites welcome and support incoming links, others block them or seek to license them in some way. Particularly problematic are so-called 'deep links,' which bypass the home page along with the extensive advertising and promotional material that is usually found there. While some contend that a site's mere presence on the web is implicit permission for virtually any form of linking, others argue that at least in some circumstances deep linking is unfair and constitutes misappropriation of intellectual property.

In this paper we will explore the issue of **deep linking** from a distinctly moral vantage point. While legal scholars have vigorously debated this issue, it has received little attention from moralists. But deep linking raises a plethora of complex property issues with subtle moral implications, and hence it deserves our careful scrutiny. The most fundamental question concerns the appropriate scope of property rights for a web site and how those rights can be properly balanced against the common good of free and open communications on the Web. It is our contention that there is no presumptive claim to the liberty of deep linking at will, since it may be disrespectful of property rights in certain situations. In order to defend this position we first make the case that a web site is a form of intellectual property, drawing support from the major theories that justify property ownership. Once we have established that a web site is really property, we consider the specific rights implied by such ownership. We conclude that on the basis of those rights, a *prima facie* case can be made that because of the potential for negative effects, users should not presume that deep linking is acceptable unless they first seek out the permission of the target web site.

We also fully appreciate the dangers inherent in propertizing the web and the need to encourage the most flexible forms of linking. Therefore, we argue that any arbitrary or unnecessary restrictions against deep linking should be eschewed for the sake of the common good of open communications, flexibility, and maximum porosity in the Internet environment. While web site authors may indeed have a property right in their creative work they have a correlative obligation to promote the sharing and free flow of information when their specific ownership rights are not put in jeopardy by deep linking.

## The technical aspects of web site linking

A web site refers to a combination of text, graphics, or media content that has been put into an area of the Internet known as the World Wide Web. Each web site has a unique address or URL (Universal Resource Locator) such as [www.bc.edu](http://www.bc.edu). A web site typically consists of multiple pages which are organized and controlled from a beginning or home page. It is important to note, however, that a web site is more than these logical protocols. It has a physical dimension as well, since a web site is located on a machine running server software, which is connected to other systems over a network. A logical web site is stored on such a physical server that may be owned and controlled by someone else such as an Internet Service Provider. In some cases, of

course, the creator of the logical web site also owns the physical server. While this distinction may complicate matters to some extent, in our treatment of property rights we are referring to the logical web site and its content, and assuming that if the creator of that site does not own the server on which it is located he or she has the authority to use that server for the purpose of building and operating a web site.

Quite simply, a link is a connection within the same web site or between two different web sites. For example, a hyperlink within a web page may contain the URL for another web site, which is activated with the click of the mouse. While most links take the user to the other web site's home page it is possible to bring the user to subordinate pages

within that web site. This practice has become known as 'deep linking.' The hyperlink text itself can appear in many forms. It can be the name of the linked to web site or a description of what is to be found at that web site (usually the name or description appears in highlighted text). It can even take the form of a revealing graphic or image such as a company logo. There are two types of links: an HREF link which instructs the browser to locate another web site and provide its contents for the user, and an IMG or image link. An IMG link instructs a browser to enhance the text on the user's Web page with an image contained in a separate file usually located at a completely different web site. For instance, if one is writing a narrative on Monet, the French Impressionist painter, one can include an image of a Monet painting from the Boston Museum of Fine Art's on-line image file to provide an illustration that will accompany that narrative.

The mechanics of the more common HREF linking are simple enough. A link is merely a short line of HTML code such as the following: <A HREF="http://www.bc.edu">Boston College<A>.

The '<A HREF' piece of code tells the browser that this is a link to another Web page to which the user should be taken. The address or URL of that web page (http://www.bc.edu) follows. And the words 'Boston College' represent the text that appears on the screen — this is the only thing that the user actually sees. When the browser encounters this line of code it is thereby instructed to locate the Boston College web page. It then sends a copy of the web page to the user's browser. For the sake of clarity in this discussion we will refer to the site which is being linked to as the 'target' web site. The site containing the hypertext link will be called the 'source site.'

The value and social benefits of linking are manifold and beyond dispute. Most web pages have multiple links to other web pages and they are also the target of many other links. Links from one web site to another permit instantaneous access to multiple sources of information. They are an indispensable tool for search engines that allow users to search for products across a variety of web site data bases. Linking also allows users to easily follow a complex and intricate trail of research, and each user can determine how extensively or deeply to follow that trail. Linking is the essence of the World Wide Web, and there is little doubt that legal or technological constraints on linking would have substantial negative ramifications for the web. Although most users concede that there is nothing wrong with linking even without getting the target site's permission, there are problems with the way in which some source sites do their linking. Some of the more serious and common problems are highlighted in the following two case studies.

## Two case studies

### *The Ticketmaster v. Microsoft Case*

In 1997 Ticketmaster Group Inc. filed suit against Microsoft for federal trademark infringement and unfair competition. Microsoft operates a web site called Seattle Sidewalk, which functions as a guide to recreational and cultural activities in the Seattle metropolitan area. Seattle Sidewalk provided abundant links to related web sites including a link to Ticketmaster, which operates a popular ticket selling web site. That link, however, bypassed the Ticketmaster home page and went directly to the respective pages for purchases to events listed in the Seattle Sidewalk page. For instance, a listing on the Seattle Sidewalk page for the Seattle Symphony would include a direct link to a Ticketmaster sub-page that would allow users to purchase their symphony tickets.

This is a prime example of deep linking, and Ticketmaster raised a number of objections to this practice. According to Ticketmaster, by bypassing its home page Seattle Sidewalk users were not being exposed to the extensive advertising and promotional announcements that were posted there. This diminished the value of that advertising and ultimately the rates that could be charged to future advertisers. A second problem with this mode of linking concerned Ticketmaster's relationship with MasterCard, which was promised to receive greater prominence than other payment methods. But unless Ticketmaster could control how users navigated this site it could not keep its commitment to MasterCard. Ticketmaster also complained that Microsoft was able to generate advertising revenues on the basis of this link because Microsoft posted a banner advertisement on the same page on which it displayed the Ticketmaster name and link. And, according to Wagner (1997), Ticketmaster alleged that the links were done in such a way that they 'presented information incorrectly and out of context.'

This case certainly raised the fundamental problem with deep linking which circumvents advertising and other identifying or promotional features on the home page. Deep linking not only reduces the value of the target site's advertising, but deprives that web site of its proper exposure and recognition. On the other hand, it could be argued that Ticketmaster had no real quarrel here. Its web site information is at least quasi-public. Ticketmaster therefore should not interfere with the web's free flow of information. In its legal defense Microsoft argued 'that Ticketmaster breached an unwritten Internet code in which any web site operator has the right to link to anyone else's site' (Tedeschi, 1999). Microsoft also argued that it had a First Amendment right to publish this public information.

There was an out of court settlement to this lawsuit in February 1999. Although the terms of that settlement were not disclosed, Microsoft did agree to link to Ticketmaster's home page instead of to its sub-pages. The settlement was actually a disappointment for those searching for a firm legal

precedent about controversial linking activities. As a result, at least in the United States there are currently no unambiguous legal guidelines on the practice of deep linking.

Since the Ticketmaster case there have been several other contentious disputes that have reinforced the problem of deep linking for commercial web sites. For instance, Universal Studios insisted that a web site called Movie-List remove direct links to movie previews on the Universal site. Universal had no problem with linking to its overall package of information about a film but not directly to a trailer. According to a Universal spokesperson, it was important to pursue this matter as a means of 'protecting our property in all media.' (Kaplan, 1999). And eBay has recently taken a strong stand against auction search engines such as AuctionWatch. These sites collect data about products for sale on eBay and other auction sites and then include links to those items. But eBay is pursuing legal action to block these search engines from gaining direct access to items within its auction database. It claims that AuctionWatch unfairly profits from its investment and devalues the eBay brand, since buyers are not exposed to its upper level pages.

#### *Maria's On-line Art Gallery*

This case is purely hypothetical but does represent a realistic example of the problems that non-commercial web sites can experience with deep linking. Maria is a young up-and-coming artist who decides to set up a web site to display scanned images of her most recent art works. On the home page she explains the rationale behind this exhibit and describes how these works, which center on three basic themes, must be examined sequentially for the proper effect. She is willing to allow links to her site but wants those links to be to the home page so that viewers and art critics will have an opportunity to read her explanation of the exhibit and to look at the works in their proper context and sequence. Nevertheless, deep linking to this site is rampant, especially to one work that seems provocative and somewhat sensational when considered in isolation, but has a much different meaning when viewed in its proper context. Several art critics who have seen only this work, thanks to a few maverick source sites that include it in their on-line collections, criticize Maria's exhibit on the basis of this one painting, and her reputation suffers.

To be sure, deep linking may be the source of other difficulties that are not illustrated by these cases. Nonetheless, the problems which emerge in the Ticketmaster case and the hypothetical case of Maria's art gallery are representative of the moral (and legal) issues triggered by deep linking.

#### **Web sites as intellectual property**

Given the potential for harm cited in these cases, what should be done about deep linking? To some extent, the resolution of this normative question depends upon whether or not a web site can be classified as private property and, if so, what

specific rights should belong to the property owner. When authors create web sites and put them on the World Wide Web, do those sites in effect become part of the Internet commons and does this give others an implied license to link to those sites in any way they choose? Or are they still the intellectual property of their owners despite their quasi-public and social nature? Before we explicitly consider this question, it is instructive to review the prominent theories of intellectual property that have been invoked to justify property rights. These theories can help us to address the issue of whether or not there is a justification for classifying a web site as private intellectual property. Moreover they can assist us in determining what set of specific rights or privileges are implied by such a classification.

There are three theories that one encounters in the traditional literature about intellectual property, and each of them has a convenient label:

1. Utilitarianism
2. The Lockean or labor-desert theory
3. The personality theory

We cannot concern ourselves here with the viability of these theories, though we acknowledge that each has certain deficiencies. As Fisher (1998) has observed, none of these theories can provide a determinate means for resolving questions of legal entitlements or complicated ownership issues — 'rather, each is best understood and employed as a language, a paradigm helpful in identifying considerations that ought to be taken into account when determining who should own what.' They are, therefore, simply fruitful avenues of reflection for helping us think critically about intellectual property and ownership questions. Despite their ultimate indeterminacy, they do enable us to make more nuanced and reasoned judgments about intellectual property issues.

The utilitarian approach assumes that the utility principle, sometimes expressed as 'the greatest good of the greatest number' should be the basis for determining property entitlements. It has several variations but the main argument is based on the premise that people need to acquire, possess, and use things in order to achieve some degree of happiness and fulfillment. Since insecurity in one's possessions does not provide such happiness, security in possession, use, and control of things is necessary. Furthermore, security of possession can only be accomplished by a system of property rights. Also, utilitarian philosophers such as Bentham justified the institution of private property by the related argument that knowledge of future ownership is an incentive that encourages people to behave in certain ways that will increase socially valuable goods. It would certainly appear that the basic utilitarian argument can be easily extended to intellectual property. According to the Landes/Posner model, since intellectual products can often be easily replicated due to low 'costs of production,' there is a danger that creators will not be able to cover their 'costs of expression' (e.g., the time and effort involved in writing a novel or

producing a music album). Creators cognizant of this danger are reluctant to produce socially valuable works unless they have ownership or the exclusive prerogative to make copies of their productions. Thus, intellectual property rights induce creators to develop works they would not otherwise produce without this protection, and this contributes to the general good of society (Fisher, 1998).

The second approach, sometimes referred to as the labor-desert theory, is based on the premise that the person who works upon common or unowned resources has a right to the fruits of his or her labor. John Locke stated this simple thesis in the Fifth Chapter of his *Second Treatise on Government* where he brings property to the center of political philosophy. According to Locke, people have a natural right or entitlement to the fruits of their labor. Thus, if someone takes common, unusable land and through the sweat of the brow transforms it into valuable farm land, that person deserves to own this land. Locke's basic argument is that labor is an unpleasant and onerous activity and hence people do it only to reap its benefits; as a result, it would be unjust not to let people have these benefits they take such pains to procure. In short, property rights are required as a return and suitable reward for the laborers' painful and strenuous work. Locke, however, stipulates a proviso that one can acquire such a property right only as long as one leaves 'enough and good enough' left for others.

Although Locke had in mind physical property such as land, it would seem that this theory is naturally applicable to intellectual property as well. In this case the relevant resource is common knowledge (i.e., unowned facts, ideas, algorithms, etc.), and one's intellectual labor which contributes value to this common pool of knowledge should entitle one to have a natural property right in the finished product such as a novel, a computer program, or a musical composition. Even if this sort of labor is not so unpleasant and difficult, Hughes (1997) argues that a property right is still deserved since that labor creates something of social value. Further, the granting of most intellectual property rights will satisfy the Lockean sufficiency proviso. Nozick (1974) contends that the proper interpretation of this proviso is that ownership of property through labor is acceptable if others do not suffer any net harm. He argues that patents, for example, satisfy this proviso since without this incentive, that is, without the prospect of a long, heavily protected monopoly around one's invention, there would probably be no invention and everyone would be worse off.

The basis of the third and final approach is that property rights are essential for proper personal expression. This theory has its roots in Hegel's philosophy. Hegel argued that property was necessary for the realization of freedom, as individuals put their personality into the world by producing things and engaging in craftsmanship. According to Reeve (1986), 'Property enables an individual to put his will into a thing.' Property then is an expression of personality, a mecha-

nism for self-actualization. This theory seems particularly apt for intellectual property. As human beings freely externalize their will in various things such as novels, works of art, or poetry, they create property to which they are entitled because those intellectual products are a manifestation of their personality or selfhood. It is an extension of their being and as such belongs to them. While not all types of intellectual property entail a great deal of personality, the more creative and individualistic are one's intellectual works, the greater one's 'personality stake' in that particular object and the more important the need for some type of ownership rights (Hughes, 1997).

It seems plausible that by relying on these general 'avenues' of theoretical reflection, a convincing case can be put forward that a web site should be considered as the proprietary and private property of its creator(s). From a Lockean perspective, there ought to be property rights in web sites because their value is based predominantly on the labor and energy involved in constructing and setting up the site. The production of a web site is most often a labor-intensive activity and this effort should confer a property right for those who have made the substantial investment of time and effort to build that site. In addition, if we follow the value-added logic that is hinted at in Locke, the production of a web site from common intellectual resources clearly creates social value and therefore deserves a fitting reward.

Further a property right in a web site would appear to be consistent with Locke's sufficiency proviso, though this certainly depends on how society chooses to interpret and implement that property right. It also depends on what we mean by the intellectual resources, which belong to the commons. If we follow Hughes' interpretation (which is slightly different from Nozick), it refers to the set of all 'reachable' ideas, that is, ideas which are available to us or within our grasp. According to Hughes (1997) the development and expression of most ideas inspires people to reach new ones and thus expands the commons rather than depletes it. Following this interpretation, propertizing a web site should not worsen the lot of others since the idea(s) which it embodies may stimulate new ideas for other potential web site developers. For instance, by granting eBay a property right in its web site, we do nothing that will impede others from developing their own novel ideas (based perhaps on what they see at the eBay site) that will in turn result in new and unique web sites providing similar services. Also, the raw materials (such as graphics, text, standard musical harmonies, algorithms, etc.) that are woven together into a multi-media web site remain (or should remain) part of the commons and available for other web site creators. As a consequence, as long as the property right is properly implemented, it should not yield any net harm to persons since the resources available for their use will not be constricted in any meaningful way when that property right is bestowed. Indeed, the U.S. legal system does appear to recognize some type of property

right in a web site, and yet this has done nothing to interfere with the extraordinary pace of new web site development.

Likewise, the utilitarian argument that ownership rights are justified because they maximize social utility and provide an incentive to build future web sites is also apposite. It surely seems reasonable to conclude that the prospect of future ownership and all that it entails is an incentive for the creation and embellishment of web sites, many of which require a high cost of expression. While it may be too much to say that no web site would ever be created without the prospect of ownership, it seems obvious that without such an incentive, the rate of creation would be reduced especially for commercial web sites where there is an expectation of ownership and control in order to generate the revenues that will pay for this investment. Also, the quality of web sites would be diminished since there is generally a strong correlation between quality and a high cost of expression, and the higher the cost, the more web authors look to ownership rights to help ensure a return on their investment. Without the protection of ownership there would likely be a preponderance of 'cheap' web sites, that is, sites of lower quality with a reduced cost of expression. To some extent, then, a recognition of private property rights in a web site does provide an incentive to develop new, high quality sites, since developers will be motivated by the realization that they will retain firm control over the accessibility to these sites and reap the tangible and intangible rewards of ownership.

And finally to varying degrees a web site is often a creative expression or manifestation of one's personality and for this reason too should be considered as a form of property. Many web pages, particularly those created by individuals, clearly reflect the personality of their creators. According to Radin's (1982) theory one could argue that web pages like other intellectual products 'are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.' It is true that not every web page will have the same level of self-expression. Hardy (1996) notes that corporate web pages will have fewer 'personal attributes,' but even here a 'corporate personality' is often expressed by a web page. Hence given that both individuals and corporations do have some 'personality stake' in a web page, its creators deserve a property interest in such pages to safeguard that stake (Hughes, 1997).

Thus, all three theories seem to converge and support the notion that a web site is a form of intellectual property. According to our analysis, a property right is warranted as an incentive for future creation, a reward for one's labor and the social value created by that labor, and as a means of protecting whatever personality stake is included in this intellectual product. This result is also consistent with our common moral sense. We realize that as the virtual world begins to displace the physical one, a web site is an impor-

tant information asset that will become a principal wellspring of wealth and advantage for both corporations and individuals.

### Deep linking revisited

Even if a web site is a form of private intellectual property, what does it mean to say that one 'owns' this property? What is included in the bundle of rights that belong to a web site author? We cannot assume that just because someone has a property claim on a web site that any deep linking activities involving that site are morally forbidden. What are the specific intellectual property rights implied by one's 'ownership' of a particular web site? For example, it seems intuitively evident that a property right would include the right to prevent blatant copying or the preparation of derivative works. Therefore an on-line bookseller cannot simply copy the content of amazon.com's web pages, but must create its own original web page that performs the same function of selling books. But what else is included in this property right? Is there any basis for the claim that there is also a right to determine how others link to web site?

In order to answer this question we must consider what is implied by the 'ownership' of property. According to Honore (1961), ownership is defined as 'the greatest possible interest in a thing which a mature system of law recognizes.' This definition acknowledges that property ownership is not absolute, but it also suggests that there is a set of powers, rights, and privileges that constitute ownership. Along these lines, Honore (1961) argues that the liberal notion of ownership (as opposed to absolute ownership) includes the following elements: the right to possess; the right to use; the right to manage; the right to income; the right to capital; the right to security; the right of transmissibility; the absence of term; the prohibition of harmful use; liability to execution; and residuary character. A full treatment of each of these elements is well beyond the scope of this paper, but two elements seem especially pertinent for our analysis, especially in light of the case studies discussed above: **the right to manage** and **the right to income**. The right to manage is the right to decide how and by whom a thing shall be used, while the right to income means the right to appropriate the value generated by allowing others to use one's property.

There are many varieties of ownership based on the various subsets of these elements, but according to Becker (1977) the rights to security in possession, security in use, security in income, and security in management are among the most fundamental of these elements. They are at the core of what we commonly mean by ownership of physical or intellectual property. It seems reasonable to assume that a web site author should possess this full subset of rights, but we will concentrate on the right to earn income and the right to manage. To exclude these rights from ownership would suggest a diluted version of ownership that seems difficult to justify. More importantly, it would be inconsistent with the

theoretical rationale which we have used to justify that ownership.

Let us first consider the right to earn income, which is clearly at stake in many deep linking disputes. In Hohfeldian terms, this is in part a power right, which represents 'the existence of a state of affairs such that one person (the right holder) may morally (or legally) alter at will some of the rights, duties, liberties, power or immunities of another person (the liability bearer)' (Becker, 1977). In this case it would mean that the web site owner has the power to curtail the rights and liberties of other stakeholders with respect to that web site and to set the conditions for activities such as linking when the revenue-generating potential of that site is at stake.

If labor has engendered a property right in a web site, it follows that one should have one of the most basic rights of ownership, that is, the right to derive income from that site, especially since that income is the primary reward for that labor and an incentive for future creations. By making the investment of labor, energy, and capital the owner is surely entitled to maximize the return on that investment, which is realized by the right to earn income by allowing others to use that site. Any restrictions on that particular right would be tantamount to a disincentive for investing heavily in the socially valuable activity of new web site creation. It seems evident then that a property right based on the labor-desert rationale would surely be hollow unless the property owner can get a return on his or her investment as enabled by the right or 'power' to earn income.

If this is so, what does it imply about the activity of deep linking. The Ticketmaster case presented the general problem. Web site X derives revenues from advertisements, which appear primarily on its home page, but web site Y links to a subordinate page and completely bypasses those ads. Consequently, many users who visit site X do not see these ads. This has the effect of reducing the eyeball contact with the advertising and this will negatively effect the rates that can be charged to advertisers. Therefore deep linking to site X undercuts its revenues and thereby interferes with its right to earn income from that site. In summary, Y's activities or liberties with respect to site X impede X's efforts to derive a material benefit from allowing others to use its property and this is inconsistent with its right to earn income.

The hypothetical case of Maria's on-line gallery is different since there are no advertising revenues at stake. What is at stake is Maria's prerogative to control her web site. In Honore's terms the basic property right at stake in this case is the right to manage, to determine how people use her web site for the purpose of preserving her creative integrity. This too is in part a power right that allows Maria to alter the liberties of others with respect to her site. In this situation her ability to control how her material is presented to viewers is compromised by source sites that engage in deep linking without permission. If we justify property rights through the personality theory, which has a special relevance in Maria's

case, it follows that the need for web artists and authors to maintain some control over their personal expression is of paramount importance. Maria's strong personal and emotional attachment to her virtual gallery demands that she have a property interest in her work and that interest must take the form of *managing* how her art will be viewed by others. The essence of the personality theory is the right to control the public disclosure of one's works since they embody one's personality. This can only be effectively realized by the **right to manage**, i.e., to determine how and in what manner they will be accessed by others. Through that right to manage Maria will be able to better protect her expressive integrity.

Moreover, this issue is connected to Maria's First Amendment right to free expression. As Hughes (1997) has noted, 'freedom of expression is meaningless without assurances that the expression will remain unadulterated.' Deep linking can sometimes be used as a tool for editing the target site's works, and this can create the perverse effect of undermining the integrity of the creator's work. Authors like our fictional Maria should have the right to use this medium of expression as effectively as possible and this means the moral prerogative to demand that others refrain from deep linking when it caricatures or distorts their creative efforts and expression.

In summary, then, if ownership is to have any real meaning for the web site author, it must include these basic elements cited by Honore, including the right to manage and to derive income. The bottom line is that if a web site is to be regarded as property with a legitimate owner, that owner has the right to control his or her intellectual product, that is, to set the rules and conditions for how that web site will be accessed and used by others.

Of course one can make a counter argument here that these particular rights of control, specifically, the right to income and the right to manage, should be restricted in some way because of serious disutilities or negative externalities for other Internet stakeholders. A claim may be presented that the scope of these property rights should be limited for the sake of curbing those externalities. But are there significant disutilities that would warrant the abridgement of these particular rights?

Although certain disutilities can be identified when we take away an unrestricted liberty to deep link, none are grave enough to justify the limitation of these basic ownership rights to manage and derive income from one's possessions. Granted, users are sometimes inconvenienced by the need to enter a site through the home page and work their way down to their desired location. Deep linking does make it considerably easier for users to access material and information, and it does take better advantage of the Internet's extraordinary flexibility. More significantly, perhaps, a case can be made that the functionality of deep linking is quite significant for Internet users since the construction of those links is itself an act of creative self-expression in which cer-

tain users unlock the value and meaning of the Internet. As we have already demonstrated, producing a web site is an important creative activity which is enhanced by the use of techniques such as deep linking.

While we recognize the functionality and value of deep linking along with the inconvenience of putting any limitations on this activity, we must consider two key points. First, we are certainly not arguing that deep linking should not be allowed to the vast majority of web sites, only that one should not presume a right to link in this way without permission. If the target site is reasonable and there is little or no harm involved, deep links will most likely be permitted. Also, despite the role that deep linking can play in the expressive activity of web site production, the target site's ownership rights should still take precedence. There is little justification for circumscribing a legitimate property right in order to facilitate someone else's self-expression. We can find many analogies in the non-virtual world that would support this view. For instance, putting together an anthology of 20<sup>th</sup> century poetry is also a creative activity, but that does not mean that the compiler of the anthology should not be required to seek permission of the poets or copyright holders just because to do so would be an inconvenience and would interfere with his or her creative activity.

Furthermore, according to Becker (1977) the disutilities that might provoke us to limit property rights should be on a much grander scale than the ones we have cited. They should usually involve complete inaccessibility to or monopolization of some scarce resource. Becker argues that the labor argument 'produces a presumption in favor of allowing people to acquire full ownership, ...[and] once the disutilities of exhaustibility, accumulation, and harmful use are taken care of, other disutilities serious enough to outweigh the labor and liberty arguments are likely to be rare.' Nothing of the sort is going on when we require that users seek out permission before deep linking. There are no substantial disutilities that would warrant limiting one's ownership based on hard work. Hence the property right in one's web site should trump the interests of other Internet stakeholders when deep linking to that site is damaging in some objectively meaningful way such as the loss of revenue or the impairment of creative integrity.

### **Respecting the common good**

Although we have argued with some insistence on behalf of a web site author's property rights there is another side to the equation when intellectual property issues are considered from a moral perspective. The web site author as property owner should not completely neglect or ignore the interests of other stakeholders. There is always a danger that when one focuses exclusively on his or her individual property rights, the needs and interests of those other parties will be shortchanged. This is incompatible with the moral point of view, which requires respect for the perspective and projects

of others. Further, too narrow a focus on the individual's rights ignores the social role of creative activity. There is a need, therefore, to balance these web site property rights which we have identified with proper respect for the common good of the web. Without this kind of balance, there is a tendency to absolutize ownership claims to the detriment of the larger purpose served by the Internet and the connectivity which it provides for its users. As McFarland (1999) maintains, 'Ethical policies for the use and distribution of information must take into account the social nature of information, even as they recognize the legitimate claims of the producers. It is in this balance. . . that virtue is found.'

But what is the common good in this case and how can it best be articulated? It is probably made manifest by examining the ultimate purpose of the World Wide Web: the sharing and dissemination of information. For this purpose to be fully realized web sites and the information which they contain should be made as widely available as possible in the most efficient manner.

What implications does all of this have for these routine activities such as linking? As we have already intimated, there must be some recognition that linking is a vital activity for the web, which furthers the goal of open communication, that is, the free exchange and free flow of ideas and information. Given a moral obligation to respect the common good and the social nature of information, some reasonable limits should be imposed on the property right enjoyed by web site authors. One way of achieving this balance is to assume that there is an implied license to link to any target site's home page, since this sort of linking has not been the source of so much contention. The target site should prevent such links or demand permission only under unusual circumstances. In our estimation, it would be too burdensome and counterproductive to insist upon such explicit permission for every HREF link. The necessity of seeking such permission could dramatically curtail the linking that occurs on the web and thereby impair the common good of the free flow of information. Even deep linking should be permitted and facilitated in cases where there is no harm that accrues to the target web site such as a loss of revenues or a threat to the site's integrity. Web sites that suffer no such appreciable harm should allow deep linking out of regard for the free flow of information. As a result, deep linking should not be blocked for arbitrary or trivial reasons since it does have unusual functionality and serves as a valuable means to the ends of openness and information sharing.

If web site authors block or demand permission for deep links only for legitimate reasons such as the ones cited here, they will be acting prudently, respectful of the moral imperative to balance their own important property rights with the interests of others and the web's ultimate purpose. In our estimation, these *prima facie* rules represent a reasonable

way of harmonizing one's legitimate property rights in a web site with respect for the Internet's common good.

## Conclusion

Although deep linking may appear on the surface to be a benign activity that captures and fulfills the meaning of the Web, it has become fraught with controversy for the reasons enumerated in this paper. This issue is complex and even has a certain symbolic import since the creation of web sites through deep links and other techniques seems to obscure our traditional notion of authorship, which assumes an irreducible point of reference. Nonetheless we argue here against any presumptive claim on behalf of source sites that boast a right to deep link to other sites at will, and we defend this position with the following argument:

1. Deep linking can be harmful for target web sites in some circumstances. For example, it can lead to lost advertising revenues or damage to one's creative integrity.

2. Because of this potential harm, a presumptive claim to the liberty of deep linking without permission is unjustified. This is based on the assumption that a web site is private intellectual property and not common property and that, as a result, liberties with respect to web site access are constricted.

3. The notion that a logical web site is a form of intellectual property can be defended by invoking traditional justifications for property rights: utilitarianism, labor-desert, and personality-based theories. All three theories offer firm support for the conception of a web site as private intellectual property. A property right is warranted as an incentive for future creation (utilitarianism), a reward for labor and the social value created by that labor, and as a means of protecting whatever personality stake is included in an intellectual product.

4. If a web site is property, according to the liberal theory of ownership, ownership rights should include (among others) the right to earn income and the right to manage. Ownership that did not include these basic rights would be empty especially given the theoretical rationale used to justify that ownership in the first place. These two rights endow property owners with the power to set conditions for how their sites will be accessed and utilized. This would appear to

preclude potentially disruptive activities such as deep linking unless the source site obtains permission of the owner.

5. However, the moral point of view has an other-directed component and requires that intellectual property owners also consider the common good. The good or ultimate end of the Web is the sharing of information. Hence web site property owners should not block deep links for arbitrary or insignificant reasons but only when material or meaningful harm can be demonstrated. In this way property rights in a web site will properly be harmonized with the common good.

6. In conclusion, we argue here for a **limited and balanced property right in a web site** that does impose a moral duty on other web sites to engage in deep linking activities with care, to consider the possible harm that those activities can bring about, and to seek permission for deep linking unless it is abundantly clear that deep links cause no damage and are welcome by the target site. ♦

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