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USING FAIR USE TO STOP A COPYRIGHT TROLL FROM THREATENING HYPERLINKERS

Nicole Downing

Righthaven, a recently created company, has filed hundreds of copyright infringement claims against blogs and other small Web sites for posting content from copyrighted news articles online. These claims—filed without any cease and desist letters to warn potential infringers—demand not only high monetary damages, but also forfeiture of the infringers’ domain names. Focusing on the claims against Web sites that are under attack for posting content accompanied by a hyperlink, this Recent Development looks at copyright law and issues involved in hyperlinking to copyrighted content. Specifically, it argues that a Web site that reposts an entire copyrighted article accompanied by a hyperlink to the original article’s posting can make a successful fair use defense. The adoption of this defense by the courts would permit blogs and other Web sites to continue reposting newsworthy articles without fear of litigation.

1. INTRODUCTION

It is early morning, and you are scanning your go-to news sources, as you do every day. You come across a story that interests you enough that you want to share it. So, you post a status on Facebook; you tweet it; and you blog about it. In each of those places, you quote the article and include a hyperlink to the news story, just like thousands of people do daily. What if that action of reposting that news story was against the law, punishable by up to $150,000 in damages? Most people believe that since you cannot go to any of those Internet sources without encountering just such a hyperlinking situation, that this is not a concern. However, a wave of cases being brought by the company Righthaven are based upon the claim that posting a news article with a hyperlink to the original story is copyright infringement. If courts were to agree with Righthaven’s arguments, thousands of
bloggers across the United States would become copyright infringers who can be punished under copyright law.

Righthaven was founded in March 2010 by attorney Steve Gibson, the company’s chief executive officer, with the purpose of bringing copyright infringement claims. Righthaven currently has three clients: the Las Vegas Review-Journal (“Journal”), WEHCO Media, and Media News Group. The Journal was Righthaven’s original client, and almost all of the suits that Righthaven has filed have been for copyright infringement of news stories originating with the Journal. Righthaven has not yet filed any lawsuits on behalf of WEHCO Media, but it has begun doing so for Media News Group.

Righthaven’s actions have been labeled as those of a “copyright troll.” Its actions follow the same basic pattern. First, Righthaven searches the Internet for alleged copyright infringement for hyperlinkers. People who link to online content may not be aware that the content they are linking to may be protected by copyright. Righthaven then files suit against the linker, demanding that they remove the link and pay damages for copyright infringement.

Righthaven’s actions have been met with criticism from various groups, including EFF, which has sought to help Righthaven defendants. EFF has argued that Righthaven’s actions are a form of copyright trolling, and that the company’s actions are illegal.

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1 J.D. Candidate, University of North Carolina School of Law, 2012. I would like to thank the JOLT editors for their help during the publication process and Professor Deborah Gerhardt for her professional insight and feedback. I would also like to thank my incredible parents for their endless support.

2 John Patrick Pullen, Las Vegas’s copyright crapshoot could maim social media, FORTUNE (Jan. 6, 2011, 12:39 PM), http://tech.fortune.cnn.com/2011/01/06/las-vegas-copyright-crapshoot-could-aim-social-media/. Righthaven is owned by Net Sortie Systems, a Las Vegas-based limited liability company owned by Gibson, and SI Content Monitor, an Arkansas-based limited liability company, which is owned by the same family that owns the Las Vegas Review-Journal.


4 Id.

5 Id.

6 Richard Esguerra, Righthaven’s Brand of Copyright Trolling, ELECTRONIC FRONTIER FOUNDATION (Sept. 2, 2010), http://www.eff.org/deeplinks/2010/09/ righthavens-own-brand-copyright-trolling (“Copyright trolls are nothing new, and Righthaven is just the latest group of lawyers to try to turn copyright litigation into a business model. What these lawyers have in common is that they seek to take advantage of copyright’s draconian damages in order to bully Internet users into forking over money.”).
infringement of the *Journal’s* news articles. When Righthaven believes it has found one, the *Journal* transfers the copyright for that news story to Righthaven, which then files a lawsuit against the individual or organization that runs the infringing Web site. Infringers have included not only those who have used just part of an article or a whole article on their Web site, but those who additionally hyperlinked to the news stories. Most recently, Righthaven has brought suits against individuals who comment on message boards by posting the copyrighted news articles, rather than the Web sites where such postings appear. Righthaven does not provide notice to alleged infringers before filing suit and demands the statutory maximum damages of $150,000. In addition, Righthaven demands that the Web site owners surrender the domain name of the site where the alleged infringement occurred, regardless of the amount of infringement. With more than 200 claims made to date, Righthaven’s novel approach to copyright infringement claims is raising a variety of issues in this unsettled area of law. If Righthaven is able to stop bloggers from posting articles and including links to news articles on copyright infringement grounds, it could affect hyperlinking all across the Internet and significantly impact a majority of Internet users.

This Recent Development will focus on the hyperlinking aspect of the news article posts by blogs and other Web sites and the claims Righthaven has made against those who post copyrighted content with a hyperlink to the original source. Part II discusses notable cases on the copyright of hyperlinks and its legal status prior to Righthaven’s actions, and outlines the copyright issues

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7 *Id.*
9 See discussion *infra* Part II.A.
10 Pullen, *supra* note 2.
12 Pullen, *supra* note 2.
13 *Id.*
14 RIGHTHAVEN LAWSUITS, *supra* note 3.
15 See discussion *infra* Part II.A.
raised by hyperlinking to copyrighted works. In Part III, this Recent Development focuses on Righthaven’s current legal strategy and the results of their lawsuits, including settlements and legal defenses. Part IV discusses fair use as a possible solution to this type of copyright infringement, and the danger of Righthaven’s copyright infringement lawsuits prevailing in courts.

II. COPYRIGHT ISSUES OF HYPERLINKING

Part of understanding the issues arising out of Righthaven’s actions involves understanding the technology behind hyperlinking and the applicable copyright law Righthaven is relying on in bringing the lawsuits for posting and hyperlinking to news articles. Once this has been established, a view of how the copyright issue of hyperlinking has been litigated by the courts shows how the resulting varied opinions have allowed hyperlinking to copyrighted material to be a tentatively accepted process.

A. Hyperlinking on the Internet

Internet documents can include hyperlinks, which are graphics or text that, when clicked on, send the person to another Web page. A hyperlink (or “link”) can often be identified by a string of blue and/or underlined text. Hyperlinks allow users to easily navigate the Internet by moving quickly from site to site. “Deep linking” is a type of hyperlinking that takes you to a specific Web site page that bypasses that Web site’s home page. For example, a link can take you to cnn.com, which is CNN’s home page, whereas a deep link to a specific CNN news article bypasses cnn.com and takes you directly to the Web page displaying the specific article.

Deep linking can create controversy, as Web site owners do not like having their home pages bypassed. Web site owners can make

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17 Id.
19 Id. at 44.
a significant amount of money on the advertising space they sell on their home pages. Impressions, which occur when someone opens a page with the advertising on it, are used to measure the number of times an advertisement is viewed. When home pages are skipped, Web site owners lose out on valuable advertising impressions, which affects their advertising revenue. If a user has to go to the home page before visiting another page on the site, the Web site owner benefits. Deep linking can thus hurt Web site owners because it allows a user to bypass the site’s home page.

Hyperlinking plays an integral part in the functioning of the Internet because hyperlinks are the means by which Web sites connect to one another. Hyperlinks help users to find what they are looking for among the incredible amount of available information on the Internet. Search engine technology is even based on hyperlinking. If hyperlinking were not available, every time a person wanted to go to a new site, they would have to type in the Web site address. The Internet would not have the connectivity that users take advantage of almost every time they use the Internet.

B. Copyright Law

Under the Copyright Act of 1976, a copyright protects original works of authorship that have been fixed in a tangible medium of expression, including "(1) literary works; (2) musical works, . . . (3) dramatic works, (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." The owner of a copyright has a bundle of exclusive rights, including the exclusive rights to make reproductions, derivative works, and distributions of the

20 Id. at 45.
21 Id.
22 Id. 23 Alain Strowel and Nicholas Ide, Liability with Regard to Hyperlinks, 24 COLUM.-VLA J.L. & ARTS 403, 404 (2001).
24 Id.
25 Id.
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Copyright infringement claims can be brought against anyone who violates any of the copyright owner’s exclusive rights. This means that while a copyright owner may engage in the above activities of copying or distributing their work, others may not do so without the copyright owner’s express permission.

While these rights are exclusive, they are not absolute. Fair use, for example, is a defense to copyright infringement that allows the use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.” In this situation, copyright infringement occurs because one of the exclusive rights of the copyright holder has been violated, but fair use functions as a defense, excusing the infringer from any liability. Four factors are used to consider whether a particular use of the copyrighted material constitutes “fair use.” The first factor looks at the purpose and character of the use, asking “whether such use is of a commercial nature or is for nonprofit educational purposes” in making the determination. Use of a commercial nature favors the plaintiff in a determination against fair use, whereas use of an educational nature favors a finding of fair use. The second factor looks at “the nature of the copyrighted work,” which involves a consideration of the factual versus creative nature of the work used. The third factor considers “the amount and

27 17 U.S.C. § 106 (2006) (“(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission”).
31 Id.
32 Id.
substantiality of the portion used” in comparison to the work as a whole. Finally, the fourth factor is an investigation of “the effect of the use upon the potential market for or value of the copyrighted work.” These factors are used together in a balancing fashion, without one factor being clearly dominant over the others. A final part of the fair use defense is a weighing of all four factors in light of the overarching purpose of copyright: “[t]o promote the Progress of Science and useful Arts.”

C. The Courts Address Copyright and Hyperlinking

In its suits, Righthaven claims that, by posting an article and linking to a copyright holder’s news article, a linker is guilty of copyright infringement. For this to be true, at least one of the copyright holder’s exclusive Section 106 rights, specifically the rights to copy, distribute, and display the work, must have been violated. Righthaven, however, is not the first copyright holder to bring a suit in connection with hyperlinking. The first widely noted hyperlinking lawsuit, *Shetland Times, Ltd. v. Jonathan Wills and Zetnews Ltd.*, took place in Scotland. *Shetland Times* claimed that *Shetland News*’ hyperlinks to the *Times*’ stories were copyright infringement, as *Shetland News* included headlines on their home page that linked to the *Shetland Times*’ news stories. The court ordered the equivalent of a preliminary injunction against *Shetland News*, but the case was settled between the parties before a final decision on the facts could be reached.

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33 *Id.*
34 *Id.*
36 *Id.* at 575.
39 Quinn, *supra* note 18, at 59.
40 *Id.*
41 *Id.*
Two notable, yet contrary, decisions have been reached by United States courts on the issue of hyperlinking in *Ticketmaster Corp. v. Tickets.com, Inc.* and *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* In *Ticketmaster Corp.*, the District Court ruled that hyperlinking is not copyright infringement. Ticketmaster used exclusive selling agreements with events to sell tickets online, while Tickets.com sold tickets and provided information on where other tickets could be purchased. Tickets.com would link to an interior event Web page of Ticketmaster to allow people to buy tickets. The court ruled that no copying is involved in hyperlinking, because the user is transferred to the original author’s Web page. The court analogized the situation to a footnote in a paper, because a hyperlink, like a footnote, “tells the reader where to find the referenced material.”

However, this reasoning has a flaw that the courts had not yet addressed. It may be said that the hyperlink does not create a copy of the copyrighted work, but when a person clicks on the link, the copyrighted work is being displayed on a new screen. The court did not address whether this new display violates the exclusive display right of the copyright holder. The court has since addressed what constitutes a copy on the Internet and what violates a copyright holder’s display right on the Internet in the context of images in the case *Perfect 10, Inc. v. Amazon.com, Inc.*

According to the Copyright Act, a “display” of a work is defined as showing a copy of the work “either directly or by means of a film, slide, television image, or any other device or process.”

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45 *Id.* at 3.
46 *Id.* at 5.
47 Quinn, *supra note* 18, at 65.
48 *Id.*
49 *Id.*
“Copies” are then defined as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Finally, a work is “fixed” when “its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” In applying these definitions, the court found an image is “fixed” when stored in a computer’s server and the stored image is the “copy.” The court then concluded, “a person displays a photographic image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computer’s memory.”

In the second landmark hyperlinking case, Intellectual Reserve, Lighthouse Ministry, operators of a Web site critical of The Church of Jesus Christ of Latter-day Saints, posted unauthorized copies of the Church Handbook copyrighted by Intellectual Reserve on the Internet. Lighthouse Ministry did not contest the allegation that these postings amounted to copyright infringement, but they did protest the scope of a motion for a preliminary injunction prohibiting their hyperlinking to other locations on the Internet that displayed copies of the handbook. The court found that in order to prove copyright infringement, Intellectual Reserve had to prove that Lighthouse Ministry’s linking contributorily infringed Intellectual Reserve’s copyright, but this first required proving that Lighthouse Ministry’s hyperlinks were a direct infringement of the Intellectual Reserve’s copyright. The court ruled that direct infringement occurred when a person clicked on one of Lighthouse Ministry’s links to the copyrighted material.

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53 Id.
54 Id.
55 Perfect 10, 508 F.3d at 1160.
56 Id.
58 Id. at 1291.
59 Id. at 1292.
because in doing so the person made a copy of the copyrighted material on his or her computer when he or she displayed the copy of the handbook. According to the court, the plaintiff was guilty of direct copyright infringement for hyperlinking to the copyrighted material.

As evident by the opposition of these two cases, the courts have not reached consensus on the issue of copyright and hyperlinking. Under Ticketmaster, hyperlinking is not copyright infringement, but the court does not address the issue of the new display created by clicking on a hyperlink. Intellectual Reserve involves a situation where hyperlinking is copyright infringement, but the links led to a copy of unauthorized copyrighted material. Therefore, while there is precedent for the holding that hyperlinking will not be found to be copyright infringement, there are situations in which a court has found it copyright infringement. There are also issues the court has still not conclusively addressed that could allow a finding that hyperlinking is copyright infringement.

III. RIGHTHAVEN ENTERS THE MIX

A. Righthaven’s Process

Righthaven is bringing claims in an area of law that has been largely unchallenged for the past ten years, advancing a new twist on the more traditional approach to copyright infringement claims. After bloggers or writers quote language from an article or repost an entire article, Righthaven acquires the copyrights on those news stories, and then files lawsuits for copyright infringement without first sending cease and desist letters. In

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60 Id. at 1294.
61 Id.
63 Intellectual Reserve, 75 F. Supp. 2d at 1290.
64 Esguerra, supra note 6.
65 Id. Normally, copyright holders send cease and desist letters or DMCA takedown notices to allow the blogger or Web site operator to make any necessary changes, rather than jumping straight to litigation. Id.
Fair Use for Hyperlinkers

each of its suits, Righthaven demands damages, attorney fees, and forfeiture of the allegedly infringing site’s domain name.66 It is more usual for the copyright holder to go after the single infringing article or blog post, rather than asking for the whole Web site to be shut down, in the event of a single copyright violation.67

With more than 200 suits filed, one wonders what sort of results Righthaven is having. Many of the suits are being settled out of court, as it is cheaper for defendants to settle than to pay the attorney fees necessary to fight the actions.68 Righthaven’s cumulative settlements to date are estimated to be more than $400,000.69 These defendants, taking the path of least resistance, allow Righthaven to continue with its current process of making claims against Web sites posting news articles and using hyperlinks. Not every case, however, has followed this route; there is now precedent for dismissal on the grounds of fair use when the claim involves a small excerpt of the article.70

B. A Fair Use Defense to News Story Excerpts

Originally, Righthaven was making claims against Web sites where bloggers and journalists used excerpts from news stories or

66 See Complaint at 7, Righthaven LLC v. Democratic Underground, LLC, No. 2:10-cv-01356 (D. Nev. Aug. 10, 2010), available at http://www.citmedia.org/sites/citmedia.org/files/2010-08-10%20-%20Complaint.pdf. The Copyright Act provides for a maximum damages award of $150,000 for willful infringement. 17 U.S.C. § 504 (2006). The Copyright Act then provides that the court “may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” Id. § 505 (2006). Finally, the Copyright Act provides that the court may “grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of copyright.” Id. § 502 (2006). This can be interpreted as forfeiture of the domain name, as a means of preventing or restraining further infringement of copyright.

67 Esguerra, supra note 6.


69 RIGHHAVEN LAWSUITS, supra note 3.

whole articles, often accompanied by hyperlinks. Righthaven has now come forward to say that it will stop bringing claims against those who used only small excerpts from articles accompanied by a hyperlink, after a claim on such grounds was dismissed as fair use. The first case to successfully use the defense of fair use in this context was *Righthaven LLC v. Realty One Group, Inc.* In that case, the defendant, Michael Nelson, was a realtor with an Internet blog on which he displayed the first eight sentences of a thirty sentence news article that had been published by the *Las Vegas Review Journal*. The Journal transferred its rights in the article to Righthaven about one month after Nelson used the eight sentences. Righthaven then filed suit. Nelson decided not to settle and instead asserted a fair use defense claim in court as grounds for dismissal of the suit. The court agreed with Nelson and found that his fair use defense was enough for a motion to dismiss.

The court reached its conclusions on fair use in *Realty One Group* by examining the four fair use factors. Regarding the first factor, the court found the purpose and character of Nelson’s blog to be commercial and educational, but that the educational aspects were there mainly to create more business for him. As discussed

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74 Id at *1.


77 Id at *3.

78 See discussion *supra* Part II.B.

earlier, the first factor of fair use does not favor such a commercial aspect to the work.\footnote{See discussion supra Part II.B.} The court next looked at the nature of the copyrighted work and found that eight sentences of factual news reporting is not given the same deference as commentary because the news reporting is informational rather than creative.\footnote{See Realty One, 2010 U.S. Dist. LEXIS 111576, at *2; Sherman, supra note 75.} News alone, i.e., facts, are not copyrightable.\footnote{See Feist Publ’ns v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).} Therefore, the court weighed this factor in Nelson’s favor.\footnote{See Realty One, 2010 U.S. Dist. LEXIS 111576, at *2.} Next, the court looked at the amount of the work used and found that using only eight of thirty sentences of factual information was also in favor of fair use.\footnote{Realty One, 2010 U.S. Dist. LEXIS 111576, at *2 (citing Los Angeles News Serv. v. CBS Broad., Inc., 305 F.3d 924 (9th Cir. 2002)) (copying only as much as necessary in a greater work to provide relevant factual information weighs in favor of fair use).} Finally, the court found that a hyperlink to a news article did not have the negative market effects for the copyright holder that would weigh against fair use, instead concluding:

Nelson’s use of the copyrighted material is likely to have little to no effect on the market for the copyrighted news article. Nelson’s copied portion of the work did not contain the author’s commentary. As such, his use does not satisfy a reader’s desire to view and read the article in its entirety the author’s original commentary and thereby does not dilute the market for the copyrighted work.\footnote{Realty One, 2010 U.S. Dist. LEXIS 111576, at *2.} Weighing all of these factors together in light of the purposes of copyright law, the court concluded that Nelson’s use of the excerpt was fair use; therefore, his infringement was excused and he was not liable for damages.\footnote{Id. at *2.}

The effect of the court’s holding in Realty One Group was immediately felt by other defendants in Righthaven lawsuits. Before the court’s ruling in Realty One Group, Righthaven had brought suit against another Web site, Democratic Underground.\footnote{DEMOCRATIC UNDERGROUND, http://www.democraticunderground.com (last visited Mar. 27, 2011), (a left-wing news and discussion Web site).}
under a similar set of facts in *Righthaven, LLC v. Democratic Underground*. The *Journal* posted a 34-paragraph news story on its Web site, and on the same day, Democratic Underground posted the first four paragraphs of the story and a link to the rest of the *Journal’s* story on its own Web site.⁸⁸ With the precedent of *Realty One Group* and the help of the Electronic Frontier Foundation ("EFF"), who joined with Democratic Underground, Democratic Underground counterclaimed, arguing that the *Journal* gave license, consent, waiver, and acquiescence to the use and claiming a fair use defense to the use.⁸⁹ The counterclaim points out that the *Journal’s* Web site offers and invites its users to share its articles through social media third parties.⁹⁰ They then argue a fair use defense, focusing on the facts that support a fair use finding in relation to “the nature of the copyrighted work” and “the amount and substantiality of the portion used.”⁹¹ The counterclaim first points out that the information posted on Democratic Underground’s Web site was “predominantly informational, factual[,] or news.”⁹² It then focuses on the amount of the article used before the hyperlink, which was “less than ten percent of the news article.”⁹³ The counterclaim also emphasizes the “purpose and character of the use” and “the effect of the use upon the

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⁹¹ Id. at 14–16 (providing links to Newsysn, Digg, Technorati, Reddit, StumbleUpon, Del.icio.us, Slashdot, Propeller, Mixx, Furl, Twitter, Myspace, Facebook, Google bookmark, Yahoo! bookmark, Microsoft Live favorites, Ask bookmark, and myAOL favorites).

⁹² Id. at 16–18.

⁹³ Id. at 17.

⁹⁴ Id.
potential market” by arguing that the post was not for any financial benefit. Instead, the excerpt and link were meant for “attracting attention to matters of political interest” and then attracting attention to the Journal when readers further investigated the article. The result of these counterclaims was an unusual turn of events: Righthaven made a motion to dismiss the lawsuit.

IV. FAIR USE AS A DEFENSE TO HYPERLINKING

The success of a fair use defense in cases such as Realty One Group and Democratic Underground has resulted in Righthaven no longer bringing claims against bloggers and journalists who repost a small portion of an article. However, the liability issue is still present for those posting whole stories and hyperlinking to articles. Claims are still being brought by Righthaven on that basis. The question becomes whether the fair use defense can and should be used as successfully in such cases.

A. Use of a News Story From the Copyright Holder’s Perspective

The argument against finding fair use for the posting of large excerpts and complete news stories followed by a hyperlink to the original story has a legitimate basis. The news stories are protected by copyright as an original work of authorship. Web sites that publish these news stories rely on the traffic to their Web

96 Id.
97 Wendy Davis, Righthaven Backtracks in Democratic Underground Copyright Infringement Suit, THE DAILY ONLINE EXAMINER (Nov. 17, 2010, 6:00 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=139728; see David Kravets, EFF Demands Copyright Troll Pay for SUing Democratic Underground, WIRED (Dec. 8, 2010 3:42 PM) http://www.wired.com/threatlevel/2010/12/payup-troll/. The EFF was unwilling to stop at Righthaven making a motion to dismiss the case and demanded that Righthaven pay the attorney’s fees for EFF’s defense of Democratic Underground.
site from people reading the story, because that is how they raise their advertising revenue.\(^9\) However, if someone can get most of the information from the news story on a blog, then the copyright holder’s Web site does not get any economic benefit from having published the story.\(^10\) The news source put the time, money and effort into publishing the story, and likely would wish to see the economic benefits from having done so by getting visits to its Web site.

B. Use of a News Story From the Bloggers’ Perspective

While the Web site owners have legitimate concerns, the consequences of not allowing bloggers and other journalists to report on and then cite to news stories through hyperlinks are high. The Internet is largely structured on the ability to jump from page to page through hyperlinks.\(^11\) Eliminating part of that option eliminates one of the main components of the connectivity of the Internet.\(^12\) If bloggers cannot report on and hyperlink to news stories, then it may follow that no one else can. There does not seem to be a large distinction between the action of a blogger reporting on a news story and posting the link to the source and a Facebook user who posts quoted language to a news story in a status update with a hyperlink to the original article. Both are reporting on a news article by posting content from the copyrighted material and urging readers to follow the link if they would like to read the original article. This has begun to be protected by the decision in *Realty One Group*, but there was no definitive line drawn between an excerpt and a substantial portion of the article. If the actions of the blogger are found to be copyright infringement, then thousands of everyday Internet users could become copyright infringers as well. This result would also stifle the flow of ideas, as people would only be able to find out about news that they are directly searching for on a news Web site.

\(^9\) See discussion *supra* Part II.A.

\(^10\) See discussion *supra* Part II.A. At best, readers will click the hyperlink to the original story and the problem with deep linking surfaces.

\(^11\) See discussion *supra* Part II.A.

\(^12\) See discussion *supra* Part II.A.
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Such results would not be in line with the overarching purpose of copyright: “to promote the Progress of Science and the useful Arts.”\footnote{U.S. Const. art. 1, § 8, cl. 8.} This purpose involves the exchange of ideas in order to allow society to grow and build upon those ideas.\footnote{See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349–50 (1991).} Copyright law works both to protect the rights of authors and to allow the public access to the works of those authors.\footnote{See id.} The sharing of ideas should not be, and is not meant to be, stifled by copyright law. A fair use defense not only considers the four factors enumerated in the Copyright Act, but also balances those four factors with this final consideration of the purposes of copyright.\footnote{See Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 578 (1994).} By considering the factors in light of the purposes of copyright, a fair use defense to reposting and hyperlinking to news articles can be made.

C. Fair Use Argument

One of the areas in which fair use is available for copyrighted works is when the works are being used for “news reporting,” as is the case with bloggers and other Web sites posting and linking to news stories.\footnote{17 U.S.C. § 107 (2006).} The four-factor fair use test can then be applied to defend the actions of those hyperlinking to news articles. The analysis begins with the first factor, “the purpose and character of the use,” and causes an immediate issue for those posting and hyperlinking to news stories. Fair use does not favor a commercial benefit from the use of copyrighted material,\footnote{See discussion supra Part II.B.} and the copyright holder can argue that blogs and other Web sites posting and hyperlinking to the news story are gaining some commercial benefit from the use of the story. By using the news story, a blogger or Web site owner is drawing people to their Web site to read about it. If there is any advertising on the site, then commercial benefit is obtained through the use of the article, which drove readers to the site in the first place.\footnote{See discussion supra Part II.A.}
advertisements on the Web site, exposure to the site could be a commercial benefit depending on the nature of the site. For example, if the site relates to a particular business, then drawing people to the site advertises the business. To defend against this commercial argument, the user of the infringing work must argue that in his or her situation there was no commercial benefit to the use. Bloggers could make the argument that their blogs are for purely educational purposes, i.e., to inform the public about current issues. While in instances such as this, the infringer would be able to argue educational use of the material, it seems that there is a strong argument that many times there will have been commercial benefit to the use.

The second fair use factor, “the nature of the copyrighted work,” deals with the informational versus creative nature of the work. The copyright owner will argue against fair use by pointing to the creative elements of the new story, such as word choice and commentary on the facts. A news story, however, is based on facts, and facts, in and of themselves, are not protected by copyright. The user of the copyrighted work would point to the overall informational and factual nature of a news story. Unless a news story heavily included commentary or criticism, it appears that the copyright holder does not have much basis to successfully argue for the creative nature of the work.

Posting a full article and hyperlinking to the original source runs into another issue with the third factor of fair use analysis: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” With the posting of a large portion, if not the entire article on a Web site, the copyright infringer is using a substantial amount of the work. By linking to the original article, it can be further argued that the infringer is

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100 Righthaven LLC v. Realty One Grp., Inc., No. 2:10-cv-1036-LRH-PAL, 2010 U.S. Dist. LEXIS 111576, at *2 (D. Nev. Oct. 18, 2010), (stating that while the defendant’s use of his blog was to educate people about realty news, he was commercially benefiting from people visiting the blog because he was a Realtor).
112 See Feist, 499 U.S. at 340.
using the whole article on his or her Web site. Once the reader clicks on the hyperlink, the full article is being displayed for the reader to see. The link that led to the viewing of the full article originated with the infringer through the hyperlink. This seems to favor copyright holders against a fair use defense. However, an argument can be made on the infringers’ behalf as to the hyperlink, in that the infringers are not actually using any of the original article when they link to it. The link only takes the reader to the copyright holder’s domain. Therefore, the amount of the work that is actually used by a hyperlink is zero, favoring a fair use defense for the infringer.

Both sides have compelling arguments in relation to the fourth factor of fair use, which is “the effect of the use upon the potential market for or value of the copyrighted work.” Copyright holders can argue that by having other Web sites report on the story, they are losing credit for having written the story as well as the business and financial benefits that come with that credit. If the hyperlink is not clicked on, then the reader may never associate the story with the copyright holder. Also, when they do not click on the hyperlink, they are not visiting the news source’s Web site, which means fewer impressions can be used to calculate advertising revenue.

Even when the hyperlink is clicked on, it will most likely be a deep link, so it bypasses the home page of the news source. Again, the Web site of the news source is losing out on impressions. However, the infringers can make an argument that their use of the copyrighted material helps the market for and value of the work. First, they are advertising for the news Web site by spreading word of the news story and then directing more people to the news site. The news Web site will receive more impressions on their site if people are writing about its news stories and linking to them throughout the blogosphere. Second, although the news Web sites miss out on the initial viewing of the home page when readers follow the link to an internal page, overall traffic to their Web site could be increased by raising awareness about the site as

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115 See discussion supra Part II.A.
116 See discussion supra Part II.A.
a result of the linking. Any advertisements on the interior page would be getting impressions, so copyright holders still have the opportunity to increase advertising revenue in the case of deep linking. Additionally, people may return to the news Web site after having been introduced to it through the link, at which time they would go through the home page.

Both sides have arguments for and against the application of the fair use defense to hyperlinking to news articles on the Internet when analyzed with the four factors. The final step is to weigh that analysis with the purpose of copyright: “to promote the Progress of Science and the useful Arts.” A copyright holder has strong, legitimate arguments against the fair use defense when applying the four-factor analysis. However, the arguments of the infringer for a fair use defense during the same four-factor analysis are also strong. Those arguments combined with this final consideration of copyright law show that fair use can be entirely successful in defending the use by blogs and other Web sites of a post containing a whole news article followed by a hyperlink to the original copyright holder’s work.

IV. CONCLUSION

The fair use defense for copyright infringement can be recognized by the courts and conclusively set forth to protect not only the bloggers and journalists being targeted by the Righthaven litigation, but the Internet-using public as a whole. Righthaven’s actions as a copyright troll are threatening Web sites with not only

117 U.S. Const. art. 1, § 8, cl. 8.
119 See id.
high monetary damages but a forfeiture of their domain name, for a
post that refers the reader back to the original copyrighted work
through a hyperlink. Because most of Righthaven’s targets are
often bloggers or small organizations who can not afford legal
battles, many fear litigation. This means that most cases will settle
rather than go to court where a definitive ruling on the issue can be
reached. Such a system allows Righthaven to continue with its
current practice. The few cases that have made it to the courts
indicate that the courts are willing to use fair use to defend
excerpts of a news story. This practice is a strong indication that
they would be willing to consider the same defense when a larger
portion of the work is used along with a hyperlink. If the courts set
a precedent on the issue, then bloggers and other Internet users
would be able to continue reporting news stories without fear of
litigation from Righthaven and any other companies who may
choose to follow its example. The courts need to affirmatively
recognize a fair use defense to posting and hyperlinking, so that
bloggers and Internet users may be secure in their reporting and
hyperlinking to news articles, as this is in line with the ultimate
purpose of copyright law to promote the progress of ideas.
Fair Use for Hyperlinkers