Internet regulation by the back door?
Copyright and the future of the web

Maurizio Borghi
Professor of Law
Centre for Intellectual Property Policy & Management
Bournemouth University
Enforcement of copyright and related rights in the cyberspace

Two layers of effect

• On the Internet as ‘content distributor’

• On the technical functioning of the Internet as such
Basic copyright

- Exclusive right to authorize or prohibit copying
- ...and to disseminate copies to the public
Basic copyright

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Why? What is ‘copying’? What is a copy?
Basic copyright

• Exclusive right to authorize or prohibit copying

• ...and to disseminate copies to the public

Why? What is ‘copying’? What is a copy?

“[copyright is] a law of public places and commercial interests”
(P. Goldstein)
What’s wrong with copying?

Is copying without public dissemination an infringement?

eg copying for private use

or copying for uses that are unrelated with the normal destination of the work
What’s wrong with copying?

Is copying without public dissemination an infringement?

*eg* copying for private use

*or* copying for uses that are unrelated with the normal destination of the work

Maybe not in principle **but** copying is (historically) the best ‘predictor’ of an intention to infringe

by parting his Manuscript, [the Writer] has constituted a Substitute in his Stead, which speaks perpetually to the Eyes of every Reader. But, though he has given out one or a hundred Copies, has constituted one or a hundred Substitutes to speak for him; yet no Man has a Right to multiply those Copies, to make a thousand Substitutes instead of one; especially, if any Gain is to arise from such Multiplication. (W. Blackstone LJ, *Tonson v Collins*, 1762)
Controversial cases – 1

Perforated rolls for player piano: ‘copies’ of sheets of music? (Boosey v Whight, 1900; White-Smith Music v. Apollo, 1908)
Controversial cases – 1

Perforated rolls for player piano: ‘copies’ of sheets of music?  
(Boosey v Whight, 1900; White-Smith Music v. Apollo, 1908)

‘to play an instrument from a sheet of music which appeals to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing’  
(Lindley J in Boosey v Whight)

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act  
(J Day in White-Smith Music v Apollo)
Controversial cases – 2

Computer programs: subsistence of copyright in object code – meaning of ‘copying a literary work’

what is the subject of copyright [...] will, although not immediately published and perhaps never published, be capable of being published and thus being seen or heard. The very idea of publishing is that something should be seen or heard. The same may be said in relation to performing a work, broadcasting a work, causing a work to be transmitted to subscribers to a diffusion service and, I think it follows, reproducing a work ... In short [...] literary works [...] must, in my opinion, be capable of being seen or heard.

Sheppard J dissent in *Apple Computer v Edge*, 1984 (AU)
The public

• From public performance to broadcasting to ‘making available on demand’

• (From time-space simultaneity to space-shifting to time-space shifting)
The public

• From public performance to broadcasting to ‘making available on demand’

• (From time-space simultaneity to space-shifting to time-space shifting)

“the entire concept of ‘private copying’ makes little sense in a world where the work is predominantly marketed directly to the end users[,] . . . and the market for, or ‘normal exploitation of’, the work will by and large be the private copying market” (J. Ginsburg, 1995)
The internet
‘Digital copyright’ (Litman 2000)

1. Economic rights of authors and related rights owners are extended *as such* to the Internet.

2. Authors and related rights owners have the *exclusive right* to control the communication of their works on the Internet.

3. Authors and related rights owners can adopt *technological measures of protection* which are in turn legally protected.
‘Digital copyright’ – reproduction

• Reproducing the work in any manner and form is an infringement
• Both permanent and temporary copying is infringing
• *However* certain acts of copying that are purely technology-dictated are exempted

   *see InfoSoc Directive, Art. 5(1) – five cumulative conditions (technical rather than functional approach to copying)*
The case with copy-reliant technologies

= technologies that operate on the basis of routine, automatic and indiscriminate copying of works *en masse*
The case with copy-reliant technologies

= technologies that operate on the basis of routine, automatic and indiscriminate copying of works *en masse*

- Media monitoring (Google News, Meltwater, Infopaq...)
- Web scraping / crawling (Expedia, Ciao...)
- Indexing and search (search engines, digital libraries)
- Search engine applications (e.g. statistical machine translation)
- Text mining (iParadigms)
- Mass digitization projects (Google Books, HathiTrust, Internet Archive, Europeana...)

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## What’s in a web page *and why we should worry*

<table>
<thead>
<tr>
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<th>Direct liability</th>
<th>Secondary liability</th>
</tr>
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<tbody>
<tr>
<td>Texts, images, sounds, news items,...</td>
<td>Copyright</td>
<td>Copying / making available</td>
</tr>
<tr>
<td>Personal data</td>
<td>Data protection</td>
<td>Processing</td>
</tr>
<tr>
<td>Information or data organized in a systematic way</td>
<td>Copyright / database right</td>
<td>Extraction and/or reutilization</td>
</tr>
<tr>
<td>All the above (+ non-IP protected content / services)</td>
<td>Contract (click-wrap)</td>
<td>Breach of contract</td>
</tr>
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<td>Access control measures (e.g. password, paywall)</td>
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Facilitating, inducing, countenancing, “turning a blind eye towards”... an infringing act carried out by third parties
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Facilitating, inducing, countenancing, “turning a blind eye towards” an infringing act carried out by third parties.

Safe harbour / e-Commerce Dir. DMCA / Bournemouth University

[www.cippm.org.uk](http://www.cippm.org.uk)
Copyright and related right infringement – updated

Both humans and machine can infringe, BUT

• Fair use + DMCA caching safe harbour in the USA (*Perfect 10 v Amazon, Kelly v Arriba Soft, Field v Google*)

*In EU?* → Caching defence (Dir. 2000/31/EC, art. 13),

No passe-partout exemption from direct infringement, BUT:


• “*Ius usus innocui*” – Spanish Supreme Court, n 172/2012, 3 April 2012
‘Consent architecture’ – robots.txt

Robots exclusion standard (robots.txt) or Noindex/NoArchive tags are text files stored in the root directory of a website that instruct crawlers which directories of a website not to index.

• Ignoring robot.txt exclusions can lead to trespassing claims in the US (eBay v Bidder’s Edge 100 F. Supp. 2d 1058 (N.D. Cal. 2000) Intel Corp. v. Hamidi, 71 P.3d 296, 308–09 (Cal. 2003))

And in Europe?

• Right to “opt out” when personal data area published – search engines must respect opt-outs expressed by website editors through robots.txt (Article 29 Working Party, Opinion 1/2008 on data protection issues related to search engines)

• However: not an “effective technological measure” of a database but mere “etiquette” (Court of Appeal Arnhem (NL), 4 July 2006)
The end of the ‘consent architecture’?

- New ‘informational capitalism’

- Technological and legal (contractual) control over access to online content

- *Plus* control over automated access and uses made possible by Big Data

- The role of copyright and related rights in a post-copyright environment
Hyperlinking
<table>
<thead>
<tr>
<th>Event Time</th>
<th>Event Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>6:50pm</td>
<td>Copa Sudamericana: Fluminense FC - LDU de Quito</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Liga de Bolivia: Real Potosi - The Strongest</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Basket (NBA): Milwaukee - Washington</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Basket (NBA): NY Knicks - Orlando</td>
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<tr>
<td>7:00pm</td>
<td>Basket (NBA): Phoenix - Cleveland</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Basket (NBA): Toronto - Atlanta</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Hockey (NHL): Tampa Bay - Boston</td>
</tr>
<tr>
<td>7:00pm</td>
<td>Hockey (NHL): Vancouver - New Jersey</td>
</tr>
<tr>
<td>7:30pm</td>
<td>Basket (NBA): Dallas - New Jersey</td>
</tr>
<tr>
<td>7:30pm</td>
<td>Hockey (NHL): Colorado - Florida</td>
</tr>
<tr>
<td>7:45pm</td>
<td>Clausura de Chile: La Serena - Colo Colo</td>
</tr>
<tr>
<td>8:00pm</td>
<td>Basket (NBA): Detroit - Chicago</td>
</tr>
<tr>
<td>8:00pm</td>
<td>Basket (NBA): Memphis - Minnesota</td>
</tr>
<tr>
<td>8:00pm</td>
<td>Basket (NBA): Philadelphia - Oklahoma City</td>
</tr>
<tr>
<td>8:00pm</td>
<td>Hockey (NHL): Nashville - Minnesota</td>
</tr>
<tr>
<td>8:30pm</td>
<td>Promoción de Colombia: Bucaramanga - Pereira</td>
</tr>
<tr>
<td>9:00pm</td>
<td>Apertura de Guatemala: Comunicaciones - Marquense</td>
</tr>
<tr>
<td>10:00pm</td>
<td>Apertura de México: Morelia - Cruz Azul</td>
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<tr>
<td>10:00pm</td>
<td>Basket (NBA): Indiana - Sacramento</td>
</tr>
<tr>
<td>10:30pm</td>
<td>Basket (NBA): Houston - LA Clippers</td>
</tr>
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**Últimos partidos en descarga**
- van a subir el xerez-Barca??
- IMPORTANTE BARCA-ZARAGOZA NO VA BIEN
- NBA: Celtics @ Bobcats 01/12/09
- Liga Adelante J10: Real betis-Villarreal B 2/12...
- NBA_2007_01_12_Jazz@Sonics

**Últimos videos**
- Un Fan del Jerez le dice la verdad a Laporca
ACCESS TO THE WEBSITES LISTED ON THIS PAGE HAS BEEN BLOCKED PURSUANT TO ORDERS OF THE HIGH COURT

You have the right to apply to the High Court to vary or discharge the Orders below if you are affected by the blocks which have been imposed. Any application must be made to the High Court directly and must (i) clearly indicate your identity and status as an applicant; (ii) be supported by evidence setting out and justifying the grounds of the application, and (iii) be notified to all parties 10 days in advance.

<table>
<thead>
<tr>
<th>Identity of parties who obtained the Order</th>
<th>Blocked Websites</th>
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<td>The Pirate Bay</td>
</tr>
<tr>
<td>Members of BPI (British Recorded Music Industry) Limited and of Phonographic Performance Limited</td>
<td>KAT or Kickass Torrents websites</td>
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<td>Members of BPI (British Recorded Music Industry) Limited and of Phonographic Performance Limited</td>
<td>HD3t</td>
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<tr>
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<td>Fenopy</td>
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<td>Members of the MPA (Motion Picture Association of America Inc)</td>
<td>Movie2K / Movie4K</td>
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<tr>
<td>Members of the MPA (Motion Picture Association of America Inc)</td>
<td>Download4All</td>
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<tr>
<td>The Football Association Premier League Limited</td>
<td>EZTV</td>
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<td>First Row Sports</td>
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<td>Abmp3</td>
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<td>eMmp3World</td>
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<td>Mp3rad</td>
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<td>Rapidlibrary</td>
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<td>TorrentHound</td>
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Comprehensive media monitoring designed to save you time. More than 23,000 news articles pour into our portal every day. Add 25,000 blog entries and you get an idea of the massive flood of information that we are exposed to every day and are expected to process.

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Intetain, al Politecnico di Torino tre giorni di dibattiti sull ...
Gioconews POKER (Registrazione) - Jun 9, 2015
Dal 10 al 12 giugno il Politecnico di Torino ospiterà il convegno internazionale Intetain – International on Intelligent Technologies for interactive ...

Ambiente, Lavazza e Politecnico di Torino: come coltiva...
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Funghi commestibili dai fondi di caffè
Opinion - La Stampa - Jun 6, 2015
Explore in depth (8 more articles)
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About 29,400 results (0.42 seconds)

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What’s in a hyperlink

• = a link from a hypertext document to another location, activated by clicking on a highlighted word or image.

• Facilitate and speed-up access to a resource available online

• Linking / Deep linking / Framing / Embedding
Legal issues with hyperlinking

In the US

• Deep linking and reproduction in reduced-size copies (thumbnails) are both fair use

• Linking and framing are generally exempted under the fair use doctrine

(Kelly v Arriba Soft, Perfect 10 v Amazon, ....)
Legal issues with hyperlinking

European courts (before Svensson)

- Generally not a direct infringement – neither ‘reproduction’ nor an autonomous ‘communication to the public’
- Occasionally protected under freedom of press and freedom of speech
- Infringing only in special cases (e.g. the material is otherwise unfindable by the public; the material is “obviously illegal”)
- Some courts in Nordic countries found direct infringement (linking to streaming sport events)
CJEU Svensson

Hyperlinking is an independent act of communication, but...

Infringement only if the communication meets certain criteria:

- The original communication is subject to access protection mechanisms
- The communication reaches a new public
- The communication affects the market for the original work.

Svensson and Others v Retriever Sverige AB (C-466/12)
Consequences of Svensson

- Hyperlinks to freely available content are permitted
- However, hyperlinking is ‘communication’ – albeit not necessarily ‘to the public’
- How to make sure your hyperlinks are non-infringing?
- More copying and less hyperlinking?
- New CJEU referral on this issue (GS Media) – direct vs. indirect infringement
Web crawling / scraping
Crawling / scraping

- Web crawling → systematic browsing for the purpose of indexing

- Data scraping / screen scraping → extraction of data (or other information) from human-readable outputs of a website (e.g. search module of airline companies)
The issue with scraping
Database right and access to information

• Protected by copyright and *sui generis* database right (Database Directive, 96/9/EC)

• *Sui generis* database right = Exclusive right to ‘extract and/or re-utilize substantial parts of a database’

• ‘Sole-source databases’ normally unprotected by the *sui generis* right (investment in ‘creation’ of data alone not sufficient to confer protection: CJEU *BHB* 2005, C-203/02)

• Mandatory exceptions to guarantee the “right of lawful users” – not contractually overridable (Dir. 96/9/EC, art. 6, 8 and 15)
Meta-search engines and the database right

Directive 96/6, Art. 7(1) (*sui generis* database right)

‘Meta search engines’ infringe database right if they
I. offer the same functionalities as
II. transfer data in real time from
III. present results in an order that reflects similar criteria as those of...

...the search engine of a protected database.

Innoweb v Wegener, Case C-202/12 [2013]
CJEU Ryanair

• Art 15 (non-overridability of ‘lawful use’ exception) not applicable to non-protected databases.

• Ergo: lawful use of a database can be restricted by contract if the database is not protected by copyright or sui generis right!

• Logic?
Consequences of *Ryanair*

- The end of meta-search engines?
- Access to information regulated by unilateral contact.
- Are contractual restrictions on automated access (‘screen scraping’) enforceable?

  - **YES:** *Ryanair Ltd v Billigfluege.de*, High Court (Ireland), 26 February 2010
  - **NO:** *Ryanair v Atrapálo* Spanish Supreme Court, 572/2012; *Cheaptickets.de v Ryanair*, BGH (Germany), 2014

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Summary and conclusion

- Copyright and related rights enforcement impact upon the very structure of the internet (not only upon the way we access content online)
- This is not the purpose of copyright
- Absent internet regulation, the future Internet will be the more and more shaped by (conflicting) private interests