

Legal regulation of search engines

The end of the 'consent architecture'?

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Search engines

- General vs 'vertical' search engines
- Meta-search engines
- Search aggregators
- ...

Search engines – key activities

- Indexing and caching web pages → *enabling search by means of “web robots”, i.e. programs that navigate the web automatically to index web content (AKA: bots, spiders or crawlers).*
- Data scraping / screen scraping → *extraction of data (or other information) from human-readable outputs of a website (e.g. search module of airline companies)*
- Content aggregation → *arranging and presenting hyperlinks and short extracts (or thumbnails) from multiple sources (e.g. online newspapers) in response to search queries*

What's in a web page *(and why search engines may worry)*

| | <i>Possibly protected by..</i> | <i>Direct liability</i> | <i>Secondary liability</i> |
|---|--|---------------------------------|---|
| Texts, images, sounds, news items,... | Copyright | Copying / making available | |
| Personal data | Data protection | Processing | Facilitating, inducing, countenancing, |
| Databases | Copyright / database right | Extraction and/or reutilization | “turning a blind eye towards” ... an infringing act |
| All the above (+ non-IP protected content / services) | Contract (click-wrap) | Breach of contract | carried out by third parties |
| Access control measures (e.g. password, paywall) | “para-copyright” (anti-circumvention provisions) | Deliberate circumvention | |

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‘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)

Copying for indexing and caching

- 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:

- Doctrine of implied consent – BGH 29.04.2010 (*Vorschaubilder I*); BGH 19.10.2011 (*Vorschaubilder II*)
- “*ius usus innocui*” – Spanish Supreme Court, n 172/2012, 3 April 2012

Processing of personal data after *Google Spain*

- Crawling websites that include personal data is “data processing” (Dir. 95/46/EC)
- The operator of a search engine is a “data controller” with respect to personal data published in third parties’ websites
- “Legitimate interest of the data controller” as a legal basis for such processing (art. 7(f)) is limited by the right of the data subject to object inclusion of personal information in the list of results that are displayed following a search made on the basis of his/her name (“right to be forgotten”)

Google Spain v AEPD and Mario Costeja González, Case C 131/12 [2014]

News aggregators

About 28,800 results (0.18 seconds)



U2's Songs of Innocence album has been downloaded 2...

[The Guardian](#) - 15 hours ago

U2's new album has been downloaded by a reported 26 million people, ... Bono has also recently debuted a new music project: the Venetian ...

81 million Apple customers have listened to **U2's new album**

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U2's New Album Has Been Downloaded 26 Million Times

[Diffuser.fm](#) - 15 hours ago

Apple Releases Download Numbers for Free **U2 Album**

[New York Times \(blog\)](#) - 14 hours ago

The Download Heard 'Round the World: iTunes Numbers Show 81 ...

[Billboard](#) - Oct 9, 2014



[Alternative Pr...](#)



[Diffuser.fm](#)



[Billboard](#)



[USA TODAY](#)



[DailyTech](#)



[CNET](#)

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U2 releases new album for free during Apple's iPhone ev...

[Today.com](#) - Oct 2, 2014

U2 surprised the world Tuesday by releasing "Songs of Innocence," their first **album** in five years, as a gift from Apple, available for free ...

Apple's forced 'gift' of **U2's new album** has iTunes users freaking out

[Financial Post](#) - Sep 11, 2014

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Underlying reproduction of the original content for indexing and caching

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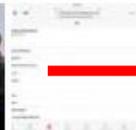
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Hyperlink

Snippet

Thumbnail

News aggregators – regulation

- USA: litigations and settlement agreements with news publishers (Agence France Press and Google, 2008; Associated Press and All Headline News, 2008; Gatehouse Media and New York Times, 2008; AP v Google, 2009)
- Belgium: *Copiepresse v Google* settled after Appeal
- France: 60M € agreement between Google and French Publishers (under the auspices of Government) towards a “Digital Publishing Innovation Fund”
- Germany: Ancillary copyright for press publishers introduced in August 2013
- Spain: Non-waivable remuneration right introduced in January 2015 (“Google tax”). Similar legislation under discussion in Italy and Belgium

Restricting news aggregation. Compatible with EU law after *Svensson*?

Svensson v Retriever, Case C-466/12 [2014]

(Q 4): Is it possible for a Member State to give wider protection to authors' exclusive right by enabling communication to the public to cover a greater range of acts than provided for in Article 3(1) of Directive 2001/29?

NO!

Granting of more extensive rights compatible with international obligations – but it would adversely affect the functioning of the internal market.

News items and quotations – Berne Convention

Art 2(8): The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Art. 10(1): It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

- Imperative restriction on copyright protection of news items (Ginsburg & Ricketson)
- “Quotation right” widely embraced by copyright laws throughout the world

Meta-search engines

The screenshot shows the Skyscanner website interface. At the top, the Skyscanner logo is on the left, and the text "The world's travel search engine" is in the center. On the right, there are options for "English (EN)", "GBP - £", and "Change". Below the logo, there are three main search categories: "flights", "hotels", and "car hire". The "flights" category is selected. The search form for flights includes a "From" field with "United Kingdom (UK)" and "All airports", a "To" field with "enter a country, city or airport", and a "map" link. There are checkboxes for "Add nearby airports" and "Prefer directs". The "Depart" section shows "return" selected over "one way", with dates "28/01/2015" (Wed, 28 Jan 2015) and "29/01/2015" (Thu, 29 Jan 2015). There are also fields for "1" adult, "0" children (under 12), and "0" infants (under 2), and a "Economy" class dropdown. A large green "Search" button is at the bottom right. To the right of the search form is a Virgin Atlantic advertisement with the text "virgin atlantic Let it fly" and "AMAZING DE".



Meta-search engines and 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]

Meta-search engines, database and contract

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

the fact that a database corresponds to the definition [set out in the Directive] does not justify the conclusion that it falls within the scope of the provisions of that directive governing copyright and/or the sui generis right if it fails to satisfy [the conditions for protection]

[The articles establishing] mandatory rights for lawful users of databases, are not applicable to a database which is not protected either by copyright or by the sui generis right under that directive, so that it does not prevent the adoption of contractual clauses concerning the conditions of use of such a database

Ryanair v PR Aviation, Case C 30/14 [2015]

To summarize...

'Consent architecture' mainly challenged by services opposing extraction, aggregation and likening to their 'own' information.

Defensive v. predatory behaviours

Balance between freedom of information and protection against 'free riding'

Private ordering mechanisms not always the best solution (new monopolies)

Any regulatory option should consider carefully 1) the balance of interests at stake, 2) the effect of the regulation and 2) compliance with international obligations.

Not relying only on IP law!

Thank you!