
Research Issues in Computing: Internet Law

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Some definitions



**RESEARCH: A
systematic search
for facts; scientific
investigation**



Some definitions

RESEARCH:

**You think; you reflect;
you **write**; you revise;
you communicate; you
receive **feedback**; you
think; you reflect.....**



Internet: CYBERSPACE?

- Physically the Internet is a collection of packet-switched computer networks connected together by a set of software protocols called ***Transmission Control Protocol/Internet Protocol***.
- Thousands of networks are connected to a **core** – high capacity backbone networks in the USA – by adapting Internet protocols and then linking in.
- The physical boundaries of the Internet are **virtually impossible to define**.

Course Outline – Internet Law



- Internet, cyberspace, and governance
- The key players
- Internet and Intellectual Property
- Internet –Telecomms and Broadcast Regulation
- Domain Name Registration
- Online Service Agreements
- Copyright
- Patent Law

Key References

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Internet: CYBERSPACE and its Governance

- The Information Society is currently empowered by technology and is governed by laws that predate the society by many years – decades in fact.
- Laws related to post, telegraph and telephony are used to govern the behaviour of buyers and sellers on the Internet.
- What about *digital content* (electronic documents on a CD ROM, on a web-site) as opposed *physical content* (ink-paper-image documents)? Any difference?



Internet: CYBERSPACE and its Governance

- Changes in our world:
 - 1041 Movable clay type invented in China.
 - 1440 Gutenberg completed his wooden press which used metal moving type.
 - 1455 Gutenberg was effectively bankrupt.
 - 1456 Mazarw Bible printed in Mainzhttp:
 - 1563 UK Parliament passed the Statute of Artificers Act which proved greatly restrictive to craftsmen.
 - 1572 John Day introduced Roman type in England.
- **Laws to govern the print media** (ink on paper)
- www.dotprint.com/fgen/history1.htm

Internet: CYBERSPACE and its Governance



- Changes in our world:
 - Print Media →
 - Broadcast Media (Sound) →
 - Broadcast Media (Images) →
 - Broadcast Media →
 - Interactive Media
- Terrestrial**
Cable
Satellite
Telephone
-

Internet: CYBERSPACE and its Governance



- Changes in our world:
 - Print Media →
 - Broadcast Media (Sound) →
 - Broadcast Media (Images) →
 - Broadcast Media →
 - Interactive Media
- Analogue**
Digital
-

Internet: CYBERSPACE and its Governance



- Changes in our legal world:
 - Media → Copyright; Defamation - Libel/Slander; Security; Information Content; Conduct of producers and consumers

Terrestrial
Cable
Satellite
Telephone

Analogue
Digital

Internet: CYBERSPACE and its Governance



Legal Framework:

- To protect the rights of individuals and organisations;
- To outline the duties of individuals and organisations;
- To define the jurisdiction of the framework in terms of time, place, and communities

Internet: CYBERSPACE and its Governance



Legal Framework for the Online World:

	Owners		Users	
	Rights	Duties	Rights	Duties
Information Security	Ownership	Authenticity; integrity	Fair Usage	Confidentiality
Information Content	Ownership	Ethical & Moral	Fair Usage	Prevent Abuse
Online Conduct	Fair profits	Ethical & Moral, Political; Tax	Fair Usage; Tax,	Confidentiality ; Prevent Abuse

Internet: CYBERSPACE and its Governance



- Internet is a unique global **institution**.
- Internet grows with the help of, and is threatened by, a number of *players*: national and supra-national governments, for profit and not-for profit organisations, individuals and groups.
- Collaboration between these various players is usually not **formalized**.

Internet: CYBERSPACE and its Governance



- Governance by consensus through the **Internet Society** which is based in the USA and Switzerland. (*www.isoc.org*)
 - The **Internet SOciety** (ISOC) is a professional membership society with more than 150 organization and 16,000 individual members in over 180 countries. It provides leadership in addressing issues that confront the future of the Internet, and is the organization home for the groups responsible for Internet infrastructure standards, including the
 - **Internet Engineering Task Force (IETF) and**
 - **Internet Architecture Board (IAB).**
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Internet: CYBERSPACE and its Governance



- **Internet Society Mission Statement**
"To assure the open development, evolution and use of the Internet for the benefit of all people throughout the world."
 - The Internet Society acts not only as a global clearinghouse for Internet information and education but also as a facilitator and coordinator of Internet-related initiatives around the world.
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Internet: CYBERSPACE and its Governance



The Internet Society was founded to

- Facilitate open development of standards, protocols, administration and the technical infrastructure of the Internet
 - Support education in developing countries specifically, and wherever the need exists
 - Promote professional development and opportunities for association to Internet leadership
 - Provide reliable information about the Internet
 - Provide forums for discussion of issues that affect Internet evolution, development and use -- technical, commercial, societal, etc.
 - Foster an environment for international cooperation, community, and a culture that enables self-governance to work
 - Serve as a focal point for cooperative efforts to promote the Internet as a positive tool to benefit all people throughout the world
 - Provide management and coordination for on-strategy initiatives and outreach efforts -- humanitarian, educational, societal.
-

Internet: The PLAYERS and their roles



THE PROVIDERS

- Infrastructure and Network Providers
- Content Providers
- Access Providers
- Navigation Providers

OTHERS

- Hosts
 - Administrators
 - Transaction Facilitators
-

Internet: **The PLAYERS and their roles**
Infrastructure Providers: Key components



<u>COMPONENT</u>	<u>FUNCTIONS</u>	<u>OWNERS</u>
Routers	Computers designed to receive & forward packets of data	Governments & private organizations (fully connected)
Hosts	Systems which store programs and data	Governments & private organizations (fully connected)
Pipes	Telecom connections that link the hosts & routers	Usually, telecom companies that lease capacity/routing/switching

Internet: **The PLAYERS and their roles**
Network Providers



Network providers have:
Physical links

to enable traffic flow direct from one network to another;

Contractual relations

Peering Agreement: governs traffic exchange between networks;
no peering agreement & no physical link → no traffic or find alternative routes

Appropriate Use Policies: used typically by governments to prohibit commercial traffic;

Pricing arrangements that are flat-rate



Internet: The PLAYERS and their roles Network Providers

- Internet protocols allow messages to route around gaps or blockages
 - Example: Local site but router in the US because there is no peering agreement with local gateways;
- The route is therefore sometimes unpredictable → there is **no one person to take legal responsibility** for END-TO-END delivery of message



Internet: The PLAYERS and their roles Network Providers

<u>Content Form</u>	<u>Examples</u>
Real-time	audio, video, animation, voice telephony, video conferencing
Downloadable	copiable files including text, graphics, video, computer programs, updates, patches



Internet: The PLAYERS and their roles Network Providers

- Any '**soft** product' seems to be a good candidate for buying & selling on the Internet: software, news, books;
- Boundaries of ownership and responsibility are BLURRED.
- Can *linking* to other sites generate legal liabilities for content on the target such as copyright INFRINGEMENT/defamation?



Internet: The PLAYERS and their roles Network Providers

- Copyright? – The exclusive right to reproduce or authorize others to reproduce artistic, dramatic, literary or musical works. The right now includes sound broadcasting, films and TV.
- The UK *Copyright Act 1988* **confers** the right.
- **Remedies:** If a plaintiff's copyright has been breached then he or she can (a) take action for damages (b) demand account for profits and (c) seek an injunction against the accused.
- A remedy (also known as redress, relief) is any of the methods available at law for the enforcement, protection, or recovery of rights or for obtaining redress for their infringement.

Internet: The PLAYERS and their roles

Network Providers



- Defamation? The **publication of a statement** about a person that tends to lower his or her reputation in the opinion of right thinking members of the community or to make them shun or avoid him or her.
 - Defamation is usually in **words**, but pictures, gestures, and other acts can be deemed defamatory.
 - **In English law a distinction is made between *defamation in permanent form* (LIBEL) and *defamation not in permanent form* (SLANDER) (not in Scottish Law). Defamatory statement must be proven to have been communicated to a 3rd Party.**
 - Remedies: Damages and Injunction.
-

Internet: The PLAYERS and their roles

The Hosts



- A host is a storage place accessible to the Internet for storing data. The *Internet Society's Domain Name Server* is a host.
 - **Two extremes of data ownership**: The owner of the host may **OWN & CONTROL** data (company hosting an ftp resource); or may have the most tenuous connection with the data (*USENET*)
 - **Liability?** The liability will vary according to the data ownership status as perceived by the plaintiff and by the defendant.
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Internet: The PLAYERS and their roles

The Administrators

- Internet *works* because of the protocols promulgated by the *Internet Society*.
Administration is through consensus.
- Administration is needed because software vendors are vying for business and sometimes adopt extensions to standards before they come into existence.
- Administration will always be needed because of the computing industry's perennial desire to have *de facto* standards.



Internet: The PLAYERS and their roles

The Access (Service) Providers

- ACCESS: The UK *Computer Misuse Act 1990* states that 'a person secures **access** to any program or data held in a computer if by causing a computer to perform any function he (or she) alters or erases the program or data, or copies or moves it to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held (whether by having it displayed or in any other manner)'.



Internet: **The PLAYERS and their roles** **The Access (Service) Providers**

- **ACCESS:** In the USA, to **access** strictly means to instruct, communicate with, store data in, retrieve data from, or otherwise obtain the ability to use the resources of a computer or any part thereof.



Internet: **The PLAYERS and their roles** **The Access (Service) Providers**

- The term Internet *access provider* refers to an organization that provides **HIGH-CAPACITY INTERNET-COMPLIANT** links to the backbone(s) and other sites.
- Initially, most of the access providers were academic institutions; however, this was limited to their staff and students. A large number of commercial organizations now provide access to the Internet.
- Access providers often provide additional services including acting as a host; distributing software; web-design.



Internet: The PLAYERS and their roles The Access (Service) Providers

- Major telecomms organizations provide access to the Internet: these organizations can provide *local-dial up* numbers – **PoPs**: Points of Presence – around a country and connections to the Internet.
- Small access providers typically re-sell the capacity of major access providers through the use of local telephone numbers. The local numbers are routed through the major's network to the (small) access provider. This method of maintaining PoPs is called **virtual PoP**.



Internet: The PLAYERS and their roles The Access (Service) Providers

- **Legal Liability**: Access providers have been sued by plaintiffs who have argued that data copied automatically onto other computers (strictly IP numbers) by an access provider, say servicing a news group, were directly infringing the rights of the plaintiff. Furthermore, the defendant is still liable irrespective of his or her knowledge of the contents of the copied data.
- The legal point here is this: whether or not the access providers are liable for incidental copies automatically made on their computers using their software **as part of a process initiated by a 3rd party**.
- The famous case in Californian courts, *Religious Technology Center v Netcom* (21/11/1995) established that Netcom was not liable.



Internet: The PLAYERS and their roles The Access (Service) Providers

Plaintiff: Somebody who complains

- Organisations, individuals, countries,
- Federations, UN
- ABOUT INFRINGEMENT OF THEIR RIGHTS

Defendant: Somebody who has been complained against.

The defendant has *violated* the rights of
The plaintiff or has not performed their duty.

PERFORMANCE of DUTIES

VIOLATION of RIGHTS



Internet: The PLAYERS and their roles The Access (Service) Providers

- The *Religious Technology Center v Netcom* case was settled in favour of the defendants *Netcom* because the court could not find 'a theory of infringement that would hold the entire Internet liable for activities that cannot **reasonably** be deterred'.
- In other cases where plaintiffs failed to establish the case for 'criminal copyright infringement', the courts rejected their appeals (*United States vs LaMaccia 1994*).

Internet: **The PLAYERS and their roles** Navigation Providers



- Navigation providers help their users, usually without any cost, to find the information on the Internet they require. The emergence of *search engines* is an example where the providers compile catalogue resources across the Internet.
- The navigation providers act as signposts to quality information.

Internet: **The PLAYERS and their roles** Navigation Providers



- Navigation providers finance their operation through 3rd party advertisements and sponsorships.
- NPs sift contents on one host and the results (mainly links) may be stored on yet another; the two may be under different legal jurisdiction with the NPs under another.
- NPs are involved in more complex sets of **contractual relationships** found on the Internet.



Internet: **The PLAYERS and their roles** Transaction Facilitators

- Internet flourishes by the way data is freely exchanged across organizations, across national and international boundaries.
 - Lack of security and the near-anonymity of Internet users has led to the formation of organizations that provide security and identity systems.
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Internet: **The PLAYERS and their roles**

- Internet is a consensus-based community
 - The manner in which members of the community interact with each other and others is governed by legislation which is state-based.
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Internet and Intellectual Property

- Internet deals with data – an **intangible asset** – unlike property, plant or machinery. Data has no physical existence legally and hence is intangible.
 - Internet is about the efficient access of data. Such access may not be perceived by some to be *equitable*.
 - Three areas of Intellectual Property Law relates to Internet: copyright; patents; and trademarks.
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Internet and Intellectual Property

- Copyright Laws and the Information Society
 - UK:** Copyright, Designs and Patent Act 1988 which is based on the Copyright Act 1709.
 - Europe:** Copyright and Related Rights in the Information Society 1995.
 - Provision has had to be made for electronic media, for remote operations, for new modes of work involving telecommunications systems, for digitization and 'dematerialisation' of information, misuse of confidential information on the Internet.
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Internet and Intellectual Property



- Evolution of the concept of intellectual property:

Providing programs to copy files and software on bulletin boards: The person who developed the copier program, for a specific file/software, can be held responsible for infringing the right of those who hold copyright on the software (US → *Sega Enterprises v Maphia 1994*);

Hosting bulletin boards which can be used to distribute copyrighted material: The person who owns the board(s) is responsible for what is on it, even though he or she may not be aware of it (US → *Playboy Enterprises v Frena 1993*)

No decisions in the UK courts until recently related to copyright infringement on the Internet.

Internet and Intellectual Property



- Evolution of the concept of intellectual property:

Hosting bulletin board(s) for the free exchange of commercial software: although this behaviour was, according to a US court, 'heedlessly irresponsible, [...], self indulgent and lacking in any fundamental sense of values', but as long as 'no personal gain was made' the host cannot be accused under the US Computer Fraud and Act 1986. The person may be tried under the US Copyright Act for 'criminal copyright infringement'. Case dismissed. (US v *LaMaccia 1994*)

Hosting content providers who may have deemed to have infringed somebody's copyright: Host not guilty because there 'is no workable theory of infringement...'. (Religious Technology Center vs *Netcom Online Communications Services 1995*)

Internet and Intellectual Property



- Evolution of the concept of intellectual property:

Publishing confidential information obtained through *hacking*: The US courts have held that 'electronic transfer of confidential information from one computer to another across [US] state lines constituted interstate transfer of stolen property'. So far cases in which law enforcement records, banking information, stock market information and emergency procedures were obtained without consent, have been decided in favour of the plaintiffs.

However, in the UK there is no law which specifically forbids 'dishonest appropriation of pure information' and that 'information is not property capable of being stolen' (*Oxford v Moss 1978*).

Internet and Intellectual Property



- The copyright, patent and design acts in various countries are being used
 - The body of law is evolving each time a court case is settled. This is called *precedence*.
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Internet and Intellectual Property



- Trade Mark and Passing Off
 - The UK Trade Marks Act of 1994 describes a *trade mark* as ‘any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings’.
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Internet and Intellectual Property



- ‘Passing Off’
 - A term used in the UK legal system: ‘A common law version of trade mark law [...] Passing off protects business goodwill and safeguards the public from deception by giving a right of action against anyone who tries to pass off his[her] goods or services as those of someone else’ (Bainbridge 1996:126).
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Internet: Telecommunications & Broadcasting



- The Intellectual Property (Rights) discussion is focused largely on the written word.
 - The issues related to the *transference* of information across national boundaries poses a set of major challenges.
 - Internet has opened up new types of *markets* in publishing and entertainment; again there are only national laws and statutes in this area.
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Internet: Telecommunications & Broadcasting



- In order to offer services over the Internet and to operate the infrastructure, one needs LICENCES and CONSENTS.
 - Regulations dealing with content have to define the distinction between the modality of information: *text v. video*; *video v. graphics*; *voice v. music* and so on.
-

Internet and Telecomms Regulations



- The UK Telecommunications Licensing Regime
 - **The Act:** UK Telecommunications Act 1984
 - **Defines** telecommunications system;
 - **Introduces** the notion of **VOICE RESALE**
 - **Elaborates on the concept of international voice telephony through the Internet.**
-

Internet and Broadcasting Regulations



- The UK Broadcasting Licensing Regime
 - **The Act:** UK Broadcasting Act 1984
 - **Defines** relevant broadcast programme;
 - **Introduces** the notion of **LICENSABLE PROGRAMME SERVICES**
 - **Distinguishes between web sites comprising still pictures and graphics and a television programme.**
-



Internet and Telecommunications and Broadcasting Regulations

- Internet-based services use public switched networks (PSN), international private leased circuits (IPLC).
- The service provision cuts across national boundaries, yet in each country the use of publicly available networks for information dissemination is governed by its unique social and cultural norms.
- The new 'digital' markets cannot be easily regulated and licensed partly because of their novelty.
- Harmonisation of telecommunications and broadcasting norms is a major challenge and opportunity provided by the Internet.



Internet and Telecommunications and Broadcasting Regulations

- The UK's Telecommunications Act 1984 (UKTA84) plays an important role in licensing the operations of the Internet within the country.
- A *telecommunication system* is defined in s[ection] 4(1) of the 1984 Act as: '...a system for the conveyance, through the agency of electric, magnetic, electro-magnetic, electro-chemical or electromechanical energy, of (a) speech, music, and other sounds; (b) visual images; (c) signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or (d) signals serving for the actuation or control of machinery or apparatus.'
- A *telecommunications service* is defined in Section 4(3) of the UKTA84 as any service consisting in the conveyance of anything falling within Section 4(1) of the UKTA84.



Internet and Telecommunications and Broadcasting Regulations

- The UKTA84 puts significant burden on those running a telecomms system. Those running the system can only do so if they have a licence.
- Internet services require a close interaction between: *infrastructure and network providers; content providers; hosts; administrators; and access providers.*



Internet and Telecommunications and Broadcasting Regulations

- As a general rule any person responsible for the **transmission** (including multiplexing) or **switching** of traffic will need to be licensed under Section 7 of the UKTA 1984.
- Under the definition of a 'telecommunication system', the *infrastructure and network* providers on the Internet can be deemed to run a telecommunications system. Similarly *access* providers (which often also act as hosts) which operate their own networks, comprising private circuits leased from public telecommunications operators such as BT or Mercury Telecoms, and switches, leased and owned by the access provider, are also running a licensable system. The switches operated by an access provider enable the end-user to dial up the access provider and gain access to any number of sites on the Internet. It is the access provider's job to route this traffic to the correct Internet host in accordance with the end-user's instructions.



Internet and Telecommunications and Broadcasting Regulations

- As a general rule any person responsible for the **transmission** (including multiplexing) or **switching** of traffic will need to be licensed under Section 7 of the UKTA 1984.
- By contrast, Internet content providers are not involved in the running of a telecommunications system, although they may be providing a telecommunications service. For example, a company that establishes a page on the WWW will use a host to store the data which makes up the page, but neither the host (unless it is an access provider) nor the WWW site owner is necessarily involved in the switching of messages.

Source: Smith, Graham J H . (1996). *Internet Law and Regulation: A specially commissioned Report*. London: FT Law & Tax. (Chapter 6).



Internet and Telecommunications and Broadcasting Regulations

- Can the Internet players mentioned above operate a telephone service that allows their users to make international telephone calls?
- The Telecommunications Services Licence (TSL), issued under the UKTA 1984, permits licensees to provide telecommunications services of any description by means of the *Applicable Systems* other than *International Simple Voice Resale (Voice ISR)* and *International Simple Data Resale (Data ISR)*. For such purposes, the 'Applicable Systems' cover systems actually run by the licensee itself – e.g. a telecommunication switch located in an office. An example of a Voice ISR service which cannot be provided without an individual ISR licence are the international voice telephony services being offered to Internet users, which enables two-way live speech to be transmitted between personal computers logged on the Internet. In addition, video-conferencing applications currently under development which will enable international two-way live speech to be transferred over the Internet constitute a licensable service.



Internet and Telecommunications and Broadcasting Regulations

■ Can the Internet players mentioned above operate a telephone service that allows their users to make international telephone calls?

■ Internet voice telephony services are marketed as a means of making international and long distance calls for the price of a local telephone call. To access the service, you need a multimedia PC with an Internet connection, a modem capable of transmitting voice and a soundcard allowing the computer to record sounds and play them back. Once suitably equipped, the user is able to purchase a software package which enables him or her to make international calls at local call rates because calls are carried from the user's home via the PSN to the nearest Internet access provider's switch, which is invariably a local call away. The calls are then routed over private circuits to the country of destination and then via the PSN to an Internet user in that country (a method is being developed which will enable users logged on to the Internet to call anywhere instead of being restricted to calling another Internet user).



Internet and Telecommunications and Broadcasting Regulations

■ Can the Internet players mentioned above operate a telephone service that allows their users to make international telephone calls?

■ Content providers which sell the software that enables voice services to be transmitted over the Internet are not running a telecommunication system and the provision of the voice service itself does not need to be licensed. However, an access provider which operates its own switch or switches and leases private circuits from public telecommunications operators (PTOs) and international private leased circuits (IPLCs) from BT and Mercury will need to obtain a Voice ISR licence from the DTI as it will be engaged in the switching of Voice ISR traffic. As soon as international two-way live speech is conveyed using the PSN at both ends of the call with use of an IPLC in between, the condition contained in the TSL prohibiting the conveying of such traffic is breached and the access provider is guilty of an offence under s 5(2)(b) of the 1984 Act. Access providers should therefore obtain an individual ISR licence from the DTI before such providing services to their customers.



Domain Name Registration

www.icann.org



**The Internet Corporation
for Assigned Names and Numbers**



Domain Name Registration



The Internet Corporation for Assigned Names and Numbers (ICANN) is the non-profit corporation that was formed to assume responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under U.S. Government contract by IANA and other entities.

Domain Name Registration



•Top-Level Domains

There are two types of top-level domains, generic and country code, plus a special top-level domain (.arpa) for Internet infrastructure. Generic domains were created for use by the Internet public, while country code domains were created to be used by individual countries as they deemed necessary. Below you will find links to more information about each type of top-level domain, including contact information or links to their registration services.

- Country Code Domains (.uk, .de, .jp, .us, etc.)
- Generic Domains (.aero, .biz, .com, .coop, .edu, .gov, .info, .int, .mil, .museum, .name, .net, .org, and .pro)
- Infrastructure Domain (.arpa)

Domain Name Registration



• Initially the domain name registration was performed by volunteer organisations.

• There are now nationally organized domain registrars – in the UK *Nominet* is a domain name registering organisation that operates the *primary .uk* name server containing 12 or so second level domains (*.co.uk*; *.org.uk*; *.net.uk* and so on)

• The tasks for the registrar:

- Maintain the **integrity** of the domain name database
- Ensure **consistency** and fairness
- Disseminate **registration data**
- Offer **dispute resolution** service.



Domain Name Registration

A business deal that plans to acquire a new domain name should first conduct a trademark search to determine whether anyone else is already using the proposed domain name as a trademark.

A search is also important because the registration authorities requires each applicant for a domain name to represent and warrant that:

- It has the right to use the requested domain name
- It intends to use the name on a regular basis
- It will not use the name for any unlawful purpose; and
- Its use of the name will not violate any third party's rights in any jurisdiction.



Domain Name Registration

The application must also agree to defend and indemnify registration authorities for any claim or expense resulting from the applicant's use of the domain name. This indemnity could result in significant expense if a third party sues registration authorities in a dispute over the applicant's choice of domain name.



Domain Name Registration

In the USA, the **Lanham Act** provides remedies to trademark owners who feel their trademark has been infringed.



Domain Name Registration

Legal Domain Names – Case Study 1

Give reasons as to why a leading US software manufacturer may sue for trademark infringement of the domain name *Mickeysoft.com*.

Similar Goods or Services. A likelihood of confusion may exist where the defendant is using its domain name in connection with the same type of goods or services as the trademark owner.

Trademark Relates to Computers. A likelihood of confusion may also exist when the allegedly infringed trademark is used in connection with computers, communications, or information services.

Defendant shows Bad Faith. A trademark owner's case will be particularly strong where the domain name user has adopted a domain name in bad faith - that is, with the intent of deriving benefit from the trademark owner's reputation.

Mark is very strong. One theory espoused by owners of famous marks is that unauthorised use of such marks as a domain name is inherently a use in commerce that is likely to cause confusion.



Domain Name Registration

Legal Domain Names – Case Study 2

An online shopping mall containing links to various retailers' Web sites. It includes a link to a retailer who did not consent to being in the mall.

The retailer could claim that the link falsely implies that it sponsors, approves, or is otherwise associated with the mall. Some Web pages address this issue by including a disclaimer that states there is no endorsement of any other Web pages which may be linked from the site.



Domain Name Registration

Legal Domain Names – Case Study 3

A Web site for a product including a (truthful) statement that "studies prove our product works 10 times faster than the Acme brand". When the reader clicks on the word Acme, the hypertext link takes the reader to an obscene site, or to one with degrading or derogatory pictures.

While the statement itself would have been undeceptive and truthful, the link could create a trade libel.



Domain Name Registration

Legal Domain Name: Dilution

Another concept under the broad umbrella of unfair competition is known as *dilution*. Trademark infringement law is based on the likelihood of confusion between goods or services; it does not protect against non-confusing sites. Many states (in the USA) therefore have anti-dilution laws prohibiting the use of a trademark when it would “dilute the distinctive quality” of another’s mark, even if no confusion was likely. As of January 16 1996, a new federal trademark dilution statute also came into effect.



Domain Name Registration

Legal Domain Names – Unregistrable Marks

Absolute grounds for refusal of registration are, by section 3 of the Trade Marks Act 1994, where the mark is:

- not capable of graphical representation or not capable of distinguishing;
- devoid of any distinctive character;
- exclusively descriptive or laudatory (words of praise) - for example, ‘Superb Computers’;
- in *bona fide* use in the trade - for example, ‘Software Bug’;
- of a shape necessary to achieve a technical result which gives substantial value to the goods; or
- contrary to public policy, accepted principles of morality or deceptive - for example, where a dating agency that does not possess or use a computer wishes to register the mark ‘CompuDate’.



Online Service Agreements

DEFINITION

Online service agreements govern relationships between a service provider and an individual member.



Online Service Agreements

Online Service Agreements – Case Study 1

In 1986 the UK courts decided that a manufacturer of cassette tape-recorders is not responsible for infringement of copyright protection when the manufacturer advertises that his or her product (the cassette tape-recorders) can be used to copy pre-recorded cassette tapes (*Amstrad Consumer Electronics plc v The British Phonography Industry Ltd* 1986).

Why did the court find in favour of the manufacturer?



Online Service Agreements

Online Service Agreements – Case Study 1

Joint infringement occurs where two or more persons act in concert pursuant to a common design to infringe. In terms of stereo equipment having dual cassette tape players, in *Amstrad Consumer Electronics plc v The British Phonograph Industry Ltd* [1986] FSR 159, it was held that supplying machines which would be likely to be used to unlawfully copy pre-recorded cassettes subject to copyright protection was not authorised infringement of copyright. The supplier had no control over the way the machines were used once sold.



Online Service Agreements

Online Service Agreements – Case Study 2

The museum of the City of Gotham in the UK has filed a lawsuit against Joe Bloggs suggesting that they have encouraged and helped *CopyMonsieur* to infringe the copyright on some of the Monsieur's holdings.

Could you use the judgement in *Amstrad Consumer Electronics plc v The British Phonography Industry Ltd.* case to argue in favour of Joe Bloggs Online Services?



Online Service Agreements

Online Service Agreements – Case Study 2

In the case of ISPs, things are different. They do have some control. They can monitor and check what is being made available through their service. They can erase or block infringing material. The problem they have is that the sheer volume of material involved makes effective control and policing almost impossible. The best they can do is to warn their clients about the dangers of copyright infringement. But if they encourage, even implicitly, a disregard for copyright laws, this could be seen as authorising or even as joint infringement.

A sensible approach for an ISP is to inform their clients and to carry out a reasonable level of policing and checks on what material is being made available and transmitted through their service, the only difficulty being that they may then be accused of invasion of privacy.



Online Service Agreements

Responsibilities of Clients

The use of an online service presumes that the member has a modem and a telephone line with which to connect to the service. The member is also responsible for all charges related to making the initial connection to the online service. The largest online services have arranged for telephone numbers around the country so that the initial connection is a local call, but the agreement does not guarantee the availability of a local access number.



Online Service Agreements

Rights of the Online Service Provider

The online service usually retains the right to monitor the chat rooms, message boards and the upload areas to determine that its rules prohibiting unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, profane, hateful, racially, ethnically, or otherwise objectionable material of any kind are being followed. The online service also reserves the right to add to its list of prohibited conduct additional activities that it considers, in the exercise of its sole discretion, to be harmful to the service or its members.



Online Service Agreements

Rights of the Online Service Provider

The online service retains the right to terminate its agreement with the member at any time if the member has violated any provision of the service agreement. The online service also retains the right to change the operation of the service, the charge levied for the use of the service, or the content that is available through the service. Many online service agreements provide that if the member is not satisfied with such changes to the service, its only recourse is to terminate service.



Online Service Agreements

Licenses

CopyMonsieur has recently asked Skippy the eco-warrior to produce a compilation of eco-poems, plays and paintings with environmental themes for the last century (1900-99). Skippy selects 3 poems of his mate Jim, who is an eco-poet of considerable standing. Skippy has also selected a play by Joe, who died 20 years ago, about environmental destruction of rain forests in the 1960s. Skippy's friend, Jenny, is happy for Skippy to use a TV documentary she produced, about the effect of motorway construction produced by Cynical TV, for his compilation. Jenny has also found the earliest novel on an ecological theme by her great grandfather, Jerry, who died about 90 years ago and Skippy will digitise the novel for his compilation as well.

Describe what kinds of licences and permission CopyMonsieur will need from Skippy, Jim, Joe, Jenny and Jerry to comply with the UK Copyright Laws.



Online Service Agreements

Licences

Describe the kinds of licences and permission CopyMonsieur will need from Skippy, Jim, Joe, Jenny and Jerry to comply with the UK Copyright Laws.

- A licence from Jim and from Joe's estate (as he is now deceased) allowing for the copying, performance and issue to the public of their poems;
- An assignment (or exclusive licence) from Jenny in respect of the compilation copyright and the material she has written;
- An exclusive licence from Jim in respect of his live performance (this is protected as a right in a performance, a right analogous to copyright); and
- A licence from Cynical TV in respect of the broadcast.



Online Service Agreements

Copyright conventions & Assignment of Copyright

Rights of the author: Copyright and Moral Rights

Author Attributes: Living/Dead?
Employee/Contractor?

Work Attribute: Time Elapsed from Creation?
National Origins?



Online Service Agreements

Internet-accessed document?

UK Copyright, Designs and Patents Act – CABLE TV Programmes.

CTV programme: (1) accessible at two or more places – (a) synchronously; (2) for presentation to the members of public.

Therefore an Internet service is equivalent to a Cable Programme service

Dr Jonathan Wills who provided access to *Shetland Times* and was deemed to have violated the copyright of the *Shetland Times*



Online Service Agreements

LOOPHOLES:

(1) Is digitising an image/text/sound/music equivalent to **COPYING** that work?



Online Service Agreements

LOOPHOLES:

(2) What is a published edition of an electronic work?

(3) Who is liable? ISP? End users?



Online Service Agreements

Infringement on the Internet:

1. Secondary infringers
2. Authorizing Infringement
3. JOINT INFRINGEMENT



Click Wrap Licences:

Specht and others v Netscape & AOL

United States Court of Appeals for the Second Circuit August Term 2001
Specht v Netscape
(Case Argued March 14, 2002; Decided: Oct. 1st, 2002)
Christopher Specht and others (Plaintiffs-Appellees)
v.
Netscape Communications Corp. & America Online Inc., (Defendants-Appellants)
(<http://www.findlaw.com/2nd/017860v2.html>)

The plaintiffs alleged that the defendant invaded the plaintiffs' privacy by secretly disseminating personal information when the plaintiff used the software supplied by the defendant *SmartDownload*: a plug-in program for enhancing the functioning of the defendants' browser (program) *Netscape*. The Court examined the defendants' claim that the plaintiff should seek arbitration as per the Licence relating to the use of *SmartDownload*.

Click Wrap Licences:

Specht and others v Netscape & AOL



United States Court of Appeals for the Second Circuit August Term 2001
Specht v Netscape
(Case Argued March 14, 2002; Decided: Oct. 1st, 2002)
Christopher Specht and others (Plaintiffs-Appellees)
v.
Netscape Communications Corp. & America Online Inc., (Defendants-Appellants)
(<http://www.findlaw.com/2nd/01786ov2.html>)

The Court decided that

- (1) plaintiffs neither received **reasonable notice** of the existence of the licence terms nor **manifested unambiguous assent** to those terms before acting on the webpage's invitation to download the plug-in program;
- (2) plaintiffs' claim relating to the **plug-in program is not subject to a separate arbitration** contained in licence terms governing use of *Netscape* owned by Netscape Comms. Corp;
- (3) the legal doctrine that requires nonsignatories to an arbitration agreement to arbitrate when they have received a direct benefit under a contract containing the **arbitration agreement does not apply to a website owner** who allegedly benefited when users employing the plug-in program downloaded files from the website.

Click Wrap Licences:

Specht and others v Netscape & AOL



The term *clickwrap*, a kind of online software licence agreement, has evolved from the term *shrinkwrap* used in the licensing of tangible forms of software sold in packages.

Clickwrap is essentially an icon on a web page which is used to present " the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked."

Click Wrap Licences:

Specht and others v Netscape & AOL



The term **shrinkwrap**, when used as a noun, means 'a protective wrapping for articles of merchandise consisting of a clear plastic film that is wound about the articles and then shrunk by heat to form a sealed, tight-fitting package'. The use of *shrinkwrap* as a verb suggests 'to wrap (an article of merchandise) in protective clear plastic film'.

In the case of a **shrinkwrap** licence the user has to break a **seal** that is on the clear packaging of a software product he or she has bought in order to access the contents of the package. Once the seal is broken the user is expected to use the enclosed computer program after encountering notice of the existence of governing license terms. The 2nd Circuit Court noted that the breaking of the seal is regarded by 'some courts to constitute assent to those terms in the context of tangible software' and the Court cited the 7th Circuit Court earlier.

Therefore by analogy, clicking on a web-page's **clickwrap** button after receiving notice of the existence of license terms has been held by some courts to manifest an Internet user's assent to terms governing the use of downloadable intangible software, *see, e.g., Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020, 1025 (N.D. Cal. 1998).

Click Wrap Licences:

Specht and others v Netscape & AOL



- Every time a browsing agent employed *SmartDownload* (through *Communicator*) to download a file from a server, *SmartDownload* not only downloaded the file but also transmitted to Netscape Comms. Corp. the address of file being downloaded – the plaintiffs alleged **eavesdropping**.

Click Wrap Licences:

Specht and others v Netscape & AOL



- The defendants' main products are *Communicator* and *Navigator*. The licence agreement is clearly displayed on the website of the defendants:
 - When potential customers start to download *Communicator*, they are shown a **scrollable text** of that program's licence agreement.
 - **The customers are not permitted to complete the installation unless they had clicked on a 'YES' button to indicate that they had accepted the terms of the licence agreement.**
 - One of the terms of the licence agreement was that 'all disputes relating to this Agreement (excepting any dispute relating to IPRs)' are subject to **'binding arbitration** in Santa Clara County, California'.

Click Wrap Licences:

Specht and others v Netscape & AOL



- The defendants' other product is *SmartDownload Communicator*. The Netscape Corp web-page captioned *SmartDownload Communicator* had the following characteristics
 - At or near the bottom of the web-page there was the **prompt** 'Start Download' and a button labelled 'Download'.
 - **When a potential customer clicked the 'Download' button, the downloading of *SmartDownload* commenced.**
 - At the completion of the download process, SmartDownload, as its **first plug-in task**, permitted the customer to proceed with downloading and installing *Communicator*.
 - The installation of *Communicator* was accompanied by the **click-wrap display** of *Communicator's* licence terms.

Click Wrap Licences:

Specht and others v Netscape & AOL



- The defendants' other product is *SmartDownload Communicator*. The Netscape Corp web-page captioned *SmartDownload Communicator* had the following characteristics
 - There was no reference to any licence agreement relating specifically to Netscape *SmartDownload* on the page that was used in the downloading and installation of *SmartDownload*.
 - The customer has to scroll down to next screen where he or she would have encountered the invitation: 'Please review and agree terms of the Netscape *SmartDownload* software licence agreement before downloading and using the software'.
 - This was the sole reference to any licence agreement specifically covering the installation and use of *SmartDownload*.

Click Wrap Licences:

Specht and others v Netscape & AOL



- The defendants' other product is *SmartDownload Communicator*. The Netscape Corp web-page captioned *SmartDownload Communicator* had the following characteristics
 - The licence terms for *SmartDownload* are **not displayed** in the manner of Communicator's click-wrapped terms.
 - The first paragraph reiterates: 'If you **do not agree** to the licence terms, do not download, install or use the software'.
 - Following the first paragraph, there is a list of licence agreements including one for the Netscape Navigator and the Netscape Communicator Product Family (**Netscape Navigator, Netscape Communicator and Netscape SmartDownload**).
 - One of the licence terms for the *Product Family* relates to **disputes relating** to the Licence Agreement – all disputes to be settled in Santa Clara County, California.
 - One of Specht's co-plaintiffs obtained *SmartDownload* from a 'shareware' site. The site merely offered only a hypertext link to 'more information' about *SmartDownload*. This link was to a Netscape web-page which, in turn, was linked to the *SmartDownload* licence agreement.



Copyright

Kelly v. Arriba

United States Court of Appeals for the Ninth Circuit
LESLIE A. KELLEY (Plaintiff-Appellant) v. Arriba Software Corporation (Defendants-Appellees)
(Case Argued and Submitted September 10, 2001; Filed February 6, 2002)
(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

- The plaintiff, a professional photographer, has copyright to many of his images of the American West. Leslie Kelly makes these images available on his own website and has licensed other web sites for making his images available.
- The plaintiff uses the images to attract Internet users to his site. The site sells advertising space, books and travel packages.
- Kelly could sell or license his images to other web sites, e.g. image database vendors, which, in turn, sell it to others.



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- The defendant, Arriba Software, runs an Internet search engine that displays the results of the search for images as thumbnail sketches. When a user clicks the thumbnails, the user can obtain the larger version of the images within the context of the Arriba web page – which may or may not have advertisements on it.



Copyright

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■ The Court decided that

- (1) Arriba's reproduction of Kelly's images for use as thumbnails in Arriba's use is a *fair use* under the (US) Copyright Act.
- (2) Arriba's display of Kelly's full sized images is not a *fair use* and thus violates Kelly's exclusive right to public display his copyrighted works.
- (3) The Court will remand with instructions to determine damages for the copyright infringement and the necessity for injunction.
- (4) Each party shall bear its own costs and fees on appeal.



Copyright

Kelly v. Arriba

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(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

■ The Court discussed two key issues:

- **ISSUE A – The display of thumbnail images:** Whether or not the plaintiff owned the copyright to the images and whether or not the defendant copied the images.
- **ISSUE B – The display of full images:** Whether or not Arriba's inline linking and framing was the infringement of the copyright based on the reproduction of copyrighted works. The Court was aware that Arriba was importing the images directly from Kelly's website rather than copying the images and then distributing the images in the conventional sense.

Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails



United States Court of Appeals for the Ninth Circuit
LESLIE A. KELLEY (Plaintiff-Appellant) v. Arriba Software Corporation (Defendants-Appellees)
(Case Argued and Submitted September 10, 2001; Filed February 6, 2002)
(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

- Arriba has developed a crawler, a linking program, and a framing program. The linking program links a thumbnail to its original site. The framing program then downloads and 'frames' the original in Arriba banner and Arriba advertising.
- **In an earlier case, in a lower court, the decision was given in favour of Arriba on two counts of *fair use*: (i) the character and purpose of Arriba's use was significantly transformative, and (ii) the use did not harm the market for or value of Kelly's work.**
- Kelly decided to appeal against the decision of the lower (district) court at the Court of Appeal.

Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails



United States Court of Appeals for the Ninth Circuit
LESLIE A. KELLEY (Plaintiff-Appellant) v. Arriba Software Corporation (Defendants-Appellees)
(Case Argued and Submitted September 10, 2001; Filed February 6, 2002)
(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

- The Court of Appeal decided to hear Kelly's appeal on the grounds that '[T]o establish a claim of copyright infringement by reproduction, the plaintiff must show ownership of the copyright to the images and that Arriba did copy those images. Therefore, Kelly established a *prima facie* case of copyright infringement'.
- The Court also noted that it should 'avoid rigid application of copyright' because there would be instances that such an application will 'stifle the very creativity which that law [Copyright Law] is designed to foster'.

Copyright



Kelly v. Arriba: ISSUE A - Ownership of thumbnails

United States Court of Appeals for the Ninth Circuit
LESLIE A. KELLEY (Plaintiff-Appellant) v. Arriba Software Corporation (Defendants-Appellees)
(Case Argued and Submitted September 10, 2001; Filed February 6, 2002)
(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

- The Court of Appeal decided that there are four factors that have to be taken into account when decisions are made regarding fair use of copyrighted material:
 - *Purpose and character of the use*
 - *Nature of the copyrighted work*
 - *Amount and substantiality of portion used*
 - *Effect of the use upon the potential market for or value of the copyrighted work.*
-

Copyright



Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Purpose and character of use:
 - It may appear that the commercial use of copyrighted material in itself is an infringement. But the US Supreme Court has ruled that the investigation of an infringement should be to see 'whether or not the new work merely supersedes the objects of the original creation, or instead adds something new, with a different purpose or different character, altering the first with new expression, meaning, or message, or it asks, in other words, whether and to what extent the new work is **transformative**'. (Campbell v. Acuff-Rose Music, Inc, 1994)
-



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Purpose and character of use:
 - The Court of Appeal observed that Kelly's claim that Arriba has merely reproduced his images without adding anything to the images. In other words, Arriba by merely reproducing is making fair use of the copyrighted material. The Court noted some earlier judgments in other courts.



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Purpose and character of use:
 - *Infinity Broadcasting Corp. v. Kirkwood (1998)*: where the courts concluded that retransmission of radio broadcast over telephone lines was not deemed **transformative**; (AGAINST ARRIBA)
 - *Worldwide Church of God v. Philadelphia Church of God (2000)*: where the courts noted that copying a religious book to create a new book for use by a different church was not **transformative**; (AGAINST ARRIBA)
 - *Nunez V. Caribbean International News Corp. (2000)*: Copying a photograph that was intended for use in a modelling portfolio and using it instead in a news article was deemed **transformative** by the courts. The use of a photograph in the newspaper transformed it into news, thereby creating a new meaning or purpose for the work. (IN FAVOUR OF ARRIBA)
 - *Sony Computer Entertainment America Inc. v. Bleem (2000)*: Bleem's use of 'screen shots' from Sony in Bleem's advertisement was fair use as it increased purchasing public's knowledge whilst Sony incurred very little loss of integrity. (IN FAVOUR OF ARRIBA)

The Court of Appeal concluded that: The above weigh in favour of Arriba: greater public benefit through the search engine and the minimal loss of integrity to Kelly's images.



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Nature of the copyrighted work
 - Earlier judgments have declared that ‘works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.’ (AGAINST ARRIBA)
 - Has the work been published? Published works are more likely to qualify for fair use as the first appearance of the creator’s expression has already occurred. (cf. Harper & Row Pub, Inc v. Nation Enterprises, 1985) → Kelly’s images already appeared on his web-site before Arriba copied them. (IN FAVOUR OF ARRIBA)
- The Court of Appeal found that Kelly’s work was creative but the images have already been published. Thus the factors related to the nature of the copyrighted material only slightly weigh in favour of Kelly.



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Amount and substantiality of portion used
 - In the Worldwide Church of God v. Philadelphia Church of God (2000) the courts found that whilst wholesale copying does not preclude fair use *per se*, copying an entire work may be closer to the infringement of copyright (AGAINST ARRIBA)
 - The secondary user should make only necessary use for his or her intended use: Arriba has had to copy the entire image for its users to recognise the image and then decide whether or not to download the image (from Kelly’s site) (IN FAVOUR OF ARRIBA)
- The Court of Appeal found that ‘If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine’ (NEITHER IN FAVOUR OF ARRIBA NOR KELLY)



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Effect of the use upon the potential market for or value of the copyrighted work

The are two questions here:

First, to what extent has Arriba's conduct harmed Kelly's markets?

Second, if Arriba was allowed to carry on without any restrictions in a widespread manner, would this have 'a substantially adverse impact on the potential market for the original'?



Copyright

Kelly v. Arriba: ISSUE A - Ownership of thumbnails

- Effect of the use upon the potential market for or value of the copyrighted work
 - The Court decided that the display of the thumbnails by Arriba's search engine would guide users 'to Kelly's web site rather than away from it' (IN FAVOUR OF ARRIBA)
 - The (low resolution) thumbnails would not be a substitute for the full-sized images, because when enlarged the images 'lose their clarity'. The user has to go to Kelly's website to obtain a quality image. (IN FAVOUR OF ARRIBA)

The Court of Appeal found that 'Arriba's use of Kelly's images did not affect Kelly's ability to sell or license his full-sized images' in that the 'low resolution of the thumbnails' will not encourage anybody to 'create, or sell a clear, full-sized image without going to Kelly's websites'.

Copyright

Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images



- The Ninth Circuit Court looked at two factors in the context of copyright infringement
 - *Public display right*: Did Arriba seek Kelly's permission before displaying his copyrighted work to the public?
 - *Fair use of full-sized images*: Can Arriba's use of Kelly's full-sized images be considered as *fair use* in the spirit of the copyright legislation?
-

Copyright

Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images



- The Ninth Circuit Court looked at two factors in the context of copyright infringement
 - The technology used by Arriba - inline linking and framing - is different to other technologies used in copying material from other web-sites.
 - Since Arriba imported images from Kelly's website every time a customer wanted to look at the originals, it is not clear how to distinguish this import of images from the conventional copying of the images.
-

Copyright



Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images

■ Public Display Right

- Kelly cannot argue that showing his work was an infringement as the images were made available on a public-access web site.
- The copyright legislation defines **a copy as a material object in which a work is fixed**, including the material object in which the work was first fixed the right of public display applies to the original as well as the reproductions of the original.

Is it possible that by inline linking and framing, the material in which the images were originally fixed, Arriba showed Kelly's images without his permission?

Copyright



Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images

■ Public Display Right

- Previous court decisions have deemed that a display can be defined as:
 - The projection of an image on a screen or other surface by any other method; OR
 - The transmission of an image by electronic or other means; OR
 - The display of an image on a CRT (or similar display e.g. solid state device or plasma display) with any sort of information storage and retrieval system.
 - *The framing of Kelly's images on a user's visual display unit will be regarded in the eyes of the law as a DISPLAY.*
 - For a display to be regarded as a public display, the plaintiff does not have to prove that any of the potential recipients of the display were in fact receiving it on their display units.
-

Copyright

Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images



■ Public Display Right

- In *Playboy Enterprises Inc. v Webbworld Inc.* (1997): Webbworld violated Playboy’s exclusive right to display Playboy’s copyrighted works by allowing Webbworld’s subscribers to view the works on display units while the subscriber was logged online. Webbworld was found to have downloaded the images on its server and then allowed its subscribers to view the image from the server. (AGAINST ARRIBA)
 - *Playboy Enterprises Inc. v Russ Hardenburgh Inc.* (1997): The owner of an electronic bulletin board system infringed Playboy’s copyright by displaying the copyrighted images. (AGAINST ARRIBA).
-

Copyright

Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images



■ Public Display Right

- Both Webbworld Inc and Russ Hardenburgh Inc acted as more than mere providers of access or passive conduits
 - The Ninth Court ruled that Arriba, like Webbworld and Hadenburgh, is directly liable for infringement. Without Arriba’s search engine, inline linkage and framing programs, users will not be able to view Kelly’s images **within the context of Arriba’s web site**. Arriba actively participated and facilitated access to Kelly’s images. (AGAINST ARRIBA)
 - Arriba is liable for publicly displaying Kelly’s copyrighted images without his permission. (AGAINST ARRIBA)
-

Copyright



Kelly v. Arriba: ISSUE B – Copyright Infringement of the Full-sized images

- Fair use of full sized images
- With reference to the ownership issue (A), *purpose and character of the use*, the Court reminded both parties that it has to establish whether or not Arriba's use of Kelly's images was transformative.
 - The **full sized images** downloaded from Kelly's site by Arriba are the likely end-products in their own right: the purpose of Arriba's display of the **full-sized images** is the same as that of Kelly's display of the **full sized images**. **(IN FAVOUR OF KELLY)**.
 - Kelly's images are still the copyrighted images. **(IN FAVOUR OF KELLY)**.
 - Arriba's display of full-sized images 'cuts against a finding of fair use' and that Arriba did not had a 'legitimate purpose' in providing full-sized images. **(IN FAVOUR OF KELLY)**.
 - The full-sized images displayed by Arriba were not 'very transformative' in that the images were targeted at the same market as that targeted by Kelly. In fact Arriba's actions in the context of full-sized image displays would result in 'substantial adverse effects to the potential markets for Kelly's original works'. **(IN FAVOUR OF KELLY)**.

Copyright



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(Case Argued and Submitted September 10, 2001; Filed February 6, 2002)
(<http://caselaw.lp.findlaw.com/data2/circs/9th/0055521p.pdf>)

- The Court decided that
 - (1) Arriba's reproduction of Kelly's images for use as thumbnails in Arriba's use is a *fair use* under the (US) Copyright Act: **In favour of Arriba are the considerations of the purpose and character of the use and the effect of the use upon potential markets for or value of copyrighted work. In favour of Kelly is the consideration of the nature of copyrighted work.**
 - (2) Arriba's display of Kelly's full sized images is not a *fair use* and thus violates Kelly's exclusive right to public display his copyrighted works.

Patents



ROLE OF PATENTS ONLINE

Patent Fundamentals
What can be patented?
The Role of Patents in Electronic Commerce
Enforcing Patent Rights Online
Obtaining a Patent
Ownership of Patent Rights.

Basile, Andrew, R. 1996. 'Role of Patents Online'. In (ed.) Thomas J Smedinghoff. *Online Law*. Reading, Mass.: Addison-Wesley Developers Press.

Patents



Definition

A patent is a right granted to an inventor by the federal government to exclude others from making, using, selling, or importing an invention. Patents are available throughout the world, and are issued on a country-by-country basis. Patents are obtained in the United States by filing a patent application with the federal Patent and Trademark Officer (PTO), pursuant to the Patent Act of 1952.



Patents

What can be patented?

Patent protection is available for any invention that is:

1. Patentable subject matter
 2. Useful
 3. New, and
 4. Non-obvious
-



Patents

Patent Infringement

A patent grants its owner the exclusive right to make, use, sell or offer for sale, and import the patented invention. Patent infringement occurs when another person or organisation performs one of these acts without the patent owner's permission.



Patents

Patent Infringement

A patent is 'literally' infringed by the unauthorised use, manufacture, or sale of a device or process (the 'accused device') that falls within the literal scope of any of the patent's claims. A patent may also be infringed under the 'doctrine of equivalents' if the accused device includes every claim element or its equivalent, and it performs the same function as the claimed invention in the same manner to achieve the same results.



Patents

Patent Infringement

The *doctrine of equivalents* is a judicial extension of literal infringement. Its purpose is to provide the patentee with a remedy when a defendant has appropriated the essence of the invention, but in some minor way has avoided the technical, literal limitations of the patent claim.



E-Commerce Patents

Interfaces - Definition

An interface is a connection between two devices or between a device and a person. For example, user interfaces are the graphics and command structures presented to users of software. Interfaces also exist between hardware and software. For example, an *application program interface* (API) is a set of commands used by software applications to communicate with other software.

The use of intellectual property rights - either patents or copyrights - to protect interface specifications is somewhat controversial. Some commentators argue that if the interface of a popular program is protected, it may be impossible for other programs to be 'interoperable' with the popular program. This in turn may thwart free competition to an extent not intended by intellectual property laws.



Patents

Communications Protocols- Definition

A communications protocol is a prearranged set of formats and procedures that computers use to exchange data. For example, the Internet is a set of protocols known as TCP/IP. These protocols enable thousands of networks connected to the Internet to exchange data.



Patents

Data Compression - Definition

Data compression is a technique for reducing the size of data files by eliminating redundancy (such as strings of blank characters). Compression is useful for saving disk storage space, but its real value is in facilitating the online transmission of files containing digitised audio and video signals. Such files range from very large to enormous. Many communications links (such as the common telephone/modem connection) are slow relative to the size of these files. Data compression reduces a file's size to management levels, allowing users to access multimedia content online without suffering inordinate delays as the content is downloaded. Compression technologies also promise real-time exchange of audio and video data, allowing computers to be used as telephones or televisions.



Patents

Encryption and Security Procedures - Definition

Encryption is a technique for encoding online messages so that they can only be read by someone having the proper code (or key). There are two popular forms of encryption - *secret key* and *public key*. The leading secret key system is DES, which is endorsed by the US government as an official standard. The leading public key system is RSA, which takes its name from its inventors, Ron Rivest, Adi Shamir and Leonard Adleman.



Patents

Geographic Scope of Patent Monopoly

Online networks are typically global, and it is possible that infringements of US patents may occur worldwide. As a general rule, however, a US patent is enforceable only in the United States and its territories and possessions.

Use of the patented invention in Canada, for example, does not infringe a US patent. To protect the invention in Canada or other foreign countries, the patentee must procure patents in each separate country. There are, however, cases where a US patent can reach activities outside of the United States.



Patents

Geographic Scope of Patent Monopoly

In particular, a US patent could be infringed by a company that induces or contributes to the direct infringement of others, even if this direct infringement takes place outside the United States. Such liability may apply in these cases if:

1. The defendant supplies components of a patented invention from the United States;
2. The components are combined outside the United States in a manner that would infringe the patent if such combination occurred within the United States; and
3. The defendant actively induces or knowingly contributes to the combination.



Patents

Inventions by Employees

Whether an employer owns the inventions of its employees varies from state to state. Generally speaking, the employer owns inventions made within the scope and purpose of the employee's employment. Ownership is less clear when the invention is made outside the scope and purpose of employment, such as on the employee's own time. Often, employers have written agreements with their employees delineating which inventions belong to which party. Some states, such as Illinois and California, regulate the content of such agreements to prevent employers from overreaching.