

How Internet Search Engines Might Affect Freedom of Creation

2nd International School of Law and Technology, Rio de Janeiro, 17 July 2018

Julien Cabay

Postdoc Researcher (F.R.S. – FNRS)
Professor Université libre de Bruxelles (ULB)
Associate Professor Université de Liège (ULiège)

icabay@ulb.ac.be



- 1) Introduction
- 2) Infringement Under Copyright Law
- 3) Challenging the Copying Requirement –
Step 1 : Access Theory and Internet
- 4) Challenging the Copying Requirement –
Step 2 : Similarities and Algorithms
- 5) Potential Consequences on Freedom of
Creation
- 6) Conclusion

1) Introduction

Olivier Debie (Theater of Liège)

v.

Kenjiro Sano (2020 Tokyo Olympics)

1) Introduction



Kenjiro Sano (Japanese Designer), *2020 Tokyo Olympics Logo* (2015)

1) Introduction



1) Introduction



Olivier Debie (Belgian Designer), *Theater of Liège Logo* (2011)

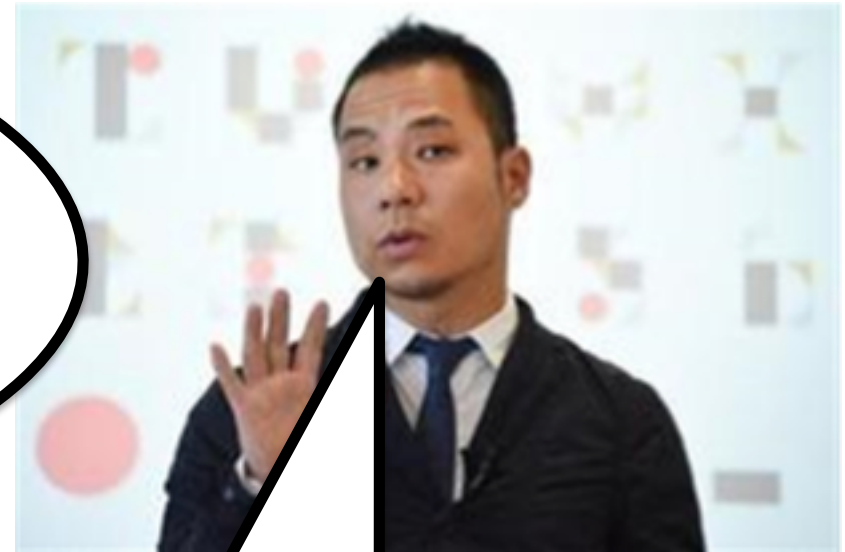
1) Introduction



1) Introduction

My logo has been published on inspiring websites such as Pinterest, they should have come across my logo in some way...

PLAGIARISM !



I have never been to Belgium, never saw that logo... **NO**

PLAGIARISM !

2) Infringement under Copyright Law

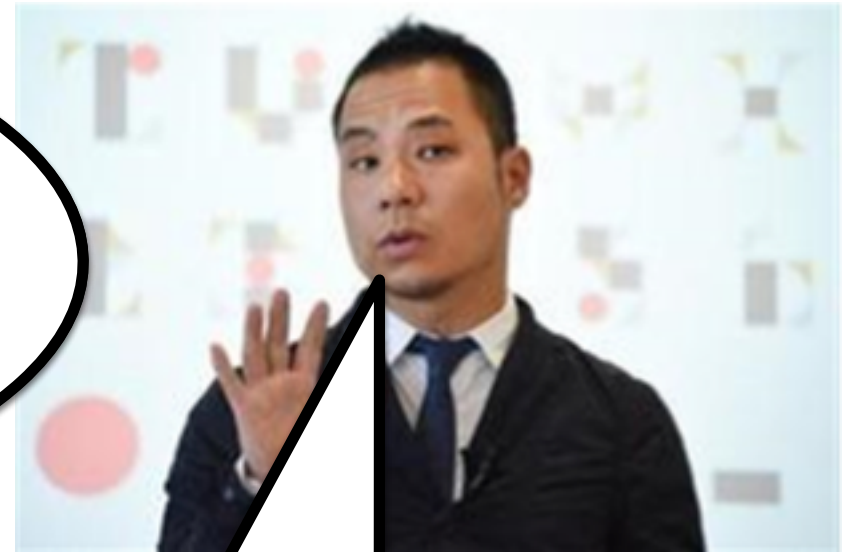
- Rights
 - Reproduction right
 - Adaptation/Derivative right
- Two requirements for infringement
 - Similarities as to protected (original) elements
 - **Copying**
 - Direct evidence (generally impossible)
 - Inference (rebuttable presumption of copying)

2) Infringement under Copyright Law

- Presumption of copying
 - Striking (probative) similarities
 - **Access** + (substantial) similarities
 - « ... To prove access, a plaintiff must show a reasonable possibility, not merely a bare possibility, that an alleged infringer had the chance to view the protected work ... »
- Rebuttal : **Independent Creation**
 - Extremely difficult in practice

2) Infringement under Copyright Law

Access + similarities
= Presumption of
copying



Independent
Creation
= No Copying

2) Infringement under Copyright Law



TOKYO 2020



3) Challenging the Copying Requirement

**3 Questions
about**

Access + Similarities on Internet

3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

Key question 1

Internet disclosure = Access (reasonable possibility of viewing, reading, listening to the work)?

3) Challenging the Copying Requirement Step 1 : Access Theory and Internet

- Copyright Case Law in the EU
 - EU National States jurisdictions
 - Scarce case law and not conclusive
 - CJEU
 - Nothing on the issue of copying, but Internet case law (*infra*) might suggest that Internet disclosure = access



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- CJEU Internet Case Law
 - Ubiquitous nature of information on Internet

*« ... Information on the internet can be consulted by an indefinite number of people living in many places at almost any time. The **ubiquitous nature of that information** is a result inter alia of the fact that the technical means used in connection with the internet are relatively simple and becoming less and less expensive ... »*

(Lindqvist, C-101/01 (2003), § 58)



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- CJEU Internet Case Law
 - Free access to information on Internet

« ... making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.

*The public targeted by the initial communication consisted of all potential visitors to the site concerned, since, given that **access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them ... »***

(Svensson, C-466/12 (2014), §§ 25-26)



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- Copyright Case Law in the US
 - Generally supporting that Internet disclosure as such is no access...

*« ... the Court will **not infer merely from the availability** of a sizable body of information – in this case, the whole of the **Internet** – a **reasonable probability of access** to the specific, copyrighted work embedded within ... »*

(Building Graphics, Inc. v. Lennar Corp., 866 F.Supp.2d 530, 541 (W.D.N.C. 2011), aff'd 708 F.3d 573 (4th Cir. 2013))



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- Copyright Case Law in the US
 - ... but additional elements might lead to access

*« ... We do not draw here a bright line as to the quantity or quality of evidence, in addition to a web presence, a plaintiff must offer to raise an genuine issue of fact concerning **access**. We decide only that the **existence** of the plaintiff's copyrighted materials **on the Internet**, even on a public and 'user-friendly' site, **cannot by itself justify an inference** that the defendant accessed those materials ... »*

(Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093, 1108 (7th Cir. 2017))



3) Challenging the Copying Requirement Step 1 : Access Theory and Internet

- Copyright Case Law in the US
 - Example: nature of the hosting website as a relevant additional element

*« ... Having furnished a **YouTube link** to his song, Braham has plausibly pled that Defendants had the opportunity to view his work... »*

*(Braham v. Sony/ATM Music Publishing,
2015 WL 7074571, 5 (C.D. Cal. 2015))*



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

Key question 1

No clear answer, but it is fair to say that Internet disclosure might prove access, if not by itself, certainly when complemented with additional elements

3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

Key question 2

**Information (previous work) can be easily
retrieved thanks to search engines =
complementary element conclusive of
access?**

3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- CJEU Internet Case Law
 - Decisive role of search engines

*« (...) activity of **search engines plays a decisive role in the overall dissemination of those data** in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published (...) »*

(Google Spain, C-131/12 (2014), § 36)



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

- Copyright Case Law in the US
 - Relevance of search engines for the purpose of access

« ... the webpage did not include “meta tags” that would identify the Art Attacks site to internet search engines. As a result, a potential viewer who typed “Spoiled Brats” into a search field would likely not encounter the Art Attacks page. A website with such limitations could not have widely disseminated the copyrighted Spoiled Brats material ... »

(Art Attacks Ink, LLC v. MGA Entertainment Inc., 581 F.3d 1138, 1145 (9th Cir. 2009))



3) Challenging the Copying Requirement

Step 1 : Access Theory and Internet

Key question 2

No clear answer, but it is fair to say that where information (previous work) can be retrieved thanks to search engines, it is probably likely to support a finding of access

4) Challenging the Copying Requirement

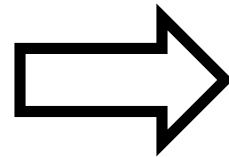
Step 2 : Similarities and Algorithms

Key question 3

Can information (previous work) be easily retrieved thanks to search engines?

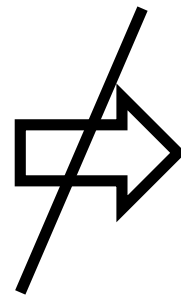
4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

- How do I get from Tokyo to Liège on Internet ?



4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

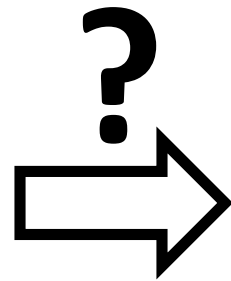
- Method 1 : **text-to-image search**
 - Input = textual description of images
 - « Logo based around the « T » letter (for Tokyo, Team, Tomorrow), in Didot font, with a red circle (took over from Yasuka Kamekura's logo for 1964 Tokyo Olympics), symbol of the Hinomaru and representing a beating heart » (Kenjiro Sano)



4) Challenging the Copying Requirement

Step 2 : Similarities and Algorithms

- Method 2: **reverse image search**
 - Input = image
 - Output = visually similar images



4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

- How does that work?

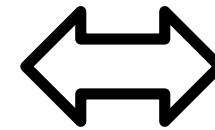
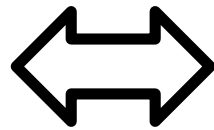


4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

- One example



THÉÂTRE
DE LIÈGE



iittala
FINLAND

4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

<p>eSearch plus EUIPO's Database access</p>		
→ THÉÂTRE DE LIÈGE iittala FINLAND	↯ THÉÂTRE DE LIÈGE iittala FINLAND	↯ THÉÂTRE DE LIÈGE iittala FINLAND
↯ iittala FINLAND THÉÂTRE DE LIÈGE	↯ iittala FINLAND THÉÂTRE DE LIÈGE	→ iittala FINLAND THÉÂTRE DE LIÈGE

4) Challenging the Copying Requirement

Step 2 : Similarities and Algorithms

- Reverse image search and IP (other than Copyright)
 - Example: TrademarkVision

4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

- Reverse image search and Copyright
 - Might greatly help identifying similar previous works...
 - ...but currently
 - Different datasets = different outputs as to identifiable works
 - Different algorithms = different outputs as to relevant similarities

4) Challenging the Copying Requirement Step 2 : Similarities and Algorithms

Key question 3

No clear answer, but it is fair to say that information (previous work) can be retrieved thanks to search engine, if not always with great ease today, probably in the near future

SO WHAT'S

YOUR POINT?

5) Potential Consequences on Freedom of Creation

- As a matter of fact
 - Because datasets will extend (eventually including all works posted on the Internet) ...
 - ... and because algorithms will perform greater, making easy identifying similarities between a new work and these previous works ...
 - ... **the number of cases where someone, without copying (independent creator), will create a work similar to a previous work, posted on Internet and easily retrievable thanks to search engines, is likely to increase ...**

5) Potential Consequences on Freedom of Creation

- As a matter of law
 - Because presumption of copying is extremely difficult to rebutt when supported by access + similarities...
 - ... and because it might prove impossible when Internet disclosure + algorithmic similarities...
 - ... **this independent creator is likely to be deprived of full enjoyment of freedom of creation, according to three scenarios ...**

5) Potential Consequences on Freedom of Creation

- ... first scenario: **chilling effect**
 - Post-creation knowledge of previous similar works and decision not to publish the in order work to avoid legal hazard

5) Potential Consequences on Freedom of Creation

- ... second scenario: **legal action**
 - Presumption of copying too difficult (impossible) to rebutt and finding of infringement despite independent creation

5) Potential Consequences on Freedom of Creation

- ... third scenario: **filter**
 - No possibility to upload because of relevant similarities (according to algorithms) with previous copyrighted works

5) Potential Consequences on Freedom of Creation

Internet disclosure +
algorithmic
similarities
= Copying



... I am
screwed

...

...

6) Conclusion

- Copying requirement at the core of Copyright law
- Requirement strikes a balance between copyright protection and freedom of creation
- Development of efficient search engines relying on AI is challenging the traditional copying requirement
- **=> AI search engines are modifying the balance at the core of Copyright law, eventually detrimental to freedom of creation**

6) Conclusion

- Some avenues and related challenges regarding to threats to freedom of creation

Threats to freedom of creation	Avenues	Challenges
Chilling effect	Report on infringement search as safe harbour	Freedom of creation and copyright entitlement not subject to formalities
Legal action	High treshold of originality	Low treshold of originality in traditional case law
Filter	Right to oppose algorithmic blocking of upload	Infringement is a matter of law, exclusive jurisdiction of Courts



Obrigado !

jcabay@ulb.ac.be