

Reconstructing Copyright's Economic Rights (Colour code: **permitted**, **prohibited**, conditional)

THEORY   BORDERLINES	Linking & embedding	News aggregation	Private copying	Re-transmission	Text & data mining	User generated content & remix	Resale (Exhaustion)	Access control & geo-blocking	Intermediary liability
<b>Right to prevent concrete user from economically exploiting copyright subject matter with respect to a (new) public</b> [reading of CJEU jurisprudence]	Linking to authorised copy of work is <b>not</b> communication to (new) public; Linking to <b>unauthorised copy for profit is presumed to be</b> (Svensson, C-More Entertainment, GS Media); Embedding: same analysis? (Bestwater)		<b>Does not extend to copies from unlawful sources</b> (ACI Adam); Compensation calculated on the basis of harm to authors (Padawan)	<b>If re-transmission involves communication to new public</b> (SGAE/Rafael, Del Corso, TVCatchup, SBS/SABAM)	Unlicensed use which has economic significance and generates additional profits may unreasonably prejudice legitimate interests of the rights holder (Infopaq II)		<b>Sale of a computer program for unlimited period not different from CD-ROM or DVD</b> (UsedSoft)		
<b>Economic interpretation: Rights limited to acts that cause market failure and negatively affect exploitation opportunities</b> (Poort)	Linking to legal content copyright irrelevant; Opt-out for embedding; <b>Notice &amp; takedown or levy for links to illegal content</b>		Most private copies can be priced into the purchase and create no market failure; <b>Some rationale for levies for systematic time shifting and wide dissemination of private copies</b>	If original transmission without access control and within original reception area, rightholder controls exploitation opportunities	No market failure; TDM was unforeseen in existing contracts for accessing databases Value users derive from TDM can largely be priced into access contracts		<b>Resale without multiplicati on no problem, contracts which override resale subject to general rules of consumer protection and fair business</b>	If a work has been sold or licensed, market failure is solved. Create neither a ban on nor protection of price discrimination by rights holders	

<b>Right to reasonable exploitation</b> (Rognstad & Poort): Acts that conflict with the economic interests of the right holder (incl. actions covered under secondary liability) “filtered through” efficiency principle; Catalogue of excluded acts	Linking to legal content presumed copyright irrelevant. Burden of argumentation with linked party; Opt-out for embedding; Notice & takedown or levy for links to illegal content		Most private copies can be priced into the purchase and create no market failure; Some rationale for levies for systematic time shifting and wide dissemination of private copies		No market failure; TDM was unforeseen in existing contracts for accessing databases; Value users derive from TDM can largely be priced into access contracts		Resale without multiplicati on no problem; TPM can be required for this; Contracts which override resale subject to general rules of consumer protection and fair business	If a work has been sold or licensed, market failure is solved; Create neither a ban on nor protection of price discrimination by rights holders	Open question if welfare benefits of blocking interventions outweigh the costs (transaction costs and chilling effects)
<b>Right to prevent unfair competition</b> (Ohly): 1) per se infringing demand side acts; 2) acts that cause negative market effects; 3) acts that are unfair	1) No negative market effect can be presumed; 2) Embedding can be substitute	2) Aggregating hyperlinks as a business model have positive and negative effects	2) Normally has negative effects; Prohibited unless justified by an exception	2) Retransmission resulting in profit is “unjust” without compensation			2) Negative market effects balanced against user interests and free movement interests		
<b>Right to prevent use of work “as a work”</b> (Strowel): Non-communicative uses are not actionable					Copying for the purpose of providing information is far away from core exploitation				If beyond technical support (optimization of display, promotion of pages, for profit), intermediaries perform an act

									of communication to the public
<b>Right to control public circulation of works</b> (Dusollier): 1) work is used “as a work”, and 2) use harms function of copyright (author autonomy derived from association with trade of work); analogy to TM law	In most cases, links reference copyrighted works already in the public sphere		Reading, viewing, receiving, enjoying a work are not exploitation activities; Social networks institute a public sphere	If retransmission constitutes exploitation (technological neutrality)	No public circulation of the processed works; No activity of exploitation in the analysis and processing of data and texts	If derivative work is vehicle to publicly disseminate expressive elements of underlying work; Counter-discourses permitted (parody, critique, new meaning)	Droit de suite: Successive sales of of artistic works are the usual way of transmitting creative value to the public		If works are monetized (eg by advertising & revenue sharing); Search engine results refer to works but do not communicate these as works
<b>Regulatory tool box (antitrust law structure)</b> (Bechtold): Rights should be shaped by an empirically testable link between scope of protection and intended purpose									
<b>Boundary condition: Exclusive rights should not extend to non-commercial consumptive uses</b> (Hugenholtz & Quintais)	n/a	n/a	‘Non-commercial’: online activities carried out by individuals for personal enjoyment (no adverts, PR); Compensation system	n/a	n/a	n/a	n/a	n/a	n/a