

Ninth WIPO IP Research Forum

Geneva, 27 May 2015

Hiding Behind Technology?



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The problem

copyright
limitation

intermediate
technical steps

exempted
use



Central question

Technical analysis

- permission required for each technical step
- copyright = veto

Functional analysis

- no permission required as long as final use exempted
- copyright \neq veto

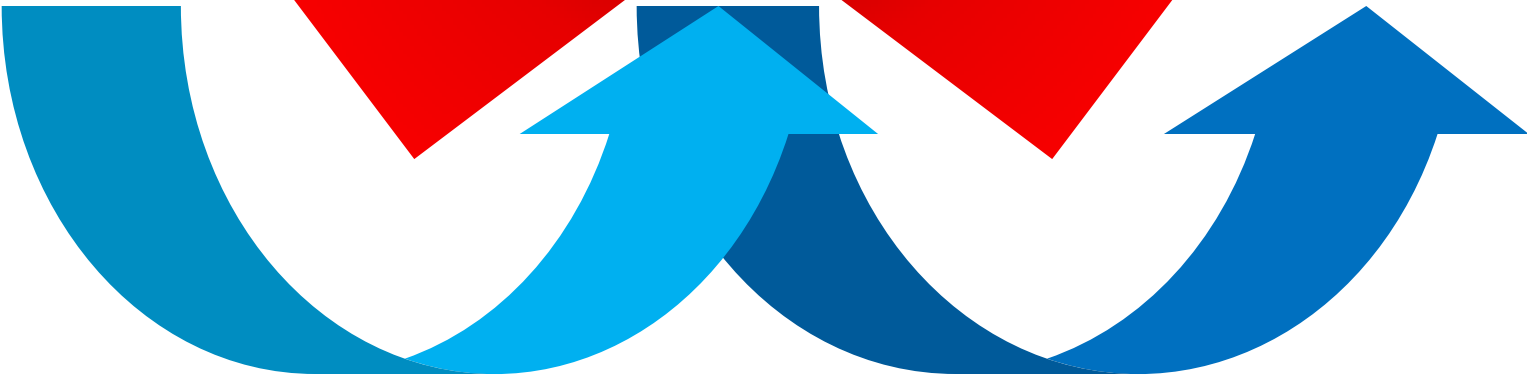
The problem

copyright
exception

tech

of

exempted
use



Field of application



Digitization of cultural heritage



Explore Europe's cultural collections

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Matches for: koninklijke bibliotheek

Results 1 - 12 of 41,194 Page: [1](#) [2](#) [3](#) [4](#) [5](#) [6](#) →



Filter your search:

By media type

- IMAGE (34,732)
- TEXT (6,460)
- VIDEO (2)

By language

By date

By country

By copyright

By provider

Include content contributed by users

Legend:

- Image
- Video
- Text
- Sound
- 3D



Beatrijs-manuscript



DOMINIO FIOREN- TINO



De Pool



Verzameling van afbeeldingen, lithografi...



Verzameling prenten betrekking hebbend o...



Gereconstrueerde Hollandse huizen in



Geologische schetskaart van Nederlandsch...



Dutch Literature



Gruuthuse-manuscript



COMITATUS HANNONIAE et



t Meerderdeel van t OOST-VRYE in



FLANDRIA GALLICA Continens



US Court of Appeals, 2nd Circuit, Authors Guild/HathiTrust

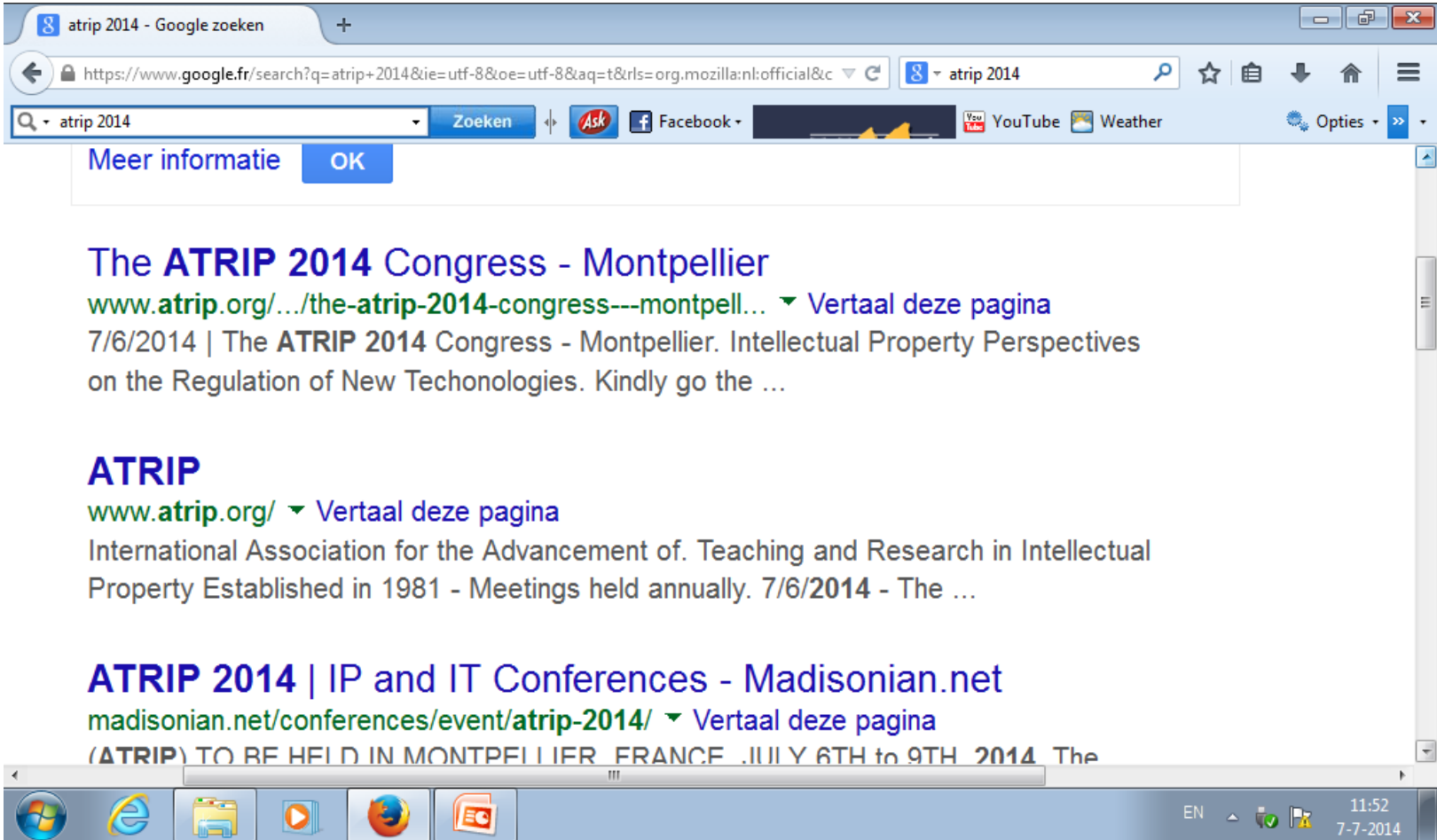
‘...in order to perform a full-text search of books, the Libraries must first create digital copies of the entire books. Importantly, as we have seen, the HDL does not allow users to view any portion of the books they are searching... Instead, the HDL simply permits users to “word search” – that is to locate where specific words or phrases appear in the digitized books.’ (p. 18)

= fair use even though entire books copied

Catalyst: US fair use doctrine

**‘...the amount and
substantiality of the
portion used in relation to
the copyrighted work as a
whole;...’**

Text mining



The screenshot shows a web browser window with the search results for "atrip 2014". The browser's address bar shows the search URL. The search bar contains "atrip 2014" and the search button is labeled "Zoeken". Below the search bar, there are buttons for "Meer informatie" and "OK". The search results are displayed in a list format. The first result is titled "The ATRIP 2014 Congress - Montpellier" and includes the URL "www.atrip.org/.../the-atrip-2014-congress---montpell...", a "Vertaal deze pagina" button, and a snippet: "7/6/2014 | The ATRIP 2014 Congress - Montpellier. Intellectual Property Perspectives on the Regulation of New Technologies. Kindly go the ...". The second result is titled "ATRIP" and includes the URL "www.atrip.org/", a "Vertaal deze pagina" button, and a snippet: "International Association for the Advancement of. Teaching and Research in Intellectual Property Established in 1981 - Meetings held annually. 7/6/2014 - The ...". The third result is titled "ATRIP 2014 | IP and IT Conferences - Madisonian.net" and includes the URL "madisonian.net/conferences/event/atrip-2014/", a "Vertaal deze pagina" button, and a snippet: "(ATRIP) TO BE HELD IN MONTPELLIER, FRANCE, JULY 6TH to 9TH, 2014. The". The browser's taskbar at the bottom shows the Windows Start button, several application icons (Internet Explorer, File Explorer, VLC, Firefox, and a document icon), and the system tray with the date "7-7-2014" and time "11:52".

atrip 2014 - Google zoeken

https://www.google.fr/search?q=atrip+2014&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:n:official&c

atrip 2014

Zoeken

Ask Facebook YouTube Weather

Opties

Meer informatie OK

The **ATRIP 2014** Congress - Montpellier

www.atrip.org/.../the-atrip-2014-congress---montpell... [Vertaal deze pagina](#)

7/6/2014 | The **ATRIP 2014** Congress - Montpellier. Intellectual Property Perspectives on the Regulation of New Technologies. Kindly go the ...

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madisonian.net/conferences/event/atrip-2014/ [Vertaal deze pagina](#)

(ATRIP) TO BE HELD IN MONTPELLIER, FRANCE, JULY 6TH to 9TH, 2014. The

EN 11:52 7-7-2014

CJEU, Infopaq 2

‘...that the acts of temporary reproduction carried out during a data capture process, such as those in issue in the main proceedings, fulfil the condition that those acts must constitute an integral and essential part of a technological process, notwithstanding the fact that they initiate and terminate that process and involve human intervention.’ (para. 39)

= one exempted process even though three successive acts of reproduction

Catalyst: Art. 5(1) InfoSoc Directive

**‘...transient or incidental
[and] an integral and
essential part of a
technological process...’**

Second hand software

The screenshot shows a web browser window displaying the Oracle Software Downloads page. The browser's address bar shows the URL `www.oracle.com/technetwork/indexes/downloads/index.html`. The page features the Oracle logo on the left and a navigation menu with links for Sign In/Register, Help, Country, Communities, I am a..., and I want to..., along with a Search box. Below the navigation menu, the breadcrumb trail reads "Oracle Technology Network > Indexes > Download Index". A sidebar on the left contains a list of links: Documentation Index, Download Index, Product Index, and Sample Code Index. The main content area is titled "Software Downloads" and includes a red arrow pointing downwards. The text below the arrow states: "For large downloads, or for functionality such as download resuming, the use of a [download manager](#) is **highly recommended**." Below this, a section titled "Developers:" begins with the text "All software downloads are free, and most come with a [Developer License](#) that allows you to use full". The Windows taskbar at the bottom shows the Start button, Internet Explorer, File Explorer, Windows Media Center, Firefox, and Oracle Software Downloads. The system tray on the right indicates the language is EN, the time is 11:54, and the date is 7-7-2014.

CJEU, UsedSoft

‘...from an economic point of view, the sale of a computer program on CD-ROM or DVD and the sale of a program by downloading from the internet are similar. The on-line transmission method is the functional equivalent of the supply of a material medium.’ (para. 61)

= exhaustion even though new download by the second acquirer

Catalyst: Art. 5(1) Software Directive

**‘...necessary for the use of
the computer program by
the lawful acquirer in
accordance with its
intended purpose...’**

Rationale



Agreed Statement on Art. 10 WCT

‘It is understood that the provisions of Article 10 permit Contracting Parties to **carry forward and appropriately extend** into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.’

‘Similarly, these provisions should be understood to permit Contracting Parties to **devise new exceptions and limitations** that are appropriate in the digital network environment.’

Role of copyright limitations

- not only market failure but fundamental policies involved
 - freedom of expression and information
 - cultural participation
- no reason to prevent third parties from offering related services
 - intermediaries not necessarily free riders
 - supporters of fundamental policies

Work ahead



Cloud video recorders

shift TV - Windows Internet Explorer

http://www.shift.tv/stv/

File Edit View Favorites Tools Help

shift TV

10 Sender gleichzeitig aufnehmen.
Download auf den eigenen Rechner möglich.

shift TV
der online tv rekorder

start - what is shift tv - about us - Pressinfo - contact - hire shift TV recorder - terms & conditions

[Programmübersicht] * [Reuters Nachrichten] * [Tech News] * [Sport News]

Login <<

NEW at shift TV ?
Register now for free <<

Fernsehen wann ich will!
Jetzt Abo abschließen und ab sofort keine Sendung mehr verpassen.

Ein Jahr lang deutsches
Fernsehen aufzeichnen
für einmalige:

100€

The coolest long distance relationship I've ever had! Your own Online Videorecorder for just € 9.99 monthly

start

Inbox - Microsoft Out... shift TV - Windows In... 2012 - Trademark Inf...

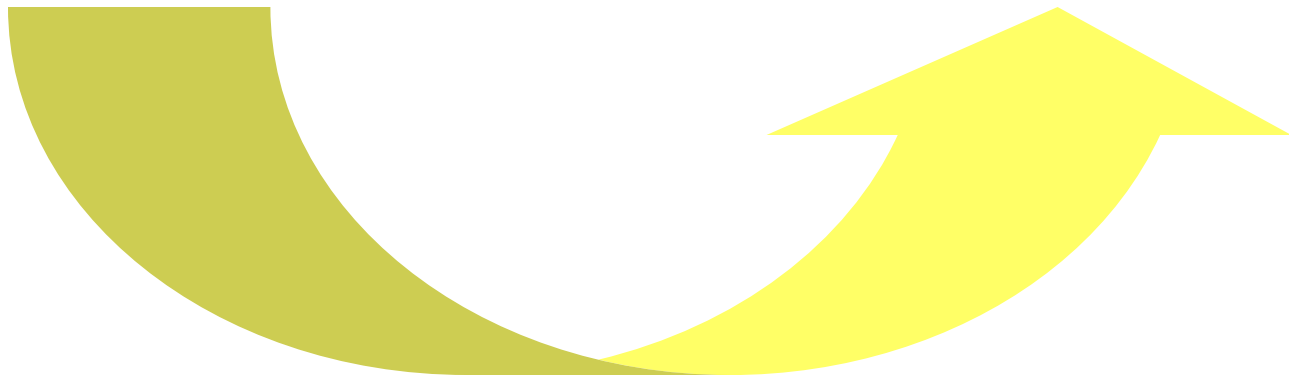
Internet 200%

15:57

BGH, Internet-Videorecorder

storage of an
individual broadcast
on the initiative of
private subscriber

exempted act of
private copying



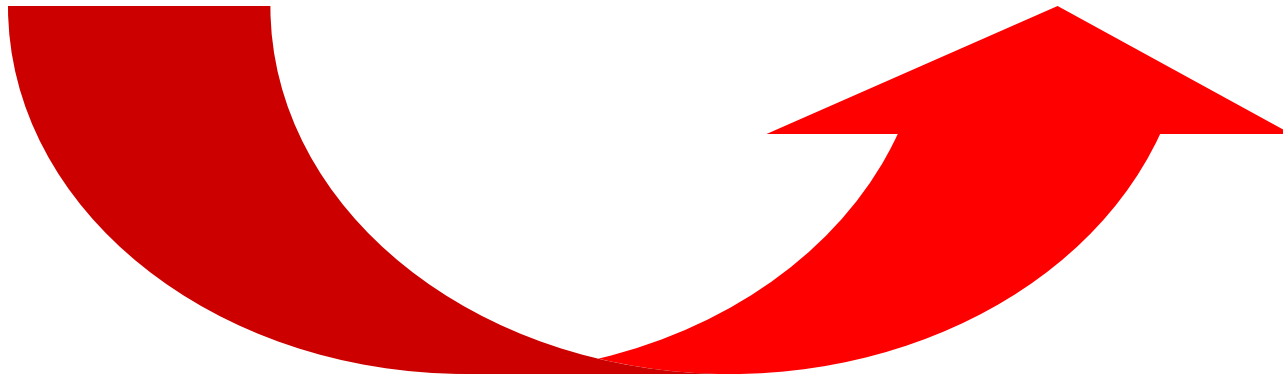
BGH, Shift TV

over-the-air
television and
radio signals

transferred to cloud
video recorders of
private users =
retransmission



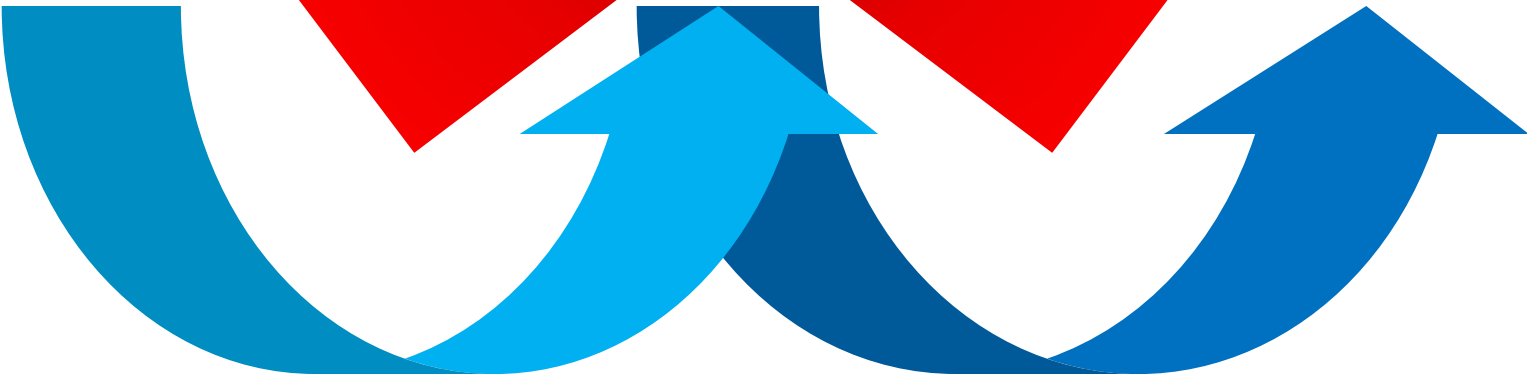
Too much focus on technology?



The problem

over-the-air
radio and TV
signals

private
copying



Catalyst? Art. 5(2)(b) InfoSoc Directive?

‘...reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial...’

Catalyst? Agreed Statement Art. 8 WCT?

‘...that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication...’

The end. Thank you!

**For publications, search for
'senftleben' on www.ssrn.com.**



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