

“Smithers, release the hounds”: Adopting a new normative framework and analysis (safe harbor?) for dealing with copyright infringement by electronic agents.

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Abstract

Courts analyzing copyright infringement of website content by electronic agents (“bots”) suffer from a critical flaw: It is anchored in a human-centric analytical framework. Rather than focus on the bot, courts erroneously hone-in on the human designer and his/her alleged breach of (an unsettled by controversy) contract: the browsewrap. The common denominator of the resulting harm is inefficiency. It can be observed in the waste of judicial resources, exists as an intrinsic component of uncertainty regarding the enforceability of browsewraps (as an extra layer of copyright protection) and in that it deprives good-faith bot designers and users from the utility of a safe harbor akin to that afforded by the CDA.

To remedy this, I argue that a normative analytical gear-shift is required. First, courts must focus on the bot and ignore the browsewrap: It’s efficacy is rendered useless when infringing bot activity is involved because it is not intended by design for putting bots on notice. Doing so recalibrates the court’s mode of analysis and disposes of the need to examine the infringing activity under the prism of consent and fairness to the bot’s human master (which argue they never saw the browsewrap). Second, I describe (in non-technical terms) the hallmarks of new technical guidelines for use by both the bot designer and the website/content owner, guidelines which build on the venerable exclusionary code of robots.txt. The result will be a sophisticated instruction set for designing the bot and the website, which will facilitate an efficient balancing of access and copyright interests. Finally, judicial enforcement will yield a safe harbor (a la recent 9<sup>th</sup> Circuit’s *en banc* ruling in *Roomates.com*) for the bot designers, certainty for website designers/owners and, not least, judicial efficiency.