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Google cache not a breach of copyright

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A US district court has ruled that Google's cache feature, which allows users to access snapshots of web pages taken when they were viewed by Google robots, does not breach copyright in those web pages. The ruling could help its Google Print dispute.

Use of the material is a fair use, said the Court.

About Google's cache

Google refers to its cache to assess whether a page matches a search term. If it had to scan and assess every live web page in real time it would be a painfully slow search engine.

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Access to the feature can be found at the foot of individual search results, where the word 'cached' appears as a link if the service is available. Google does not run the feature for sites that have not been indexed, or where site operators have requested that their content be left uncached. Such requests can be made with meta tags, the hidden HTML of a web page that provides information for a search engine.

Google promotes its cache as a back-up service that users can access if the original page is unavailable but it highlights each cached page as one that may not be the most up-to-date. The headline link in search results goes to the current page.

However, there has been concern as to whether this wholesale copying, storage and provision of web pages is a breach of the copyright held in those pages by authors and website operators.

According to Judge Robert C Jones of the Nevada District Court, the answer is no.

The ruling

The case was brought by author and lawyer Blake Field who had taken exception to Google's caching of stories posted by Field on his website. He brought an action for copyright infringement, arguing that the Google cache feature allowed web users to access copies of his copyrighted material.

Judge Jones was not impressed.

"When a user requests a web page contained in the Google cache by clicking on a 'Cached' link, it is the user, not Google, who creates and downloads a copy of the cached web page. Google is passive in this process," he wrote.

"Without the user's request, the copy would not be created and sent to the user, and the alleged infringement at issue in this case would not occur. The automated, non-volitional conduct by Google in response to a user's request does not constitute direct infringement under the Copyright Act," he added.

In addition, the fact that Field, who had admitted he knew how to disable the caching feature, had not done so created "an implied licence in favour of Google", said Judge Jones. He also found that Google was entitled to the defence of "estoppel", which stops a plaintiff from enforcing his rights if to do so would be unfair on the defendant.

Judge Jones reasoned that Field had known in advance what Google would do if he posted stories on his website; he had known how to prevent the caching, but had not tried to prevent it – so Google was unaware that he did not want his web pages cached. As a result, "Google detrimentally relied on Field's silence", wrote Judge Jones.

The judge then turned to the defence of fair use, finding that "Google's use of the copyrighted material was a fair use".

He wrote: "Because Google serves different and socially important purposes in offering access to copyrighted works through 'cached' links and does not merely supersede the objectives of the original creations, the Court concludes that Google's alleged copying and distribution of Field's web pages containing copyrighted works was transformative."

This is an important element in establishing a fair use defence.

Nor was there any evidence that Google had "profited" from the use of Field's works. The fact that Google was a commercial operation was not outweighed by the transformative purpose behind the search engine's use of the web pages, according to Judge Jones.

The fact that Google had cached whole web pages, rather than parts of them, was not really relevant either.

"Google's use of entire web pages in its cached links serves multiple transformative

and socially valuable purposes. These purposes could not be effectively accomplished by using only portions of the web pages,"the judge explained.

In addition, Field had not demonstrated any market for his works that could be affected by the caching, nor in general terms, had the court seen any evidence "of any market for licensing search engines the right to allow access to web pages through cached links, or evidence that one is likely to develop."

Taking all these factors into account, together with the fact that Google had acted in good faith in providing the cache feature, Judge Jones found that Google had been making a fair use of Field's material.

Finally, Judge Jones considered the question of the controversial 1988 *Digital Millennium Copyright Act* (DMCA), which provides a defence to service providers for the "intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider".

This was available to Google, said the Judge, because Google stores the web pages for around 14 to 20 days only, and this was "temporary" within the meaning of the Act.

Rights group the Electronic Frontier Foundation (EFF), which was not involved in the case, welcomed the ruling.

"This ruling makes it clear that the Google cache is legal and clears away copyright questions that have troubled the entire search engine industry," said Fred von Lohmann, EFF senior staff attorney. "The ruling should also help Google in defending against the lawsuit brought by book publishers over its Google Library Project, as well as assisting organisations like the Internet Archive that rely on caching."

Caching in the UK

In the UK, the E-commerce Regulations protect search engines. They provide that a company like Google will not be liable in damages (or other remedy or criminal sanction) where the caching is "automatic, intermediate and temporary for the sole purpose of providing a more efficient service".

Relevance to Google Print dispute

Google is currently being sued by US authors and publishers over its Google Print project, an ambitious plan to digitally scan library collections so that books can be matched to internet search queries.

The company has been accused of copyright infringement on a massive scale because the scanning takes place without permission from copyright holders.

A user searching Google Print sees links on the results pages when there are books relevant to his query. Clicking on a title will deliver a page from which the user can either browse the full text of the work – if copyright has expired – or brief excerpts and/or bibliographic data where the work is still protected by copyright. Links to booksellers are also provided.

Google says this is a fair use, not infringement. It is, in effect, caching the books to assist with search activity. The company stops short of revealing any more than minimal information without express permission.

Google has invited any copyright holder to opt-out; but the upset copyright holders argue that Google's activities should be opt-in.

While only a district court ruling, Judge Jones's opinion supports the arguments that Google has asserted over Google Print, which have still to be tested in court.

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