

Search Engines and the Law

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Purpose

- There is uncertainty about how copyright law applies to search engines in many jurisdictions.
- Prima facie, all copying of copyright material without approval is an infringement.
- The Australian *Copyright Amendment (Digital Agenda) Act*, the 2001 European Union *Copyright Directive*, and the 2000 US Digital Millennium Copyright Act introduced provisions that potentially relate to the activities of search engines.
- Laws are national.

What is a Search Engine?

- Search Engines use automated programs known as robots to search, locate and index pages on the web.
- Whole documents are copied during the process and stored or 'cached' on the search engine site together with a web address to the original web page.
- Users can go to the original web page via the link provided or the cached copy stored on the search engine's site.
- Site owners can use a 'robots exclusion standard' to stop their site being indexed and can use a NOARCHIVE command to prevent a search engine caching a particular page on a website.

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Virtual Goods



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Legal Issues

Are the following a breach of copyright?

1. the original copying by the robot
2. the storage of the cached copy
3. the linking to the web site by a user using the few words contained in the search
4. the opening of the cached copy by a user

Relevant Law - Australia

- Australian *Copyright Act 1968* (Cth)
 - Defences for Direct Infringers
 - Insubstantial copying
 - Fair Dealing
 - Providers of Technology Services
 - Authorisation of copyright infringement
 - Safe harbours: Category B
 - Caching copyright material

Defences for Direct Infringers

- Copying an insubstantial amount of a work will not cause a copyright infringement.
- What constitutes a substantial part of a work? Determined by quality or importance rather than the quantity.
- In relation to search engines, the copying of web pages and documents via the automatic process is considered substantial.
- Fair Dealing Provisions
 - Used as a defence against a claim of copyright infringement
 - Use must be for research or study; criticism or review; parody or satire; reporting news, or professional advice by a legal practitioner.
 - Use must be considered fair dealing
 - There have been cases in which the use of copyright material for commercial use has been held to be fair use.

Temporary Copies

- Under s 43A (1) the making of a temporary copy as part of the process of making or receiving a communication will not be a copyright infringement.
- Section 43A (1) was intended to cover caching and browsing or the simple viewing of copyright material.
- With no definition of temporary provided in the Copyright Act, the dictionary meaning of 'for a time only' would be used by the courts, thus caches that contain materials years old could not be considered temporary.

Providers of Technology Services

- Allowing others to copy material can be held to be authorisation of copyright infringement.
- Generally, where a Content Service Provider or an Internet Service Provider (CSP/ISP) merely provides the technology and has no control of how a user uses the service, they will not be held to have authorised the copyright infringement

(Sections 112E and 39B introduced into the Act in 2000)

Providers of Technology Services

- When determining whether a CSP/ISP is liable for the authorisation of a copyright infringement, Courts will look at:
 - The ability of the CSP/ISP to prevent the infringement.
 - The nature of any relationship between the CSP/ISP and the infringer.
 - Whether the CSP/ISP complied with any relevant industry codes of practice.

- However, search engines like Google are not carriers or providers of technology that facilitate the making of communications. They provide a service to users which goes beyond communications.

New Sections – Safe harbours

- The *Copyright Act* was amended in 2005, as a result of the Australian-United States Free Trade Agreement (AUSFTA), to provide that carriage service providers (CSPs) can mitigate liability by limiting the remedies available against them for copyright infringement by users or for authorisation of it if they follow certain conditions.

Safe Harbours – Category B

- Category B relates to the caching of copyright material through an automatic process.
- To gain safe harbour protection under this category, the CSP must:
 - Implement a policy to terminate the accounts of repeat infringers.
 - Comply with any relevant industry codes
 - Not interfere with the technology on the original site that handles how the copyright material is used.
 - Must not substantially modify the cached material when transmitting it to users.
 - Ensure that a significant part of any cached material that can only be accessed via a DRM on the original site, is only available to users who meet the access requirement.

- The provisions are modelled on safe harbour provisions in s 512 of the US Digital Millennium Copyright Act 2000 (DMCA). However, the Australian provisions contain a limited definition of a CSP, arguably excluding search engines, unlike the US provisions which has a broader definition which can include search engines.

Safe Harbours – Category D

- Relates to CSP referring users to an online location using information location tools or technology
- However, does not cover the actual information location tools or provider

Relevant Law - US

- Title 17 of the United States Code
 - Fair Use Defence
 - What constitutes fair use is left to the courts to assess, unlike the Australian approach.
 - s 107 provides 4 factors to be considered by the courts:
 - Purpose and character of the use.
 - Nature of the copyrighted material.
 - The amount and substantiality of the material used.
 - Effect of the use on the potential market for or value of the copyrighted material.
 - Activities such as home taping of television shows, photocopying scientific articles and the activities of commercial search engines have been assessed as fair use.

Relevant Law - US

- 1998 Digital Millennium Copyright Act (DMCA)
 - Prior to introduction of s 512 automatic online caching and indexing had been considered by the courts as non-copyright infringing
 - s 512 of the DMCA reinforces this approach
 - Exemption of online service providers
 - Four major categories of activities that service providers can qualify for protection under the safe harbour provisions (s 512)
 - Transitory Communication
 - System Caching
 - Information Storage
 - Information Location Tools such as Search Engines

Relevant Law - US

- To qualify for the safe harbour provisions under s 512(d) an Information Location Tool must have:
 - No actual knowledge of infringing material or activity.
 - No awareness of facts or circumstances from which infringing activity is apparent.
 - Upon receiving knowledge or awareness, remove or disable to infringing material.
 - Receive no financial benefit directed attributable to the infringing activity.
 - Upon notification of claimed infringement, remove or disable the link or reference and the information that permits the service provider to locate the reference or link.

Relevant Law - EU

- 2001 European Union Copyright Directive
 - The Directive provides an exhaustive list of permissible exceptions and limitations under Article 5 that member states can implement under national laws. They include
 - News reporting; Criticism, Review or Parody
 - Purposes of public security
 - Parliamentary or Judicial proceeding
 - Limitation on the liability of Intermediaries
 - Hosting or Caching Information
 - Act as a mere conduit in the transmission
 - However, the definition of 'intermediary' does not cover information location services such as search engines.
 - Some member states such as Spain, Hungary and Portugal have enacted specific protection for Search Engines

Leslie A. Kelly et al v Arriba Soft Corp - 2007

- Arriba is a visual search engine which copied, indexed and cached photographs created by Leslie Kelly, providing a thumbnail image of Kelly's work and a full size image of the photographs on the attribute page.
- Issue is whether Arriba's copying and use of Kelly's photographs could be considered fair use.
- Decision of the District Court was that both the thumbnail and the use of the full sized image was fair use. The purpose of the use was transformative, as it added a new purpose or meaning to the original work.

Leslie A. Kelly et al v Arriba Soft Corp -2007

- The Court of Appeals agreed that the search engine's use of the images was very different from the way Kelly used the photographs. The search engine use was designed to catalogue and improve access to images.
- The thumbnail index was considered functional and the purpose was not to be artistic. It was fair use.
- Use of the full sized photos was not fair use and was copyright infringement.

Blake A. Field v Google Inc – 2007

- Mr Field claimed that Google breached copyright by copying and distributing copyright material that he published on his own personal web site.
- Mr Field's claim was based around a Google user clicking on a cached link on the website.
- Google claimed that its activities were fair use, that it had an implied licence to copy and also sought to rely on the 'system cache' safe harbour of s 512(i).

Blake A. Field v Google Inc – 2007

- Judge Jones did not consider the cached copy produced by Google as a reproduction of Mr Field's page.
- Held that Mr Field made a conscious decision to permit Google to copy and store his material by not using the NO-ARCHIVE command to prevent the caching of any material he published on his web site.
- Judge Jones also accepted Google's defence of fair use, however, the reasons were more based on Google's overall activity as an Internet service rather than on the specific facts.
- Google's caching was viewed as a socially valuable purpose.

Perfect 10 v Google Inc - 2007

- Perfect 10 is a subscription based Internet service that provides access to pictures of nude models for subscribers.
- The images are held in a locked subscription only area of the Perfect 10 website.
- Some users made unauthorised copies of the images and published the images on the Internet.
- Google was not able to index the original images, however, it was able to index the unauthorised copies of the images.
- Following the *Kelly v Arriba* decision, the Appeals Court overturned a lower court decision and held that Google's use of thumbnail versions of Perfect 10's images was not a direct copyright infringement.

Copiepresse (Belgium) - 2007

- Similar to the Field's case, Copiepresse did not use protocols to prevent caching and indexing of their online media articles.
- After Google copied, indexed and cached Copiepresse's material, Google News provided a headline, a small amount of text, and a small thumbnail image with a link to the web page containing the original article.
- Issue was whether Google News' use of Copiepresse's online media article was an unauthorised reproduction and communication to the public.
- Belgium court did not consider the absence of the protocols as authorisation by Copiepresse and found that the automatic process of caching and indexing was copyright infringement.
- Google News argued that the use of the news articles was fair use as per the right to review or report news. The court dismissed this argument as no criticism or review of the content occurred.

Legal Approaches Summary

- Exclusion of temporary copying as an infringement may not be relevant to search engines as much of their cache material is years old not days old.
- Australia provides a very limited fair dealing defence but is prepared to find fair dealing in a commercial setting.
- In Australia, search engines like Google are unlikely to be able to rely on the fair dealing exceptions if copyright material was copied.

- United States has a fair use exceptions provision which is broader than the Australia fair dealing provision.
- As seen in the *Blake v Google* and the *Perfect 10 v Google* cases, fair use may be available to search engines in the US depending on whether the transformative test is passed.
- Safe harbour provisions in the US and in some European Union countries are available to search engines but in Australia these provisions are not available to search engines.
- Issue of whether the failure of website owners to use protocols to prevent caching is implied consent.

Are the following breaches of copyright?

1. the original copying by the robot – yes, but can be protected by the safe harbour provisions in some jurisdictions
2. the storage of the cached copy – yes, but can be fair use in the US and protected by safe harbours in some jurisdictions
3. the linking to the web site by a user using the few words contained in the search – yes, but can be protected by the safe harbour provisions in some jurisdictions
4. the opening of the cached copy – yes, but can be fair use in the US:

What should be done?

- Search engines infringe the rights of copyright owners when performing their searching, indexing and caching functions.
- Legislators need to determine whether this type of infringing activity should be protected under copyright law.
- An appropriate solution would be an internationally consistent safe harbour provision for search engines when performing their primary function.
 - This approach would not place the responsibility for avoiding copyright infringement onto the copyright owner.
 - A safe harbour provision would recognise the rights of the copyright owner and protect an important contributor to the functioning of the Internet.