

Copyright and the world of online news

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LONDON, UK / BERLIN, GERMANY / PARIS, FRANCE / BRASILIA, BRAZIL: The way in which we keep up with the news has changed greatly over the past decade. How many of us still buy a daily newspaper? Many of us opt to get our news from a variety of online sources.

Much of the news that's available to us online comes via news aggregators. These news aggregators come in different types. Media monitoring firms, for example, provide a commercial service to their customers - a company may, for example, want to know what is being said about it in the press and it will pay a media monitoring firm to scour the news and provide it with details on a regular basis.

Another form of news aggregator is the search engine, which is available to everyone at no cost, with Google News being the obvious example.

The legal issue that arises is this: is a news aggregator infringing copyright, or to put it in a more commercial way, does the news aggregator need a licence from every publishing company from which it extracts bits of text?

The issue came up in the UK last year in the context of media monitoring. What happened here was that a company called Meltwater provided a service which involved the company sending regular emails to its client. These emails contained the following: the headline of the article found; a snippet from the article, being the words immediately preceding and following the searched term (normally the company's name); and a hyperlink to the actual article.

Legal issues

Two major legal issues arose. The first was whether a newspaper headline enjoys copyright protection. The second was this: copyright law makes it unlawful for someone to take a "substantial part" of another's work without consent, but do a few words from an article comprise a substantial part of that article?

The UK court held that a newspaper headline can enjoy copyright as an independent literary work because it does involve a certain amount of skill and labour - there is a requirement in copyright law that, in order to enjoy protection, a work must have a certain amount of substance, which is why it wasn't really clear what the position was with headlines.

The court went on to hold that the use of short snippets from an article, like the opening words and the words immediately preceding and following the searched term, can be regarded as the use of a substantial part of an article, which means that there is an infringement if there has been no consent.

In the words of the court: "I have no doubt that in many (though not all) cases, the text extracts, even leaving aside the headline, do contain elements which are an expression of the intellectual creation of the author as a whole."

Licence fees

The Meltwater decision is being appealed, but on limited grounds: it had been argued that the defence of temporary copying - which says that it is lawful to make transient copies that are part of a technical process and that have no independent economic significance - was appropriate here, but this was rejected by the court, which said that the defence is limited to incidental and intermediate copying, and does not extend to something that is a consumption of the work.

So the law in the UK right now is that a company that takes the headline of, or a short snippet from, an article is liable for licence fees. Given that copyright law in South Africa closely follows UK copyright law, there is a reasonable chance that this will be held to be the law here. I understand that the practice in the UK right now is that commercial news aggregators are being charged licence fees, although free aggregators like Google are not.

The 'Google Tax'

Germany, however, is set to take this one step further. The German government wants to remove any doubt about the matter and pass a law that specifically says that publishers will be entitled to charge aggregators like search engines for using headlines and snippets. The royalties paid for using the snippets and headlines will be collected by a collecting society and then distributed to publishers.

It's a bit confused at present, and there is talk that this may even extend to a publisher being able to charge an aggregator for simply displaying a link to the publisher's site, and that this new right may last for one year from the date of publication of the article.

This proposed law is commonly referred to as the "Google Tax". The thinking behind it is that the government wants to help publishers recoup some of the losses they have suffered since the advent of online news - German newspaper revenue apparently fell 20% between 2000 and 2009.

Threatening diversity of information?

The Google Tax has become a big political issue in Germany. Google, needless to say, is opposing the law furiously, and it has launched a Defend Your Net campaign. This campaign comprises 10 facts, including: the fact that publishers already have the right to decide whether or not they want their pages to be found in a Google search (an opt-out); the fact that Google News is free of advertising; and the fact that Google News directs much traffic to publishers' sites.

Google says that this proposed law threatens diversity of information, and that it will set back innovative media and copyright.

Third parties have also joined the protest, claiming that if snippets and headlines require licence fees, the ability to locate information will be curtailed because search engines will simply remove publishers from their index, something Google has already done in Belgium.

They also say that the law will affect fundamental rights such as freedom of expression, freedom of science and communication, and communication and publication practices.

To make matters worse for Google, France has threatened to follow suit, and Google has responded by threatening to exclude French media sites from search results. On top of that, in Brazil 154 members of the Brazilian National Association of Newspapers (some 90% of the total) have opted out of the Google News service, claiming they have suffered a reduction in revenue.

Google has a fight on its hands, but it has fought and won a number of battles before. The Google Tax is just one more example of how IP law, and copyright in particular, is struggling to keep up with the digital world.

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