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WRTC 301 Case Study 2

Copying? Illegal. Caching? Maybe Not.

Part I

With the invention of the Internet and social media, information has become much more prevalent. Suddenly, due to search engines, everything we need to know or have the desire to research is at our fingertips, and "google" is now a verb. Since it became a company in September 1998, Google has not only changed they way we look for information, but it also has changed how we view ownership and access to information ("Our history in depth"). For example, when I googled "copyright issues," I got over 500 million results in only 0.37 seconds, demonstrating how we value both quantity and speed in our culture. As a corporation that seeks to gather and organize the world's information so that everyone can quickly search for it, some people may argue that Google displays more information than it copyright laws allow ("About Google"). Nevada author and attorney Blake Field certainly believed that it did. Field decided to sue Google for copyright infringement in return for statutory damages and better legislation for intellectual property ownership (*Field 1)*.

By 2004, Field had written fifty-one short stories that he had copyrighted and published to his website, www.blakeswritings.com (*Field* 2). Even though he did not charge people to visit his site, he did not want anyone making unauthorized copies or reading the stories away from his website. However, since he did not use a "no-archive metatag,"

Google automatically cached (stored a preview) the webpages of his site and included a short section of the cached copy in the search results ("Field v. Google Inc."). If people clicked on the link, they would see the cached copy of the website—what it looked like when the Googlebot "crawled" or recorded the page. The cached copies listed a disclaimer at the top, saying that the information could possibly be different on the actual site, depending on the amount of time between crawls, and they also provided a link to the real sites (Kociubinski).

Field viewed access to the cached pages as copyright infringement (using someone's intellectual creation without permission) and originally filed a complaint on April 6, 2004 for one of his stories, *Good Tea*. Almost two months later, on May 25, 2004, Field filed an amended complaint, adding fifty more of his stories to the list. He asked for $50,000 in statutory damages for each work, totaling $2,550,000 (*Field* 2).

Confident that his facts were correct and that he had a high likelihood of winning the case, Field asked for summary judgment (*Field* 2). This eliminated a need for a trial to dispute what actually happened, and allowed the jury to focus on interpreting the law based on the facts. Field claimed that Google could not rely on fair use, implied license, or estoppel (meaning that in certain cases, intellectual property rights do not apply based on the knowledge, intentions and reasonableness of the owner) for its defense (Newman 525). He also believed that the Digital Millennium Copyright Act (DMCA), a 1998 law that outlawed circumventing access controls for technology, devices and services to get to copyrighted material, did not protect Google either (The Digital Millennium Copyright Act of 1998 4). Google filed a response claiming that it did have a defense based on those

factors, and it did not infringe on Field's rights. Using the complicated mess of copyright laws, the court ruled in Google's favor (*Field* 1).

In order for an act to qualify as infringement, the infringer must knowingly copy the material (Copyright Act 165). In his legal statement, Field accused Google of infringement because it copied his page every time that a user clicked on the cached link. However, the court ruled that Google had not willfully copied because its automatic server was doing the caching and only created copies when people clicked on the link to request them. Because people were the ones to generate the copies and Google was simply following the commands, Google was not at fault since it was not producing copies at random (Band 4). In his article, "Copyright and the Evolving Law of Internet Search—*Field v. Google, Inc.* and *Perfect 10 v. Google, Inc.*," Ben Kociubinski notes that Field did not accuse Google for secondary infringement or simply storing the website pages in its cache. Field knew the court had decided in *Kelly v. Arriba Soft* (2003) that fair use allowed a search engine to keep small picture sizes from webpages in an archive and to display them with links to the original images, so he was attempting to make his case different (Band 3).

Determining fair use for search engines is complicated. Section 107 of the Copyright Act asks courts to consider four criteria to evaluate whether a reproduction of a work is an infringement: the reason for the reproduction and what it is like, what the original work is, how much of the original work is used, and the outcome that reproduction has on the market of the original work (19). After reviewing these criteria, the courts decided that Google had operated within the fair use requirements. For example, the cached links of Field's site serve a different purpose than the original; they help researchers find the terms they are looking for in the stories, and they keep an archival record of the pages.

Furthermore, the court did not find any proof that Google profited from caching Field's website. The cached links also did not hinder Field's profits, because Field provided his stories for free on the Internet (*Field* 10 – 15). As an additional fair use justification, section 512(b) of the DMCA (added to the Copyright Act) also protected Google as search engine because the copies were only for "intermediate and temporary storage" (Band 9).

Google's implied license tied into its estoppel defense. According to Christopher Newman, licenses allow others to use the created material according to the contract or agreement (524). For implied licenses, there is no actual contract, but it is permissible to assume one if there is inferred consent, consent by default, or someone you have hired has created something for you (Newman 528 – 536). Google is able to claim an implied license because Field did not check the box that would prevent Google from caching his site. This further strengthens Google's estoppel defense because Field knew that Google would cache his site if he didn't check the box, which it did because Field's purpose was unclear. Demonstrating good intentions, Google removed the cached links after the company found out Field did not want them (Kociubinski).

Using the definition of infringement, the Copyright Act to determine fair use, the argument for an implied license, Google's estoppel defense, and the additional bonus of the DMCA ruling, the U.S. District Court of Nevada clearly agreed with Google's summary judgment motion. Field had attempted to prove that Google was copying too much information that it didn't create, but the court decided that as a search engine and service provider, Google had the right to sift through information and provided it quickly, conveniently, and thoroughly for its users.

Part II

There are different legal permissions for owning creative and intellectual material, copying that material, using it, and spreading it. *Field v. Google (2006)* found that the solid line between illegal copying and legal using is defined through licenses, which in this case was an implied license. Illegal copying is duplicating a work for no additional purpose and without permission. However, in order to "use" a work, it must have a different purpose than the original and there must be some sort of contract or license granting permission. Later cases can use *Field* to argue for the right to use certain intellectual works based on implied licenses. However, spreading others' creative and intellectual copyrighted material is a different story. *Field* affirmed Google's right to create and share cached copies of a website when people asked for them because Field left a box unchecked. This demonstrates that, as a search engine, Google has certain privileges (that most people do not have) to display and share information. Field's allegations of copyright infringement prove that our culture's view of copyright laws have changed (as they should) since the creation of the Internet and search engines to accommodate our digital culture. Furthermore, as technology improves and increases search engines' abilities, copyright laws should continue to change to allow people to use search engines' full potential.

The United States government rewrote Title XVII of the *United States Code* using the Copyright Act of 1976. From then until 2011, there have been over 70 amendments to Title XVII, 40 of which were before 2004 when Field first filed his complaint (Copyright Act v – xii). In fact, Congress enacted the DMCA in 1998, the same year that Google became incorporated. The DMCA legislates many aspects regarding copyright laws and the Internet, but it also contains a "safe harbor provision for online service providers" that protects the search engines and Internet service programs from facing the consequences of their users'

actions (Band 8 – 9). With new ways to access and share information, it is impossible to keep the copyright laws the same.

Field had difficulty accepting these new methods of research and the new laws that surrounded them. He felt that his work was private and should not have been copied or distributed without his permission. His interpretation of the copyright laws saw Google's distribution of his work through cached copies as illegal, and he would have been right without the new Copyright Act and its amendments. These laws do not allow Field to blame Google (or other related sites) for how people use the search engine. Search engines are not people and should be held to a different standard because they are tools, not brains. Additionally, instead of infringing on his property rights as Field alleged, the cached links actually benefitted him and the rest of the American Internet users because it helped people to find his stories more easily, giving his website more traffic.

The caching system, allowing search engines to crawl through websites and to store an image of them in order to help users find what they are looking for, enables us to search and compile information faster. We can do more research and share what we've found with more people. Instead of manually looking through entire books and articles based on their titles and abstracts, Google and other search engines can examine them for us. When we put in specific search queries or key words, Google sorts through its enormous cached database in milliseconds. It provides us with thousands of sources that have the same words and ideas bolded in a short description pulled from the cache. While Google may spread copyrighted information, it only does so because we ask it to.

As technology improves and the Internet expands, search engines will continue to grow and offer more resources. Instead of using typed queries to search within websites,

articles and books, we may eventually use Google to look for content within videos, speeches and music. If Google has the right to cache images and websites, should it also be able to cache entire videos? Understandably, many authors currently do not want their entire book to appear in Google Books, and many film and music artists will most likely feel the same way (Kociubinski). People should not be able to read entire books or watch documentaries on Google without paying for them, but it would be helpful to search the media for the specific parts that they need. Search engine companies could legally negotiate with their users and the content owners to create a subscription section of their database. Users could pay a small monthly fee to quickly and efficiently search entire books, movies, etc. that they would normally buy, and the content creators would receive compensation depending on how often people searched their works. Keeping up with additional legal agreements and amendments to the Copyright Act and the DMCA would clearly define the rules for search engines, instead of using the court system to find loopholes.

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