



Comment: AP win in copyright ruling could put search startups at risk

22 Mar 13 | 21:43 GMT

Author: Mike Swift

IN BRIEF

Internet news search services could face more legal uncertainty over what constitutes legitimate access to copyrighted material, following a New York district court ruling affecting online news service Meltwater. While the ruling found Meltwater belongs in a different box than leading search services such as Google News or Microsoft's Bing, the definition of Meltwater's operations sounds similar to what Google News does.

San Francisco - Internet news search services could face more legal questions over what constitutes legitimate access to copyrighted material, following a New York district court ruling that found online news clipping service Meltwater is not protected by the fair use doctrine of copyright law.

US District Judge Denise Cote on Thursday ruled for the Associated Press in its complaint that Meltwater is illegally using excerpts from its articles, granting the AP's motion for summary judgment. Cote invited the two parties to submit proposals on what penalty Meltwater should face (see [here](#)).

Established search companies such as Google, Microsoft and Yahoo likely have the resources to defend themselves in litigation generated by the uncertainties inherent in the new ruling. But that may not be the case for search startups, which already have a difficult path to enter the hugely expensive and technically difficult field of search.

Cote said in her ruling that while Meltwater exhibited many characteristics of internet search engines such as Google News or Bing that discover news content, it should be considered a news clipping service, not a search engine. The Ninth Circuit Court of Appeals has ruled that 'transformative' aspects of search engines, such as displaying thumbnail photos in search results, are 'fair use' of copyright because of the public benefit they provide.

"Meltwater's business model relies on the systematic copying of protected expression and the sale of collections of those copies in reports that compete directly with the copyright owner and that owner's licensees and that deprive that owner of a stream of income to which it is entitled. Meltwater's News Reports gather and deliver news coverage to its subscribers. It is a classic news clipping service. This is not a transformative use," Cote wrote.

The trouble for news search engines may be that while the judge said Meltwater should be placed in a different box than Google News or Microsoft's Bing, her definition of Meltwater's operations - crawling the web to index snippets of news stories and linking back to those news websites without any added commentary - sounds very much like what Google News does.

Cote also emphasized that Meltwater is a paid subscriber service, and has a very low click-through rate to the original article. But particularly for a newly-launched search service that doesn't have much traffic, it could be very difficult to demonstrate a robust click-through rate to make the argument that its service is a transformative public benefit.

"What I find troubling about it is that she keeps distinguishing Meltwater versus 'legitimate' online search tools, but it's not really clear what that definition is," Julie Ahrens, director of copyright and fair use for the Stanford Law School's Center for Internet & Society, told MLex in an interview Friday.

The ruling, especially if affirmed on appeal, "could be chilling to people who are trying new or innovative search engines," said Kurt Opsahl, a senior staff attorney with the Electronic Frontier Foundation.

Stanford and the EFF were one of a number of internet rights groups that filed friends-of-the-court briefs backing Meltwater (see [here](#)). Their concern was that the court could restrict the use and development of online services that allow users to find, organize, and share public information.

Many leading news organizations, meanwhile, backed the AP in the case. In a friend-of-the-court brief, newspaper publishers the New York Times, McClatchy, Gannett and others argued that Meltwater is not a search engine, but a "parasitic" business that engages in "massive, systematic copying of expression" of news organizations without paying license fees (see [here](#))

The judge appeared to accept that argument. "Through its use of AP content and refusal to pay a licensing fee, Meltwater has obtained an unfair commercial advantage in the marketplace and directly harmed the creator of expressive content protected by the Copyright Act," Cote wrote.

-Right to index? -

One of Meltwater's defenses was that the AP failed to include software code on its website that would have blocked Meltwater from crawling and indexing its site. That omission constituted license to index AP's content, Meltwater argued.

Cote rejected that argument, however, raising questions about whether the simple omission of such software code allows access by other search engines to online content. That could be an issue for other search engines that have relied on that same defense.

Just because Meltwater functions like a search engine doesn't mean that it is a search engine, and that its paying subscribers should be classified the same as users of free search engines like Google or Bing to find news, Cote said. The key distinction is not the technology, but the business model, she said.

"Exploitation of search engine technology to gather content does not answer the question of whether the business itself functions as a search engine. In any event, however classified, it must still show that its use of copyrighted expressive content was a fair use. This it has not done," Cote said.

Meltwater said in a press statement (see [here](#)) that it would appeal the ruling to the Second Circuit Court of Appeals.

A strong affirmation by the Second Circuit could set up a conflict with the Ninth Circuit's rulings that search engines are a 'transformative' use, setting up the unlikely but possible outcome of Meltwater successfully petitioning the US Supreme Court to settle the matter.

Linked Case File(s)

[IT litigation - Associated Press - Meltwater](#)

© 2013 MLex Ltd. All rights reserved.