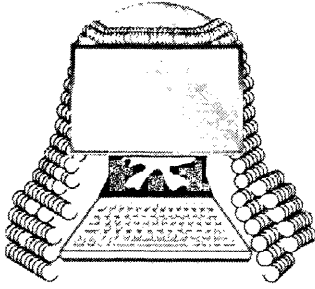


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A Temporary Fix For Temporary Reproductions?

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It is now well settled law that copyright protection applies equally to the online space. Websites can be protected by copyright as literary works, artistic works or compilations, but also, with the increase in flash media and multimedia websites, websites now often contain musical works, sound recordings, dramatic works and film. The real concern, then, is the extent to which traditional principles of copyright law can be translated to the online space – when, for example, have you reproduced a copyright work? Is the viewing of a webpage on your computer screen a reproduction or a communication? Is the copy of that webpage made in your computer's RAM in order to view the webpage, an infringing

reproduction? What about the copies made by your Internet service provider (“CSP”) in delivering the webpage to your computer?

This article reviews the recent history of Internet and website 'caching' and the current position under copyright law, demonstrating that piece-meal legislation often leaves more holes than it covers.

Caching

“Caching” is a term that has many connotations: to content users, it means faster Internet speeds and greater bandwidth; to CSPs, it means an opportunity to offer speed as a point of distinction to consumers; but some website copyright owners consider it a cause for remuneration.

Caching refers to a number of separate activities:

- at its most basic, caching is the process in which a temporary copy of a webpage is made on a local PC or network allowing users to view the webpage. When clicking on a webpage, the user's PC would automatically save a temporary copy of the file in the local RAM in order for the page to be viewed.

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Later, if the user presses the back button on their browser, the computer will load the locally saved page rather than retrieve it again from its original source. On shutting down the computer, the temporary file would generally be deleted. Essentially then, this is a necessary part of viewing a webpage ("browser caching");

- further, caching also can occur at a network and CSP level, so that a copy of a webpage is made to permit the user to view, but is then retained by the network or CSP so that if other users of that network or CSP wish to view the same page, the network or CSP² delivers the locally stored page rather than retrieving the webpage again from its original source ("proxy caching"); and
- finally, caching can also refer to deliberate activities, often by web search engines to:
- systematically copy and store popular websites on local servers so that when users choose to visit those pages, they are quicker to retrieve ("active caching"); or
- copy the content of links that appear high in search results, anticipating that these links will be clicked ("prefetching").

CSPs seek to benefit from caching by storing copies of webpages on local servers which are closer to the ultimate user for the purpose of increasing the speed and efficiency of access. By retaining a local copy, the CSP also avoids using its bandwidth to retrieve the webpage from its original source each time³. Although less of an issue given the dramatic take up of broadband and cable Internet, the availability of bandwidth and faster speeds still remains a key point of distinction between CSPs competing for the user dollar.

The http protocol (the primary protocol used by web developers) is designed to allow CSPs to update the cached content only when it changes. During each request by a user for a webpage, the CSP sends a request to verify the currency of the webpage. If the webpage indicates that it has been

updated, the CSP will retrieve the new material and replace the old material in its cache before sending it to the user. However, in order for the protocol to effectively maintain currency of cached content, website owners are required to ensure their webpages are coded appropriately, which is not always the case. Consequently, it is possible that caches store out-of-date material.

So why is this an issue? Historically, the issue was advertising revenue. Website owners often derive revenues from unique 'hits' to their websites. The 'pay per thousand' or 'pay per click' models are two of the most common online advertising models. Essentially, advertisers will pay the website owner a fixed fee for each time an advertisement is displayed on that website to a user, or an unique user clicks on an advertisement. When CSPs delivered cached content to users rather than from the original source, the technology was unable to recognise the unique visitor, thereby denying the website owner the revenue.

Times have now changed and website owners have access to technology that will measure 'hits' more accurately. The http protocol also permits website users to stop caching of their website altogether.

The more recent argument raised by copyright owners is the desire to share in the 'efficiency pie'. CSPs are benefiting from the speed and monetary efficiencies resulting from caching of copyright content and copyright owners believe that the benefits should be shared by making caching a remunerable activity.

From a copyright perspective, caching arguably involves two of a copyright owners' exclusive rights: firstly, the right to reproduce the work when it is stored in either the RAM of a PC or by a CSP on its server; and secondly, at least in the case of proxy and active caching, the right to communicate⁴ the work when it is transmitted to subsequent users from the local server rather than the original site. Legally, the question is whether caching involves a reproduction under the reproduction right or a subsequent

communication and, if it does, whether any copyright exception applies.

The "let me view" caching exception

Prior to the introduction of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), there were many concerns that although browser caching was a necessary step in accessing websites, there was no certainty that this was not a copyright infringement.

This was owing to the fact that the *Copyright Act 1968* (Cth) did not, at this stage, distinguish between temporary or permanent reproductions and so the argument went that any reproduction had the potential to infringe. Some posed the view that a cached copy would not meet the 'material form' requirements of reproduction⁵. In response to this concern, the Government, after significant debate, introduced section 43A⁶ which permitted 'temporary reproductions' of works if they were 'part of the technical process of making or receiving a communication' as long as the communication itself was not a copyright infringement.

Importantly, the Explanatory Memorandum (*EM*) to the *Digital Agenda Bill*⁷ points out that the purpose of the exception is to 'include the browsing (or simply viewing) of copyright material' and that 'certain caching would **not be caught** by the existing reproduction right. In general terms 'caching' is the process whereby digital works are copied **as part of the process of electronically transmitting those works to an end user**' (emphasis added).

While the EM suggests that the Government considered that certain caching 'would not be caught' by the existing reproduction right (perhaps because it did not meet 'material form' requirements?), the effect of the sections was to create a relatively narrow exception to infringement. Therefore, although it clarified the situation in respect of browser caching, the Government left CSPs with much uncertainty as to whether their proxy caching activities would be caught by the reproduction right and,

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if so, whether they would have the benefit of this exception.

In the case of prefetching or active caching particularly, the reproduction is not part of making or receiving a communication of the work as such. The caching occurs as a deliberate process in anticipation of a communication, rather than as a technical part of it. Even proxy caching may not fit within the exception, given the fact that the copy is kept longer than necessary for the user to view the website and may, therefore, not be considered temporary. Further, even if the reproduction is permitted under this section, when that copy is transmitted to a different user there may be an exercise of the copyright owner's communication right which is not part of the exception at all.

Under the *Copyright Act*, a communication is taken to have been made by the person *responsible for determining the content* of the communication.⁸ It is arguable, on the one hand, that this must be the original website owner. Therefore, in transmitting cached content, there would be no communication by the CSP.

An alternative view is that it is in fact the CSP determining the content of what is made available to the end user. This view is best illustrated in the situation where a CSP retains cached content which has in fact been removed from the original site by the website operator. Instead of returning no content, the CSP makes the cached content available to the user. In this case, it is hard to see how the CSP could not have communicated the work.

Such circumstances are not intended by ordinary caching practices, which are designed to confirm the currency of the cached content against the original website, but can arise if the website owner fails to code his or her webpage in accordance with the protocol. However, the example demonstrates the difficulty in finding a clear protection in favour of CSPs for their caching activities. Further, any protection afforded by section 43A is not available where the source website

is itself infringing, resulting in an infringing communication⁹.

Notably, submissions in respect of proxy caching activities were raised by stakeholders but remained unaddressed in the Digital Agenda reforms¹⁰. These issues were once again acknowledged by Phillips Fox in its Report and Recommendations of the Digital Agenda Review¹¹ conducted in 2004 in response to which the Government ultimately indicated that educational purpose proxy caching would be clarified whilst remaining silent in respect of broader caching.

Safe-harbours stir up more uncertainty

It was not until the introduction of the *US Free Trade Agreement Implementation Act*, which gave effect to obligations under the Free Trade Agreement, that caching was reconsidered. The Government's obligations under the Free Trade Agreement to introduce certain protections for CSPs, essentially for authorisation liability, led to a number of new provisions which indirectly impacted on the caching issue.

Commonly known as the 'safe-harbour exceptions', the regime protects CSPs in respect of a number of their activities in relation to hosting, linking to and communicating copyright material. The purpose of the provisions is to 'limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities...'¹². If compliance with the requisite conditions¹³ is established, any remedies are limited to orders to cease ongoing infringement¹⁴.

Relevantly, a CSP can limit its exposure for 'caching copyright material through an automatic process' if it complies with access restrictions and ensures that it maintains an up-to-date cache reflecting the material at the original source. Caching is defined for the purpose of these provisions as 'the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient

access to that material by that user or other users.'¹⁵ (emphasis added).

So, what do these provisions do? There are two ways to see it.

On the one hand, the safe-harbour exception is somewhat peculiar in that it is intended to limit remedies for infringements of copyright but to the extent it applies to caching, it is unclear whether it does in fact relate to any proscribed conduct which would lead to the liability in the first instance. Unlike the other activities to which the division applies: hosting infringing material or providing links to infringing material, each of which are established areas of copyright infringement¹⁶, caching is not yet a decided issue.

As a result, one can imply that the section intends to say that caching is a copyright infringement but, if you do certain things, the penalty for that infringement is only that you will have to remove that material from your cache. Essentially then, by creating a defence from an activity, the section may also make the activity, by default, an infringement.

The alternative view, is that the provision gives sanction to user initiated proxy caching. The analysis is as follows. The section says that carriage service providers who cache must comply with certain conditions, including ensuring that they do not provide access to otherwise unauthorised users (i.e. not providing access to password controlled or subscription only content) and, where notified, removing material which has been removed or disabled at source (essentially, a requirement to keep the cache up-to-date).

Notably, it is *not* a condition that the material itself not be infringing. Further, there is no express ability for the copyright owner to outright refuse a CSP's right to cache. These omissions from the *Copyright Act* may support a view that the legislature did not view caching as an infringement or treat it as being an exercise of an existing exclusive right, which can be revoked or denied by the copyright owner.

If this is in fact the better view, then the provision provides some comfort

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to CSPs. Firstly, it goes further than sections 43A and 111A in that it does not require the reproduction to be temporary. Secondly, it permits the purpose for the reproduction to be for efficient access rather than as a part of a technical process.

Irrespective of which view is taken on the above, the protection provided by the safe-harbour exception is limited to 'reproduction'. The protection does not apply to any subsequent communication of the cached material. Given the issues raised above as to whether the making available or transmission of cached material is in fact a communication by the CSP (which requires a decision on who determines the content), the subsequent communication may still be infringing.

Regardless of these issues, the exception does at least provide CSPs with some opportunity for debate. This development may have appeased CSPs, but for recent amendments which create further uncertainty.

The "teach me" exception

Section 200AAA of the *Copyright Act* came into effect on 1 January 2007 as part of a suite of broader exceptions and in satisfaction of the Government's commitment to clarify educational caching following the Phillips Fox review. The section permits educational institutions to proxy cache works and other subject matter to facilitate the efficient later access to the material by its users.

The Government noted in the Further Explanatory Memorandum to the *Copyright Amendment Bill 2006* that the section was intended to permit proxy caching in computer systems operated by or for an educational institution for educational purposes.

Although applicable only to educational institutions, the exception is an important tool in analysing the effect of the other caching provisions discussed above. The author submits that the drafting of this provision exposes the shortcomings in the drafting of the other provisions if they were indeed intended to have a similar scope of permission for caching generally.

Section 200AAA is structured as follows:

- it specifies the conditions required to be met before the section applies¹⁷;
- then it proceeds to say that copyright is not infringed by either the reproduction into a cache or the later communication of that reproduction¹⁸; and
- finally, the section clarifies that it does not limit the effect of section 43A or 111A¹⁹ and that it must be disregarded when determining if copyright has been infringed by persons other than educational institutions²⁰.

Importantly, unlike section 43A or 111A or the safe-harbour exceptions, section 200AAA:

- does provide a separate exception for the subsequent communication of the cached material;
- does not rely on the reproduction being temporary²¹; and
- expressly cites efficiency as a purpose for which the caching occurs.

Accordingly, one could base the following conclusions on the above observations:

- the Government does not consider proxy caching to be permitted under any of the existing provisions and, therefore, there is a need for this exception;
- the Government does see subsequent communication as an exercise of the communication right, otherwise it would not need to provide it as a separate exception in the case of educational proxy caching. This leads to the view that the previous two caching exceptions do not provide this protection; and
- in the Explanatory Memorandum, it is noted that where a student's personal computer engages in browser caching, sections 43A and 111A would continue to apply to this, confirming the view that sections 43A and 111A are likely only to apply to this kind of activity²².

Finally, it is unclear what the Government intended by stating that the section is to be disregarded if the caching is conducted by persons other than educational institutions. Does it mean that one is to pretend the section does not exist, thereby arguably permitting a broad interpretation of the other caching sections without having to justify the contrast to this provision? Or does it mean that no proxy caching exception exists apart from in the field of educational institutions?

No answers but some foreign precedent

Despite almost a decade of lobbying by CSPs and various caching stakeholders, there appears to be no greater clarity in the muddy waters for the large majority of players. Educational institutions may have finally received some comfort but, for the remainder, the legislature has not made its intentions clear and so there still looms the threat of copyright infringement actions.

The Government has announced a review in order to consider whether to extend the safe-harbour exceptions to universities, TAFEs, corporate entities and government departments. Such a development would give institutional networks some protection via the safe-harbour exceptions, but the protection may be less clear than anticipated.

Already, cases have started appearing in overseas courts suggesting that search engines may face a difficult battle. In Belgium, the Court of First Instance has ruled against Google Inc. for active caching a newspaper's online content and showing snippets of its newspaper on Google's news search page²³. In the US, a court has held that protocols that permit website owners to prevent caching by coding their pages in a particular way grant an implied licence to search engines to cache (even active caching) if they choose not to adopt the protocol²⁴.

In light of the looming threat of similar actions in Australia, the Government should embrace the opportunity to provide the certainty required. Of course, the decision will be a difficult one, with strong policy considerations on both sides of the fence – the ability to provide efficient

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and fast Internet content to users against the expectation of copyright owners to exploit copyright content.

¹ The author would like to acknowledge the assistance of Carolyn Dalton, Special Counsel at Minter Ellison.

² References in this article to CSPs are intended to apply to networks which are generally in the same position with respect to caching.

³ Geoff Huston (1999) 'Web Caching' *The Internet Protocol Journal*, September vol 2(3) at page 2.

⁴ Section 10, Copyright Act 1968 defines 'communicate' to mean 'make available online or electronically transmit'.

⁵ See the 'ALCC submission to the inquiry into the *Digital Agenda Bill*' at: <http://www.alia.org.au/advocacy/copyright/digital.agenda/1999.11c.html> at section 7, although note that this issue has now been resolved following the *US Free Trade Agreement Implementation Act 2004*.

⁶ Section 111A, *Copyright Act 1968* is an identical provision for other subject matter (audio-visual material).

⁷ *Copyright Amendment (Digital Agenda) Bill 1999*.

⁸ Section 22(6), *Copyright Act 1968*.

⁹ Section 43A(2), *Copyright Act 1968* says that the exception in section 43A(1) does not apply where the communication for which the temporary copy is made is an infringement of copyright. A corresponding section 111A(2), *Copyright Act 1968* also applies to audio-visual material.

¹⁰ Submission from the Copyright Subcommittee of the Intellectual Property committee of the Business Law section of the Law Council in respect of the *Copyright Amendment (Digital Agenda) Bill* at page 8; The Australian Digital Alliance 'Comments on April 2000 Interim Report' at page 5.

¹¹ Phillips Fox 'Digital Agenda Review: Report and Recommendations', 2004 at page 47.

¹² Section 116AA, *Copyright Act 1968*.

¹³ Section 116AH(1), *Copyright Act 1968* specifies a number of conditions that must be satisfied before the exception can be relied upon.

¹⁴ Section 116AG(4), *Copyright Act 1968* lists the remedies and section 116AG(2), *Copyright Act 1968* specifies that no monetary relief can be awarded.

¹⁵ Section 116AB, *Copyright Act 1968*.

¹⁶ Hosting copyright infringing material would require the reproduction and communication of copyright works without the permission of the owner (thus infringing). Similarly, providing links to infringing material can be a copyright infringement if it amounts to 'authorisation' of infringing communications. See *Universal Music v Cooper* [2005] FCA 972.

¹⁷ Section 200AAA(1), *Copyright Act 1968*.

¹⁸ Section 200AAA(2), *Copyright Act 1968*.

¹⁹ Section 200AAA(3), *Copyright Act 1968*.

²⁰ Section 200AAA(4), *Copyright Act 1968*.

²¹ In the earlier drafts of the Bill and Explanatory Memorandum there was a requirement that the material be removed after the course of instruction but this was not retained.

²² At paragraph 125.

²³ Philip Blenkinsop (2007) 'Belgian Court rules against Google over Copyright' *Reuters*, 13 February. See <http://www.copiepresse.be/copiepresse.google.pdf>

²⁴ *Blake A. Field v. Google Inc.*, 412 F. Supp. 2d 1106. See http://www.eff.org/IP/blake_v_google/google.nevada_order.pdf

VOIP Services – An exception to the Customer Service Guarantee?

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Certain types of Voice Over Internet Protocol (**VOIP**) services may soon be effectively exempt from the Customer Service Guarantee (**CSG**). The draft

Telecommunications (Customer Service Guarantee) Direction No. 1 of 1999 (Amendment No. 1 of 2007) (Direction), released for public

comment in January by the Minister for Communications, Information Technology and the Arts, the Hon Senator Helen Coonan, proposes to