
The New Intermediaries

Search King Inc. v. Google Technology Inc.

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On an average day about 61 million Americans go online. And with more than 60 percent of U.S. residents having Internet access,¹ the net is increasingly becoming a routine part of our daily lives. According to a recent survey, “Internet users are very likely to say that they expect the Web to be a source of information on health care, government agencies, news, and shopping.”² How do these loyal netizens find such information? Most likely, at some point in their surfing, they will hit upon one of the handful of popular search engines.

The amount of information available on the Internet is growing exponentially, and although users certainly go directly to known websites, it would be difficult to imagine an effective webbed world without search engines. Not only are these applications crucial for leading a user to a website, they are equally critical for the website owner who wants to attract that user. It is in this sense that search engines are the new intermediaries – connecting information seekers with information providers.

Instead of a cast of thousands of dot coms, the search market is really a pack of four – Google, Yahoo, MSN and AOL.³ But in the world of searching, Google reigns king. Nearly four out of five Internet searches are executed on Google or on sites that license its technology.⁴ This has led some to conclude that there is no reason to launch a website if Google doesn’t find it,

¹ Pew Internet & American Life Project. (2002). “Counting on the Internet” (available at http://www.pewinternet.org/reports/pdfs/PIP_Expectations.pdf).

² *ibid*

³ According to an independent report from WebSideStory, Inc, as of December 1, 2002 Google, Yahoo, MSN and AOL accounted for 92.79 percent of all global search referrals to shopping web sites. From “Google, Yahoo, MSN and AOL Account for more than 90 percent of Search Referrals to Shopping Web Sites,” (December 4, 2002). PR Newswire.

⁴ McHugh, Josh. (January 2003). “Google vs. Evil.” *Wired Magazine*. Available at http://www.wired.com/wired/archive/11.01/google_pr.html

because no one else will. “So powerful has Google become that many companies view it as the web itself: If you’re not listed on its indexes, they say, you might as well not exist.”⁵ Furthermore, even the leading portals and ISPs such as Yahoo and AOL are using Google to run their own searches, mixing the results with some of their own listings.

Google has been successful because it is useful. Their 100+ proprietary search algorithms have been highly effective in getting users to the information they are seeking. One of the most important search algorithms, the PageRank, assigns a relevancy number (1 to 10) to a web page based on the number and the rank importance of the pages linked to it. According to Google’s own literature, “In essence, Google interprets a link from page A to page B as a vote, by page A, for page B. But, Google looks at more than the sheer volume of votes, or links a page receives; it also analyzes the page that casts the vote. Votes cast by pages that are themselves ‘important’ weigh more heavily and help to make other pages ‘important’.”⁶ The PageRank is not displayed to a user unless she installs the Google Toolbar.

This system of having important sites determine other important sites is one way for users to quickly find relevant (even peer recommended) information. And it is widely believed that the PageRank score, in part, determines where a web page lands in the set of Google search results. When more than 75 percent of all search traffic filters through this search algorithm, the page’s relevancy ranking goes a long way in determining if that page will ever be browsed.

⁵ Olsen, Stefanie. (October 31, 2002). “Does search engine’s power threaten Web’s independence?” CNET News.com. Available at <http://news.com.com/2009-1023-963618.html>.

⁶ <http://www.google.com/technology/index.html>

Exactly how search engines make the connection between the user and the site is not entirely transparent – search algorithms are highly-guarded trade secrets. But thinking about it has spun off into a veritable cottage industry. Website developers and consultants spend a good deal of time exchanging tips on “the black art of search engine optimization”⁷ finding ways to get their sites higher up on the return list, thus ensuring their relevance to the searcher. And “link farms” have been created, where an optimizer links all clients to each other in an attempt to boost each page’s relevance rating. In response to this system gaming, Google creates new search formulas to guard against the manipulation of the search result order. Each month the company updates its index and collection of algorithms.

Search King v. Google

Search King, established in 1997, is an Oklahoma-based Internet search engine and web hosting company. In August 2002, Search King and its president Bob Massa launched the PR Ad Network (PRAD), a link farm. In an attempt to increase client rankings, the network placed text ads for its clients on web sites that had received a high PageRank score from Google. Once Google got wind of it they responded by reducing the PageRank scores of the Ad Network, its parent company Search King, as well as most of PRAD’s clients. The homepage of the PR Ad Network dropped from a rank of 2 to 0 and the Search King site went from 7 to 4.

In response, Massa filed a lawsuit in October 2002 arguing that Google had arbitrarily and purposefully devalued his companies’ and his customers’ web sites and caused his business to suffer financially. Massa asked the court to grant a preliminary injunction against Google and order the search giant to restore the sites to their previous page rank, produce the PageRank

⁷ Gallagher, David. (December 9, 2002). “Sites Become Dependent on Google.” *The New York Times*.

source code for the months of August and September 2002, and provide damages of at least \$75,000.⁸

Google filed both a response to the complaint as well as a motion to dismiss. They claimed that Search King had “engaged in behavior that would lower the quality of Google’s search results.”⁹ The company also contested that the PageRank is simply an opinion of the importance of a web page and as such deserved protection under the First Amendment. Google’s argument relied on the 10th Circuit’s decision in *Jefferson County School District No. r-1 v. Moody’s Investor Services*¹⁰, where the school district claimed that Moody’s had reduced its credit rating because it had decided not to buy Moody’s services. The 10th District Court ruled that the rating was an opinion and protected under the First Amendment. Google contended that its rankings were the equivalent of the Moody credit ratings.

In January 2003, U.S. District Judge Vicki Miles-LaGrange denied Search King’s motion, concluding that *Jefferson County* was analogous. She stated that PageRank is an opinion, not fact, and is therefore protected under the First Amendment. She went on to state that, “The PageRanks do not contain provably false factual connotations. While Google’s decision to intentionally deviate from its mathematical algorithm in decreasing Search King’s PageRank may raise questions about the ‘truth’ of the PageRank system, there is no conceivable way to prove that the relative significance assigned to a given web site is false.”¹¹

⁸ *Search King Inc. v. Google Technology Inc.*, No. CIV-02-1457-M

⁹ Google Technology Inc.’s Response and Opposition to Plaintiff’s Motion for Preliminary Injunction, No. CIV-02-1457-M

¹⁰ 175 F.3d 848 (10th Cir. 1999)

¹¹ *Search King Inc. v. Google Technology Inc.*, No. CIV-02-1457-M

The Implications

Search King may, indeed, have entered into unethical business practices by trying to manipulate the Google ranking system. Regardless, the case does raise some interesting policy questions concerning the power of private search engine companies and their role as information intermediaries and gatekeepers. As this case demonstrates, Google does not simply point a user to information, the company makes decisions about what information that user is going to see and when they will see it. As law professor Niva Elkin-Koren commented, “Search engines play a crucial role in shaping online public discourse, determining the availability and accessibility of information and thus ultimately affecting meaning making processes.”¹²

While on the one hand Google has reason to protect the integrity of its ranking system by discouraging fraud, it is questionable as to why they can then walk outside the boundaries of their mathematical formulas and downgrade certain sites for business reasons. Whose manipulation should we accept? Both are hidden behind secret algorithms owned by proprietary companies and protected by trade secret. Furthermore, the results of those hidden algorithms are considered opinion and protected under the First Amendment.

The issue is one of the dual role search engines are playing. On the one hand they are private companies, with patented technology and trade secrets. On the other hand they are providing an essential public service, connecting users to a vast amount of publicly available information. They have the legal right to delete listings, change the rank of those listings, or block groups of

¹² Elkin-Koren, Niva. (2003). “Online Public Discourse Revised.” Proceedings from the Yale Conference on Democracy in the Digital Age. Available at <http://www.nyls.edu/democracy.php?ID=25>

people from certain information.¹³ Indeed, there are times when they would be liable if they didn't block information. And though Google may be able to claim First Amendment protection for its ranking decisions, what happens to the First Amendment rights of Google users? If Google decides to retaliate against another company or promote a particular business (even for legitimate business reasons) what does that mean for Google users (remember 4 out of 5 searches are conducted via Google technology – most of us, therefore, fall into the Google user category).

Policymakers and the public should take heed. Although Google is generally considered a “good guy,” the power it and other search engines has is tremendous in determining what access people will and will not have. And with 150 million searches occurring each day¹⁴, that power is not trivial. Search engines are not neutral players and we shouldn't view them as such, they are a key component to the search process and their decisions have tremendous effect on us all.

¹³The *Search King v. Google* suit is only one of many challenges that face the search engine company. Lawyers representing the Church of Scientology requested that Google stop linking to an anti-Scientology site in Norway, claiming that the site was illegally displaying copyrighted content and that Google was in violation of the Digital Millennium Copyright Act. Google removed the pages from the index. In October 2002, a report by two Harvard researchers indicated that Google had been using filtering software in Germany, France and Switzerland - blocking sites that are considered racist. (McHugh, January 2003).

¹⁴ *Search King Inc. v. Google Technology Inc.*, No. CIV-02-1457-M