



FEDERAL-COURT RECORDS VIA PACER AND RECAP

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The Renewed Debate Over Public Access

Privacy in this new digital era is becoming increasingly difficult to maintain. Simple Google searches can unearth mountains of information about our adversaries and their lawyers. So it's quite paradoxical that federal-court records remain secreted behind electronic paywalls like Westlaw, Lexis-Nexis and PACER. The issues of privacy and public access to court records are at the heart of a new dialogue between the Administrative Office of the United States Courts (AO) and academics at the Princeton University Center for Information Technology Policy.

PACER

Many of us federal-court practitioners and researchers are all too familiar with the AO-maintained Public Access to Court Electronic Records (PACER) program—and its eight-cents-per-page charges. PACER is maintained by the AO. As mandated by Congress, the PACER program is funded entirely through user fees set by the Judicial Conference. In other words, it's a government-run Web site that provides access to public court records for a fee. The site makes available filings made in the United States District, Appellate and Bankruptcy Courts. Unless a filed document is sealed by the presiding judge, it is generally made available through PACER.

PACER user fees can add up quickly.¹ And they inhibit researchers and other

members of the general public from accessing federal-court records. Regardless, the AO is left with little choice but to charge user fees for PACER access, because the program is not otherwise funded by general tax dollars. As a boon to its program, the AO is quick to add that, in 1853, Congress set the per-page charge for court records at 10 cents. With inflation, that would be almost \$2 per page today. And paper copies today generally run about 50 cents per page.

RECAP

Princeton's recent retort to the AO's pay-per-use PACER program is RECAP—literally “PACER” in reverse.

Launched in August 2009, RECAP is a free software plugin for the Firefox brows-

—continued on p. 26 —>

er that allows free access to PACER filings that are available in a public archive. The program is very easy to use. It runs in the background when you log in to your PACER account. If a filing on a PACER docket is already available in the RECAP public archive, a small blue “R” appears next to the docket entry number. Rather than clicking on that number, you may simply click on the “R” to download a free version of the same document maintained in the free public archive.

RECAP also automatically uploads to the public archive any filings that you pay to view. This allows the next person to view that document through PACER for free, if they are running RECAP.

RECAP’s functions do not interfere with PACER’s normal operations. Rather, RECAP merely provides you with a link to free PACER documents when they are available in RECAP’s public archive. Indeed, RECAP’s Web site boasts that “RECAP is designed to improve your PACER experience without getting in your way.”

The Debate

Before reaching the privacy and other ethical implications of the debate, as a lawyer, my first reaction was to wonder about the legality of the RECAP program. With the usual caveats that this article is not meant to constitute legal advice, and readers should take the time to reach their own conclusions, there appears to be nothing illegal about the use of RECAP by those who are paying PACER users. Indeed, the program merely places public records in a public archive for general public access.

The legality of the program has implicitly been accepted by the AO itself. In a notice issued by the AO to *fee-exempt* PACER users, the AO noted that those PACER users are restricted from transferring data

obtained as a result of a fee exemption. And therefore “Fee exempt PACER customers must refrain from the use of RECAP.” The obvious implication of this notice aimed solely at fee-exempt PACER users is that it is perfectly acceptable for *paying* PACER users to use RECAP. This is further reinforced by information at the AO-maintained PACER Web site, which makes clear that information from PACER may be reproduced without permission:

The PACER system provides electronic access to case information from federal courts across the United States. The information gathered from the PACER system is a matter of public record and may be reproduced without permission. However, the PACER customer assumes all responsibility for consequences that arise from use of the data.²

From a privacy standpoint, since the launch of RECAP, numerous federal courts (including the Bankruptcy Court for the District of Arizona) have issued “warnings” about the supposed potential for sealed pleadings and pleadings containing private information to make their way into the public record.³

RECAP has denied these privacy threats and even gone so far as to state that these types of statements are misleading. In a late-August posting titled “A Note on RECAP’s Commitment to Privacy,” RECAP’s creators explained, “Protecting privacy is our top priority, and we specifically designed RECAP to safeguard the privacy of CM/ECF documents.” The creators went on to explain that they would “like to work with the judiciary in the coming weeks to ensure they understand how RECAP protects privacy and security, and to incorpo-

rate any further enhancements they might suggest.” This issue of privacy will no doubt continue to be a hot-button issue between the proponents and opponents of RECAP.

From a public-access standpoint, RECAP’s creators maintain that RECAP “is one of several projects that harness the power of the web to increase government transparency.” And they explain that some of the driving principles behind RECAP can be found in a recent essay published by the *Yale Journal of Law & Technology*.⁴ The essay points out that during the 2008 presidential election, Barack Obama, Hillary Clinton and John McCain all advocated for the federal government’s better use of the Internet to make government records more accessible to the public at large. Thus, while reducing PACER user fees may be seen as a way to “stick-it-to-the-man,” RECAP’s creators appear to have carefully thought through the ethical implications and goals of the program.

The AO has not responded to the public-access issue from an ethical standpoint—nor is it expected to. Nonetheless, this is an underlying issue that will continue to animate the RECAP debate in the coming months.

Time Will Tell

As the PACER/RECAP dialogue forges on, new light will be shed on the importance of increased public access to federal-court records and the related issue of privacy. Regardless of where this dialogue takes us, we will have the creators of RECAP to thank for bringing these issues to the forefront. 

endnotes

1. The *Electronic Public Access Fee Schedule* can be viewed at <http://pacer.psc.uscourts.gov/about.html> (last viewed Aug. 31, 2009).
2. <http://pacer.psc.uscourts.gov/faq.html#GP72> (last viewed Aug. 31, 2009).
3. See, e.g., Notice issued by the U.S. Bankruptcy Court for the District of New Mexico, www.nmcourt.fed.us/usbc/node/301 (last visited Aug. 31,

2009) (“If you have access to any sealed pleadings or any pleadings that contain full social security number or other private information relating to parties on a case, it is possible that you would be posting this private information on the public Internet.”); Notice issued by the U.S. Bankruptcy Court for the District of Arizona, www.azb.uscourts.gov (last visited Aug. 31, 2009) (“Please be

aware that RECAP is ‘open-source’ software, which can be freely obtained by anyone with Internet access and modified for benign or malicious purposes, such as facilitating unauthorized access to restricted or sealed documents.”); Notice issued by the Eastern District of New York, <https://ecf.nyed.uscourts.gov/cgi-bin/ShowIndex.pl> (last visited Aug. 31, 2009) (“Please be aware that RECAP is ‘open-

sourced’ software, which can be freely obtained by anyone with Internet access and modified for benign or malicious purposes, such as facilitating unauthorized access to restricted documents or seeding the repository with falsified or spurious documents.”).

4. See David Robinson et al. *Government Data and the Invisible Hand*, 11 YALE J. L. & TECH. 160 (Fall 2008-2009).