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James Boyle's Predictions in Technology Law and Policy for 2006

by Duke Law Professor James Boyle

Welcome to the inaugural issue of the Duke Law and Technology Review iBlawg - an informal and opinionated discussion of topical issues in Law and Technology. The DLTR staff has asked me to write an entry to start things going, and I am delighted to do so. The theme of this section is "Predictions in Technology Law and Policy for 2006." As my dismal history in picking stocks indicates, I have little reason to be confident in my abilities as a prognosticator. Consequently, I have picked three issues that, whether I am right or not about precise outcomes, reflect some of the major trends right now in intellectual property law. The time frames, however, may be significantly different.

#1 Google Library: Google loses in the District Court, wins in the Appeals Court, Supreme Court denies cert.

The Google Library Project, which offers to make the world of printed material as easily searchable as the World Wide Web, is perhaps the single most revolutionary proposal in access to knowledge and culture after the internet itself. Even though it will only make available short excerpts of books still under copyright, Google will first have to copy the books it indexes in their entirety. It allows publishers to opt out of the index for specifically identified books. Will this be found to be a fair use? A simplistic analysis of the facts would be that Google is copying all of the work, including many works at the heart of copyright protection, that the copies are verbatim and not transformative, and that they are made for commercial purposes - so that market harm should be presumed. The four factors all cut against Google. Thus, no fair use. But I think we can expect a little more out of the courts. What exactly is the "use" and how should it be judged? Google needs the copies because this is the only way to build an index. The index, and its ability

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to display targeted selections, is the goal – the copying just a means to get there. Consider the analogy to decompilation. Software companies make complete copies of software, for commercial purposes, precisely in order to produce a competing product. Though the software is not at the core of copyright protection, the evidence of direct aim at the copyright holder's market share is much more real than in Google. But the courts hold this to be a fair use – the copy is merely a means along the way to produce an interoperable program.

Alternatively, consider the graphics search engine which makes copies of every picture on the web it can find, offering a lower quality "thumbnail" of the picture to the searcher. Again, this was found to be a fair use. The copy was a "means" rather than an end in itself, and the effect of the service was to further the constitutional goals of copyright – to encourage production and dissemination of and effective access to knowledge and culture. It is hard for me to imagine a better reflection of that goal than Google Library – a service which would among other things mitigate the harms from "orphan works," something on which the Register of Copyright recently issued a report. Indeed, I think the overall effect of a pro-Google fair use decision will probably be as financially beneficial to the publishers as the effect of a pro-Sony fair use decision was for the movie industry. But just as in the Sony case, I do not expect the publishers to see that. Which way will the courts go? I think it is marginally more likely that a District Court will adopt the formalistic approach, and find infringement, and marginally more likely that an Appeals Court will reach deeper and, like other courts before it, find this to be a perfect application of the flexible doctrine of fair use. But both of those predictions depend entirely on which judges hear the case - something we will probably have to wait far more than a year to find out. It is uncomfortable to say so, but our digital Great Library of Alexandria will depend on who gets the case, how well they know copyright law, and how good Google's lawyers are. As for the Supreme Court, I assume the Justices will be too busy frolicking in a cascade of national security, abortion and commerce clause issues to take the case.

#2 The Supreme Court issues at least one rebuke to the Federal Circuit

According to some academic critics, the Federal Circuit has taken perhaps the most obviously utilitarian body of Federal law and turned it into a bizarre mixture of formalism, rules of thumb based on 1960's chemistry, de facto industry-specific rules for obviousness and occasional one-sided flights of economic fancy. Certainly, if one compares the "reasoning" that supports the State Street decision with the kind of analysis offered in even a mundane antitrust case, one is struck by the way in which the Court uses extremely general verbal formulations to sweep aside old precedent on subject matter limitations, without even considering what effects its decision might have. (I owe the idea of comparing methodologies across doctrinal areas to my colleague Arti Rai. She should not be blamed for my conclusion, however.) In the antitrust case, the court would focus like a laser beam on consumer welfare, and even its per se rules would draw their ultimate force from a utilitarian analysis. The Federal Circuit applies no such method, and has disappointed many, though not all, academics as a result - a fact that the court has born with remarkable equanimity. Indeed, the Federal Circuit has shown a disdain for academic assessment of its work that is doubtless good for the

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supply of that scarce resource – professorial humility. Will decisions like the ones academics have criticised so heavily be the reason that the Supreme Court eventually steps in? Perhaps, or it could be the fact that the Federal Circuit is viewed by many, and perhaps by its members, as "the Supreme Court of patents" and has shown an interesting tendency to interpret prior Supreme Court statements on patent law as though it felt the Supreme Court should defer to it, rather than vice versa. Whatever one thinks about the current Supreme Court, though it talks about deference and humility more than Uriah Heep, it rarely seems to find the actual practice of these virtues attractive, except perhaps where it is deferring to Congress's interpretation of the purpose behind the "limited times" requirement. Deferring to the Federal Circuit seems distinctly less attractive. Thus, the Supreme Court may feel it appropriate to keep the Federal Circuit on a slightly shorter leash. What will the subject matter of the case be? It could be software, business method patents, rules on obviousness for biotechnology, or further clarification of what remedies are available on infringement. But my bet is business method patents and/or software. We will just have to wait and see.

#3 Concerns about the constitutionality of the "Casting Treaty" raise doubts about the US negotiating position in WIPO

The United States has been supporting an extension of the Rome Treaty (to which it is not a signatory) granting broadcasters significant copyright-like rights over material that they broadcast, whether or not the material is in the public domain, copyrighted, licensed under a Creative Commons License and so on. The extension would increase the term of the broadcasters' right and, perhaps, extend it to webcasters. Critics, including me, have decried the Treaty as a classic example of the extension of intellectual property rights, without empirical evidence that they are necessary, and in a way that will simply exacerbate the existing problems with rights thickets. Apart from the Treaty's considerable weaknesses as a matter of policy, there are also reasons to believe it has significant constitutional problems. While there are multiple versions of the proposed text still being discussed, none so far as I know, meets the requirements of the US Constitution. In particular, the Treaty, if implemented in US law, would appear to grant copyright-like rights over core copyright subject matter, without adhering to the Constitution's requirements of "fixation," "originality" and perhaps that rights be given to "authors." More speculatively, it would appear that the Treaty might run afoul of the Court's announcement in the patent context that the Copyright and Patent clause forbids the Congress from removing material from the public domain. (Whether that limitation applies in the copyright context is something that, itself, is the subject of different litigation.) Finally, the treaty would require considerable ingenuity in converting into a US law that did not have substantial first amendment problems.

How should these constitutional concerns be resolved? To answer that would require a law review article. While Congress can certainly use other sources of authority to legislate on material that is not copyrightable subject matter, such as trademarks, I would argue that it may not do so on works that are at the heart of copyright, indeed which might themselves be copyrighted by their authors. There have been a number of cases about statutes raising similar questions, most of which have focused on the fixation issue and the limited

times requirement. Kiss, and Martignon, two recent District Court cases have both found anti-bootlegging provisions unconstitutional for failing to meet those requirements. Moghadam, an older Appeals Court case, is more equivocal. In one way, it seems that the Broadcast Treaty would be even more problematic constitutionally, because of the ways it flouts the originality requirement – something which is the "essence of copyright" and of the copyright clause limitation. On the other hand, the lack of a clear time limitation in the anti-bootlegging statute was clearly problematic. The "casting right" would be granted for a limited time – though it could also be gained again and again over the same work, even one on which the copyright term had lapsed. The underlying issues are still under active litigation in the bootlegging context, as well as the public domain restoration context, and it is hard to predict an outcome. What is remarkable is that questions on the constitutional issues are yet to surface in the formation of the United States' legal position. I would predict that this omission is rectified in the year ahead That ought to make the US reconsider its support for this ill-thought out measure, but I have little confidence that it will do so.

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DLTR Editor Branch Furtado :: 2/15/06 at 11:00 pm

> On behalf of DLTR, we would like to thank Professor Boyle for offering the inaugural iBlawg. As always, he offers some challenging questions and predictions about the future of information policy in the months and years to come. Stay tuned for more provacative commentary and prognostication from DLTR's guest bloggers…