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The Google Library Project: When East Doesn't Meet West

by U of Chicago Law Professor & Hoover Institution Senior Fellow Richard Epstein

I have written a number of times of the Google Library Project, and each time I do so I am impressed with the issue's difficulties. It is as though Google in its effort to design a workable and defensible program for itself managed to create a scheme that poses the perfect set of practical and intellectual challenges for copyright scholars and lawyers.

Prediction

In dealing with this issue, I agree on one point with Jamie Boyle, with whom I often spar in our joint roles as tech columnists for the Financial Times. I am lousy at predictions on all matters great and small, and hence have little confidence in my judgment as to how the Google Library initiative will play out in the courts. But having spoken about the issue in front of professional audiences on both the East and West Coasts, I see there are pronounced biases on the problem which influence the likely outcome to this litigation.

The East Coast is the home of authors and publishers. Content is king so that its protection becomes a powerful institutional interest. The West Coast is the home of the persons who distribute content, like Google, not those who create it. Hence, there the natural bias is in favor of allowing the free flow of information that any assertion of intellectual property rights could disrupt. The East Coast types are skeptical of the Google claims on both opt-out consent and fair use. The West Coast types are likely to embrace them. Jamie Boyle of Durham, North Carolina counts for these purposes as a West Coast fellow, because the East Coast is really the New York publication establishment.

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At this point, the key question on litigation depends on where the lawsuit is brought. Right now that answer is in the Southern District of New York. On the theory that jurisdiction (or is it venue?) is destiny, this location predicts that Google will lose in the District Court, as the worthy Boyle suggests. But it furthermore suggests that the Second Circuit (which was reasonably pro-property in dealing with challenges to the Digital Millennium Copyright Act) will not break ranks with its lower courts, but prove loyal to its home base, and affirm the decision below. Now the Supreme Court has yet to decide on which Coast it lies for the purpose of this property divide, and the Google case may well afford the ideal window through which to pass judgment as to its intellectual property address. My sense is that the Supreme Court is more likely to take the case if Google loses in the Second Circuit, if only because it also knows of the publishers' and authors' home court advantage. It could well be that its decision in the current eBay v. MercExchange case (which tests the strength of property rights by asking whether injunctive relief is routinely available in patent infringement cases) could give us the needed clue. A decision to soften the level of remedial protection could signal an uneasiness about intellectual property rights (one which I do not share, for whatever it is worth), which in turn increases the likelihood that the Court will take the case. The normative question is what it, or any lower court, should do.

Evaluation

This is a very hard question, and in general I have been more sympathetic to the content holders than most, including Boyle. One way to start the analysis is to ask this question: does Google work both sides of the street at the same time? On the one hand, it pays at least nominal obeisance to the model of consensual transactions when it says that it will honor opt-outs by copyright holders. This in turn raises the question, why does Google have the unilateral right on licensing questions to turn the tables on copyright owners by holding that they should come to it, rather than it go to them. One possible answer is to untangle the snags that are likely to develop when it is not clear who the copyright holder (or holders) is (or are). Thus, there are common disputes between authors and publishers over new revenue streams, and often many works have multiple authors, editors, illustrators and the like. The opt-out rule does not remove the pain for Google. It still has to decide whether any assertion of a right to block publication is indeed correct. The more players there are in the picture, the more difficult that task will become. My own inclination is to help Google with respect to old works that otherwise have to stay outside the library system, but it is difficult, save by legislation, to concoct a legal scheme that will solve this problem.

The second approach is to push the fair use test. This would apply to all works, not just the old and cold ones. And it would eliminate any need to pay compensation at all, at least for the few small snippets that Google proposes to display in response to a request. The conventional tests on fair use in copyright law suggest that Google is in trouble here, especially since it has to make a full digitized copy of all the works that it wants to produce. Boyle claims that this should be protected by analogy to the interoperability exceptions that are found in the DMCA, but there are differences. There is no explicit statutory authorization here, and there is no network integration problem of the sort that inspired the interoperability exception to the DMCA.

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Tech Law Advisor
The Trademark Blog
IP News Blog
Tech Dirt
TTA Blog

Here the claim to use the snippets, and make the full reproduction, applies to entire works, even to works that have even only a single author with whom it is always possible to negotiate.

So which way will the great Google litigation come out? My own instinct on this is still that Google will lose on the East Coast for three reasons. First, the ambiguity created by claiming both opt-outs and fair use will lead the (East Coast) court to be uneasy about both claims. Second, all of the listed factors on fair use in the Copyright Act tend to cut against Google, at least if the creation of the master is integrated with the use of the snippets. Third, it appears that Yahoo and perhaps other providers are thinking of creating a similar library by acquiring the rights from various holders. One key test for fair use says, don't invoke the fair use exception when a voluntary market can develop. All this I greet with mixed emotions. There is something nice, clean and hassle-free about letting Google do its thing, and having the publishers and authors benefit, without contract, from the increased flow of business. But there is also something which says that more works will be created if the reuse rights in others are limited when voluntary transactions are feasible, as they are in this age of microtransactions. Robert Merges suggested to me that he thought fair use should win for Google today when the markets are undeveloped, but lose for it in a couple of years when they are more robust. My views are a bit more dynamic in that if I know the market is coming, then I want to keep the fair use doctrine at bay. But who is to say? I was born in Brooklyn and am writing this blog from the Hoover Institution, in the heart of Google country. My identity crisis could cloud my judgment.

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For more of Professor Epstein's insight on this issue, see:

Why Libertarians Shouldn't Be (Too) Skeptical on Intellectual Property, Progress on Point, The Progress & Freedom Foundation, Release 13.4, February 2006

Google in Treacherous Waters

2 Responses to “The Google Library Project: When East Doesn’t Meet West”

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Ian Samuel :: 3/02/06 at 8:19 pm

Professor Epstein:

Thanks for your comments. Why don’t they apply identically to the rest of Google? Google must make a full-text copy of each and every web page it indexes in order to do so, all of which is done without any authorization or notice. “Microtransactions,” if they are feasible for the world’s millions of books, are equally if not more feasible for the world’s millions of webpages.

Pay a penny, index a page. Or a book. Right? Why aren’t Google, Technorati, Yahoo, WebCrawler, AltaVista, and every other search engine–based on the principles you set out here–all engaged in massive copyright infringement every second of every day?

Brian Sites :: 3/20/06 at 3:30 pm

Professor Epstein:

Thank you for your comments here, they take an interesting approach to the crystal ball-style analysis. While I believe that Google’s use is and should be held a fair use, I am inclined to agree with your analysis that Google is up against a “home court advantage.”