University of Richmond
UR Scholarship Repository

Law Faculty Publications

School of Law

2015

Google as Copyright Iconoclast

James Gibson
University of Richmond - School of Law, jgibson@richmond.edu

Follow this and additional works at: https://scholarship.richmond.edu/law-faculty-publications

Part of the Intellectual Property Law Commons

Recommended Citation
James Gibson, *Google as Copyright Iconoclast*, The Media Institute (Aug. 20, 2015), available at http://www.mediainstitute.org/IPI/2015/082015.php.

This Editorial is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Google as Copyright Iconoclast

Prof. James Gibson, University of Richmond School of Law
August 20, 2015

Google's role as a copyright defendant has provided fodder for many an essay in this series, particularly with regard to the Google Books litigation. (Incidentally, that litigation celebrates its tenth anniversary next month – and it's still going strong.) A more recent Google case, however, is probably just as important, and it provides another interesting lesson in the Internet behemoth's copyright litigation strategy.

The case is Oracle v. Google. In early 2010, Oracle acquired Sun Microsystems, the developer of Java, the popular cross-platform programming language. Soon thereafter, Oracle sued Google for copyright infringement, alleging that Google's Android operating system copied certain small but important programs that Sun had written, called Application Programming Interfaces (APIs), which provide basic functionality for the many programs and platforms that use Java. The lawsuit soon became a copyright professor's fantasy, raising issues both substantive (how low is the threshold for copyright protection for functional works?) and procedural (at what point in litigation does a defendant get to raise important policy issues?).[1] Rather than discuss those issues, however, I'd like to focus on Google's unique position as a copyright litigant here.

Put yourself in Google's position and consider how you might proceed. Under copyright law, there are three paths to lawful use of the Java APIs. First, you could pay Oracle for them. Second, you could convince the courts that the APIs are not protected by copyright and are accordingly free for the taking. Finally, you could convince the courts that even if the APIs are not free for the taking, your particular use of them constitutes fair use.

Let's think about which option you would prefer. One might reasonably say that the best outcome is to have the APIs declared uncopyrightable. That would free them up for any and all uses, and you would never again have to worry about the issue. The second best alternative would then be a win under the fair use doctrine; as a more fact-dependent defense, that outcome would authorize you to continue doing what you're already doing, but it would not necessarily give you much assurance about the legality of other uses of the Java APIs that you might want to undertake in the future. Finally, least preferred would be to convince Oracle to license the APIs to you, because that costs money and puts all the leverage in Oracle's hands.

But as Fitzgerald famously said, the rich are different from you and me. And Google is a rich, risk-seeking iconoclast. For that reason, I'd like to argue that it might rank these three options in the exact opposite order: a ruling of no copyrightability as its last resort, with fair use a better option, and paying a licensing fee better still.

Why? Well, let's start with the copyrightability argument. If Google convinces a court to rule that Java's APIs are uncopyrightable, then Google can use them however it likes, without restriction. But so can every other Tom, Dick, and Harry of the world of technology. A level playing field, to be sure – but if you are the big dog, do you want all the little dogs to have equal access to the kibble?

How about fair use? Like any judicial holding, a decision that Google's use is fair can be cited as precedent by anyone who wants to engage in the same use without a license. In that way, it's like the copyrightability holding: Google unwillingly externalizes some of the benefits of its

victory to others. But because fair use is very context-specific, it's not quite the carte blanche that a copyrightability ruling would be. Instead, its utility is limited to those who are doing what Google is doing. When it comes to helping the competition, then, Google might prefer this narrower win.

Finally, Google could pay for the Java APIs. Indeed, this is what the company originally offered to do back in 2005 when it first started developing Android. Sure, licenses cost money – but Google has plenty of money, and licenses (unlike legal precedents) benefit only the licensor and licensee. If you're a rich company, a world where everyone has to pay for APIs might be preferable to a world where they are free.

This hierarchy of outcome preferences reminds me of the Google Books controversy, which Google tried to settle back in 2008 through a massive licensing scheme. At the time, I pointed out in an online *Yale Law Journal* essay and a *Washington Post* op-ed that the settlement would be good for Google but bad for copyright law, precisely because it would leave an important fair use question unanswered. Fortunately, the court rejected the settlement, and we ended up with an answer to the fair use question – an answer that benefits everyone, not just Google.

We may see the same thing happening here. The argument that the Java APIs are uncopyrightable is no longer available to Google; an appeals court rejected it last year in a somewhat confused opinion. So the remaining options for Google are fair use (an issue on which the trial court will soon rule) and licensing (which is still a possibility, as the parties may settle before trial). Will Google shell out for the privilege of being the only one with legal certainty about its use of Java APIs? Or will it take the fair use issue to the jury and share some of that legal certainty with the rest of us? Stay tuned.

© 2015 James Gibson

---

1. And those are just the copyright issues; we have not even touched on the patent infringement allegations in the case.