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Google's New Monopoly?

How the Company Could Gain by Paying Millions in Copyright Fees

Last week, Google settled a controversial copyright case by agreeing to pay tens of millions in licensing fees to authors and publishers, with more to come. At first glance, it looks like this great champion of the free flow of information has caved to copyright interests. But in fact, Google may be better off with a settlement than an outright win. Before the court approves this agreement, then, it must consider the deal's anti-competitive effects.

A little history: In 2002, Google launched a project called Book Search. Its ambitious goal was to make every book in the English language text-searchable, just like Google aims to do — and largely does — with Web pages. The project held great promise; anyone with an Internet connection could be transformed into an armchair researcher, with the world's library at his or her fingertips.

But to realize this goal, Google had to machine-scan the texts of every book it would include. And because scanning is a kind of copying, a question arose: Did Google need a license — or, rather, millions of licenses — from those who own the copyrights to the books?

Google originally maintained that no licenses were needed.

Its argument was based on copyright's fair use doctrine. In essence, Google said:

Yes, there's some copying going on — but our Book Search is a socially valuable service, and finding and paying all those copyright owners would be too burdensome. We'll have to give up the project if we're forced to get permission.

Claims of fair use are common in the Internet age, when unauthorized copying of copyrighted materials happens all the time. Not so common are actual court rulings on such claims. Damages in copyright cases can be frighteningly high, and questions of fair use can be terribly indeterminate. This means that few defendants have the guts to see their fair use claims all the way through; once they get a little skin in the game, they frequently adopt an attitude of "license, don't litigate."

But Google seemed like a copyright owner's worst nightmare: a risk-taking iconoclast with deep pockets, unafraid to litigate licensing issues all the way to the Supreme Court. So the copyright industry held its breath as the controversy played out, wondering if it had met its match.

Viewed in this light, the settlement looks like a setback for Google. In the game of brinksmanship, Google blinked — losing its nerve like so many copyright defendants do. In reality, however, settling probably puts Google in a better position than it would have been if it had won its case in court.

Here's why: Google's concession has made it more difficult for *anyone* to invoke fair use for book searches. The settlement itself is proof that a company can pay licensing fees and still turn a profit. So now no one can convincingly argue that scanning a book requires no license. If Microsoft starts its own book search service and claims fair use, the courts will say, "Hey, Google manages to pay for this sort of thing. What makes you so special?"

By settling the case, Google has made it much more difficult for others to compete with its Book Search service. Of course, Google was already in a dominant position because few companies have the resources to scan all those millions of books. But even fewer have the additional funds needed to pay fees to all those copyright owners. The licenses are essentially a barrier to entry, and it's possible that only Google will be able to surmount that barrier.

Sure, Google now has to share its profits with publishers. But when a company has no competitors, there are plenty of profits to share.

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