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Great Gobs of Google

By: Jim Astrachan

Once I thought that "Google" was an arbitrary word coined by the mathematician, Edward Kasner, meaning the number "1" followed by 100 zeros. That was "googol." Then I came to believe that "Google" was a word used to describe any of the various species of myrrh trees that yield fragrant gums. When a myrrh tree was planted in my yard I learned the correct spelling is "googul."

What is a Google? It might be derivative of the word "gooey", e.g. something that money sticks to. It might be a search engine website whose stock is priced at over \$400 a share and climbing toward \$500 per share. A company whose market capitalization is larger than GM's, but perhaps that's not so meaningful today given GM's finances.

Google is an advertising powerhouse, raking in googols of advertising revenue primarily because it is able to drive web searchers to visit its site where they are exposed to advertisements paid for by advertisers who want top mention. To enhance this money making media machine, Google needs to continue to drive viewers to its site. Hence, the announcement that Google intends to scan books protected and not protected under copyright law and create the greatest library the world has ever imagined. To do this, Google may have to rewrite part of the Copyright Act or win a favorable ruling from the United States Supreme Court.

Google intends to make the non protected, scanned works available in their entirety. Thus, you could download and read Moby Dick. A very valuable service and one that should drive more traffic to Google and in turn drive up ad rates, without a copyright violation because either the scanned work was never protected or having once been, it is now in the public domain.

Scanning of works protected by copyright, on the other hand, has created a huge controversy – one that will end up in the Supreme Court when suits against

Google for infringement are eventually appealed. Google claims its scanning is a fair use, and The Copyright Act allows copying of protected works if for fair use. Fair use often, but not always, is applied to allow use of a copyrighted work for educational purposes, but in this case, the examination will need to drill far deeper. Google, expectedly, asserts that scanning copyrighted works in their entirety is a fair use, and not infringement, in part because without the authors consent it will not make the entire work available. Instead, it will make selected passages available in response to tailored searches. Still, the entire protected work has been copied, albeit electronically. The process is controversial also because Google intends to scan protected works unless the author opts-out. This is like a negative option; Google will scan unless told not to, which is the opposite of how copyright licenses are usually obtained.

Google also claims its copying will be a fair use because of the public benefit derived by assembling the world's greatest library. It also claims it will benefit publishers by highlighting lesser known works and cause sales because Google will provide links (for a fee?) to sellers of those books. And although Google's process will allow copyright holders to opt-out if they notify Google they do not want their works copied, the Copyright Act, does not provide for opt-out; instead, it requires opt-in by issuance of a license.

What is of interest about Google's intent to apply fair use to its wholesale scanning of protected works is the economic efficiency rationale it applies to its efforts to build the world's largest library in part via the unauthorized reproduction of copyrighted works. Copyright, Google claims, must bend through fair use for the public good. We'll see, for two copyright infringement suits have already been filed against Google, the first by the Authors Guild and the other by a group of book publishers.

In addition to the blatant copying intended by Google, publishers are particularly concerned over Google's plans to digitize the works. Digital works, they fret, are too capable of "escape" and once circulating on the Internet capable of destroying the value of the underlying work, an issue that will either be critical or a red herring when the courts take on this matter.

In addition to making snippets of protected works available to searchers, Google also intends to make full pages of certain works available. But these works will be licensed to Google by their authors who may believe that a taste of the appetizer will compel order of the entree.

The lines are drawn and the expert pundits are entrenched. One expert asserts that opt-out is fair because, he says, the cost of contacting each publisher and author is beyond enormous. Besides, he adds, unless an author has been living under a rock, he knows of the controversy and can elect opt-out with relative ease. Others see Google's efforts as a fair use because these acts of copying are nothing more than thumbnails, necessary intermediate steps in creating an index of all of these works for the public

benefit. While there is some legal precedent, at least in the Ninth Circuit, that allows the copying of non-reproducible low resolution photos from which viewers can select for actual license, that precedent might be a little suspect in other appellate circuits, and a wholesale transference of that holding by a district court might lead to a reversal by an appellate court.

All of these arguments are interesting, but here's the thing that I have a hard time shaking off. Google can be viewed as doing all of this, not to help the public – although clearly there is a public benefit – but in order to create valuable content on the backs of authors whose works are protected in order to drive viewers to its site which will, in turn, increase the fees Google can charge advertisers. Reach and frequency, after all, translate into dollars. If you don't believe this, ask Mr. Nielson. Not that a commercial purpose fatally taints a fair use – it does not – but if the call is close when this matter reaches the Supreme Court, this motive may be pivotal.

One thing the pundits should be able to agree to – the proper spelling could be Googol. At least based on its stock price and its financial ability to sustain litigation forever, if necessary.

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