Justin Hughes's Predictions for 2006: Part Two

by Cardozo Law Professor Justin Hughes

Part two of a two-part series. Read part one (predictions 1–4) here.

5. GOOGLE'S AMBITIOUS "GOOGLE PRINT" PROJECT OFFERS THE MOST INTERESTING TEST OF "FAIR USE" IN A VERY LONG TIME

…and you can ignore the digerati who say it's unquestionably a fair use. In truth, it presents a complex and interesting problem.

The controversial part of the program is Google's effort to copy and index the University of Michigan's entire collection *without* getting the permission of authors and publishers. Although it copies the entirety of books for its internal systems, Google says it will only make small snippets of text available to internet users. For people interested in the nooks and crannies of copyright law, the case should force us to confront the relationship between the first and fourth factors of the 17 U.S.C. § 107 "fair use" test. Google defenders say that Google's use will be "transformative" in that it provides a totally different application for the books, but Google critics can reasonably respond that the Supreme Court's understanding of "transformative" has focused on changing the *work*, not changing the work's *use*. The latter is an issue for factor four—exploitation of a work in "potential markets(s)."

But scope back to the broader picture: under "current conditions of life"—including Google's $100 billion capitalization and its vast need for new content to keep that (recently pummeled) stock price up—what would constitute "adequately doing justice" in this case? If I had to bet, I think Google will lose—again, because of the legal system's sense of doing justice. At a basic level, broadcast television, Kazaa, Napster, and Google all share(d) the same

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business model: they attract users with content that is made available free in exchange for the user suffering through some advertising. The difference is that TV networks have always paid for their content. Kazaa and Napster did not pay for their content. To date, Google and other search engines have benefited from people who want their content used (at least in the way search engines use it). They've run out of that—and, addicted to free content, simply need *more*.

If Google loses, it would not be the end of the world. Again, whatever you hear, this is NOT about the future of the Internet. Digitization and search capacity for print works would continue to expand, perhaps with more competition than if Google raced ahead unencumbered by copyright law. If Google wins, the sound bite would be something like "company permitted to copy entirety of all books under copyright law." At that point, how would we explain anything being left to copyright law? That individuals aren't allowed to copy *some* music while a hugely rich corporation is allowed to copy *all* books, *all* music, *all* audiovisual works? We know there are key distinctions, but they would be mighty hard to explain. Strategists on both sides should understand this—so, it's a hugely important case.

In a way, this case ought to settle—unlike the big profile P2P cases in the past few years. Another dynamic about the Google Print case—and a reason for settlement: Google is much less a Capitol Hill and popular press darling it was 12 months ago. Why? Ah, that takes me to two quick predictions outside IP:

6. WE WILL REVISIT AND REVISIT CHINA AND THE INTERNET—WITH GOOGLE, MSN, AND YAHOO IN THE HOT SEAT.

It's no longer about the "Great Firewall of China," which seemed to be pretty much their [ugly] business. Chinese authorities have now co–opted American companies into enforcement (taking down offensive webpages or making them inaccessible/invisible to identifiable PRC users). Beijing has also co–opted American companies into divulgation of data about people, leading to enforcement against individuals—nice way to say prison for dissidents. There's no easy answer: a variation of the problem exists when a western government issues orders to a U.S. company enforcing the country's hate speech laws—in other words, the Chinese problem already has a parallel in *Yahoo! v. La Ligue Contre Le Racisme*, litigated in France and California. The Ninth Circuit recently issued a dodge, in a complex lineup of the 11 judges sitting en banc. For the problem facing American companies, read Judge Ray Fisher's spirited—and thorough—dissent. The whole 99 pages of opinions is here.

Watch for plenty of hearings, reports, legislative proposals, municipal resolutions, and editorials.

7. MORE DETAILS OF NSA ILLEGAL SPYING WILL EMERGE BEFORE CONGRESS FINALLY LEGISLATES AGAINST THE WHITE HOUSE

…but the question remains whether the executive branch gets a slap on the wrists or a substantial rebuke. The ironic part about this is that the NSA spying operation makes it much harder for us to have any sensible position about

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what Yahoo! and MSN should be doing in China. Last week, AT&T would say only that it "abides by all applicable laws, regulations, and statutes… with respect to requests for assistance from governmental authorities." If our security agencies have regularly been asking—and receiving—cooperation on information collection from US telecoms without court supervision, it makes it a touch awkward for us to complain about the Chinese security agencies asking—and receiving—cooperation on information collection from Yahoo! or MSN. Of course, we know there is a difference—we're trying to avert acts of mass violence *against* our citizens and they're trying to avert acts of free expression *by* their citizens.

Justin Hughes teaches intellectual property, Internet law, and international trade courses at Cardozo Law School, Yeshiva University, in New York City and serves as Director of the law school's Intellectual Property Program.

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