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## **[Fair Use, Licensing and Doing Business with Google](#)**

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Today, publishers struggle to safeguard valuable content that can be copied electronically while jockeying for a top position in a coveted Google search. Meanwhile, Google pushes the edges of copyright law and fair use while making search engine optimization an elusive science.

This complicated dance creates opportunity for traditional and new media publishers to adopt a nuanced philosophy about dealing with Google and its ilk. Recent legal wrangling and negotiations involving Google and various publishers may help provide insight into distribution models, co-branding relationships and licensing strategies.

### **Fair Use Versus Copyright**

In April, Agence France Presse (AFP) and Google reached an agreement on a license deal in settlement of AFP's 2005 lawsuit against Google. AFP had sued Google in federal court for copyright infringement based on Google News' unauthorized use of AFP's headlines, story leads and photographs. AFP argued in its complaint that "story headlines and leads are qualitatively the most important aspects of a story and are painstakingly created. They capture the reader's attention and describe what the rest of the article is about." In addition to arguing fair use, Google answered that headlines and story leads cannot be protected by copyright, arguing that story leads and headlines are short, non-creative and factual.

Google also suggested that its various uses were fair uses, particularly its thumbnail indexing of AFP photographs, providing a socially valuable and therefore "transformative" use. Having not been adjudicated, the case's legal issues were not resolved. But taken as a business lesson, the settlement itself may be the most useful take-away.

License and other settlement terms were not disclosed. Cynical commentary about recent Google deals speculates that license deals are thinly disguised acknowledgements of infringement. However, it does not necessarily follow from a settlement that Google paid AFP for use of content, although an ad revenue share seems likely and consistent with terms of prior deals. AFP would have had difficulty proving damages from Google News' use of AFP's content under any scenario. Worse for AFP, its interests are not necessarily consistent with those of its subscribing members, who arguably benefit greatly from AFP's presence on Google News.

### **Deals As Early Tests**

Aggregators and search firms have been busy making lots of deals with potential copyright infringers. Some of the deals, while definitely innovative collaborations, might better be seen as tests of ideas for content sharing. In a deal last year with AP, blog search compiler Technorati reportedly agreed to incorporate AP-linked stories from blogs into AP member sites. AP made a concurrent deal with Topix (a news aggregator controlled by Gannett, Knight Ridder and Tribune Company), under which Topix will direct its search engine traffic to the AP member that contributed a news story, rather than randomly pointing a searcher to sites with re-publication of the original story. In turn, AP will provide Topix with rich-content stories written by AP writers, access to AP Online and AP photos. Various commentators have speculated that AP's deal with Google must feature similar benefits to AP, in particular links to the original AP source member for a given AP story (rather than random links to the myriad wire reprints), thus addressing a long-standing complaint between AP and its members.

Like the AFP deal, Google's deal terms with AP were not disclosed, though speculation and commentary filled the void. An AP story on the deal quoted Jonathan Zittrain, a specialist in Internet governance and regulation at Oxford University, saying, "I would be shocked if Google is paying for the status quo." Zittrain's point seems at least consistent with a more inventive view of content-aggregator relationships. While not exactly conceivable that AP or AFP would simply bow down to the Google juggernaut, it makes sense that the wire services would want to structure deals that make business sense. Zittrain suggested in the AP report that Google may have begun to apply the revenue lens to content creators that it has long used in building its AdSense business. According to a Bear, Stearns report, in 2006 Google shared \$3.3 billion of its more than \$10 billion ad network gross revenues with its enormous network of partner sites hosting Google AdSense text ads. AFP members (and thus AFP) certainly would benefit from the ability to direct Google search traffic to a source publication's Web site, and the AFP network as a whole would benefit from ad share revenue both on Google search results and in member newspaper Web sites.

### **Content Acquisition**

Much has been written about Google's ambitious books project, with its stated aim of scanning all of the books ever published. Yet it faces serious legal challenges from various industry groups. For a number of years, search engines have argued (as Google did in its AFP defense) that search technology is a socially valuable and therefore "transformative" use of the catalogued content, a fairly ambitious argument under copyright law that justifies a use as fair use. This was Arriba-Soft's successful argument in *Kelly v. Arriba-Soft*, 336 F.3d 811 (9th Cir. 2003), a dispute over a search engine's thumbnail indexing of a photographer's portfolio. The court in *Arriba-Soft* accepted the search firm's defense that search serves a socially valuable public purpose by organizing and accessing data from massive, innumerable and otherwise inaccessible sources.

For all its vaunted technological and market advantages, Google does not create content. And Google relies on much more than legal parsing to make its case to publishers. Google suggests that its books project grows the market for book publishers. Or in many cases, that it makes the market for a given title, linking book search results to Amazon and other online book retailers and piggybacking on Amazon's impact on the book distribution business. This argument seems plausible for an industry issuing 175,000 new titles every year.

"Google is now the gatekeeper. They are reaching an audience that we as publishers and authors are not reaching. It makes perfect sense to use the specifications of a search engine as a tool for selling books," says Laurence Kirschbaum, a literary agent and former book publishing executive, in a February *New Yorker* story called "Google's Moon

Shot."

The pro-aggregation argument is this: Far from cannibalizing readership, relationships with the aggregators and search engines directly benefit content creators; or can directly benefit them, if done right; by driving a larger overall audience to the original source of the content. That in turn supports source site advertising metrics. Making the source site an attractive destination at which to arrive presumably builds the core audience for the source site as, ultimately, a first-stop destination in and of itself.

That at least is the business argument offered by aggregators to legally buttress their uses as fair uses, but respected commentators have made the same point. Scott Karp of Publishing 2.0 and Folio's Digital Media Blog lauded the efforts of the New York Times last June in embracing content aggregators through effective search optimization techniques. Karp also favorably noted the Times' major push on its own site for subject aggregation, including prominent placement of third-party links on topics of interest. This argument suggests that not only does this open-source embrace of search and aggregation drive publishers' Web audience, but it also builds publishers' long-term readership as first-stop destinations. That in turn has a positive effect on conversions for online and print subscriptions, a point that Karp and others quantify.

Wire services as content wholesalers benefit mainly from building their own closed networks (i.e., publisher-member subscriptions), and benefit little from traffic driven to their Web sites. Search engines and aggregators genuinely threaten this closed-end business model where network members find they are paying for content that is widely and freely available on aggregator news sites like Google News and Yahoo News. Google and its competitors are certainly cognizant of this, but also increasingly sensitive to it. Driving traffic to an AFP member newspaper is meaningful only where that member newspaper was the source of the content in the first place.

### **Controlling Markets**

Publishers' concerns today with fair use have more to do with controlling the next markets for their content. The founders of the social networking site Facebook reportedly refused a \$1 billion buyout from Yahoo because, so they claim, the offer undervalued the franchise by viewing it as content rather than communication. In 2005, the New York Times forecasted that the Supreme Court's then-pending Grokster peer-to-peer technology decision would entrench a "permanent war" between technology and content creators, where "the court[s] can do little to alter the spread of technology or the interests of copyright owners to protect their material." As the Grokster case turned out, the Supreme Court's fair-use decision seemingly divided the technology world into active infringement enablers and passive conduits; a distinction that technology is constantly collapsing. Mark Zuckerberg of Facebook argues more optimistically and ambitiously (and Google would seem to concur) that his company is fundamentally altering the way people communicate and, with it, the business of communication; not re-purposing content. This view would seem to challenge the notion of any "war" between technology and content creators.

Fair use in digital media gets subsumed into a complex series of business decisions; and guesses; about how content creators see the market developing for their content and advertising. In simple terms, what the content deals seem to have in common is publishers' recognition of the inevitability of content aggregation through search, while some recognition by search engines and aggregators that their interests lie with deals rather than litigation. That may be an inelegant way of conceding the fair use point, but business is business.

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