

Legal Regulation & Education: Doing the Right Thing?

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A wrong focus on “non-commercial” instead of “transformative”? Lessons to be learned for European copyright policy from the Google Books decision and opt-out procedures á la robots

The United States District Court for the Southern District of New York recently in *The Authors Guild, Inc. et al v Google Inc.* found that the Google Books mass scanning of millions of books constituted fair use. Judge Chin in his decision heavily emphasized the benefits and the transformativeness of the Google Books/Library Project. Tellingly in his judgement Chin also turned to the very core of copyright law, i.e. “providing sufficient protection to authors...while at the same time permitting others to utilize protected works to advance the progress of arts and sciences” .

In the absence of a fair use doctrine and not falling under the (fair dealing) exceptions protected by copyright, in Europe the courts in *Meltwater* and *Infopaq* instead focussed on the question transient copying or the commercial nature of the copying instead of considering the transformativeness of the services of the Media Monitoring Organisations. In this paper the author will argue that

- 1.) the copyright impediments to datamining are significantly higher in the EU/UK than in the US
- 2.) there are therefore lessons for European/UK copyright reforms to be learned from the arguments raised in the Google Books decision, the Digital Humanities amicus brief in the ongoing HathiTrust proceedings as to why Google Books was transformative and what kind of benefits it provided.
- 3.) to remedy the higher copyright impediments to data mining, as suggested by the Hargreaves report , at EU level an exception to support text mining and data analytics for not only for non-commercial but also commercial use should be promoted .
- 4) as a further remedy EU copyright exceptions/the UK fair dealing concept should be expanded into the direction of the US fair use doctrine, without importing fair use “wholesale” into the EU/UK copyright system .
- 4.) in this aforementioned expanded concept into the direction of fair use the notion of transformativeness should play an important role
- 5.) as argued by copyright scholars such as Matthew Sag , an opt-out principle has long been established and proved highly workable in the context of the internet with the method/file of robots.txt which specifies an access policy for robots/search engines and therefore should be incorporated into according copyright exceptions for datamining.

The paper will look into the status quo of the according UK copyright rules, such as the CDPA 1988, The Copyright and Rights in Databases Regulations 1997, the UK copyright

reforms coming into effect on 6 April 2014 and compare those with the relevant American copyright legislation and jurisdiction. It will also look into what has been proposed in the Gowers and the Hargreaves Review and in how far this has been implemented in the exception to conduct data analysis coming into force on April 2013. The paper will also discuss the European copyright framework for datamining such as the InfoSoc Directive, the European database directive and the current 'Licenses for Europe' Stakeholder Dialogue. This will be contrasted with the legal situation in the US. Additionally, the paper will deliberate the risks of open norms such as embodied by the fair use doctrine and present alternative semi-open exceptions such as suggested in the European Copyright Code .

The importance of related intellectual property treaties will be considered such as the Berne Convention (especially the three-step test).

The paper will also discuss the arguments of authors who question the traditional focus on copying as the "barometer" of (copyright related) illegality .