Standing Copyright Law on its Head?
The Googlization of Everything and the Many Faces of Property

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Abstract

Google's Print Library Project, which is intended to make the text of numerous books searchable online, has sparked a heated public debate accompanied by two copyright infringement lawsuits. While many argue related infringement and fair-use issues, a relatively neglected aspect of the controversy is the opt-out question. Google's claim that it allows the owners of copyright in books to opt-out from the project, was summarily dismissed as "standing copyright law on it head." Copyright and property law in general, it was argued, create opt-in regimes: an interloper can never avoid liability for an infringing activity by allowing the owner to opt-out. The interloper can only avoid liability if the owner "opts-in" and grants her permission. This paper challenges this universal assertion.

In this paper I bracket the question of whether Google's activities constitute copyright infringement. Instead, I use the Google Print Library case in order to examine the role of opt-out arrangements in copyright law in general, and in the context of digital libraries in particular. I argue that the choice between opt-in and opt-out is always a context-specific policy determination and that the digital-library context makes a compelling case for an opt-out regime. The argument is threefold.

First, I refute the misconception that property rights or copyrights always have a universal and necessary opt-in structure. Property has no nature. Rights can be structured in different ways. Sometimes the optimal structure involves opt-out arrangements and there are numerous examples in which property and copyright law has adopted such mechanisms. Drawing on familiar building-blocks of property theory, I elaborate an analytic framework for analyzing the major choices and options with which property law is confronted in specific contexts.

Secondly, I apply the analytic framework to the increasingly important case of digital libraries. Digital libraries are collections of digitized content that offer great promise for the accessibility and usability of information in our society. Whether the promise of digital libraries will be realized depends, to a large extent, on the laws that shape this social-technological field. There are two sets of reasons that make an opt-out structure preferable for governing the intersection of copyright and digital libraries. From a utilitarian perspective, considerations of transaction-cost point in this direction. Given the typical structure of the market, information asymmetries and the background rules of copyright that structure the bargaining environment, an opt-out regime is likely to minimize the cost generated by related transaction and by the possible frustration of efficient bargains. Going beyond narrow economic considerations, from the point of view of distributive-justice and participatory-democratic values, broadly-accessible digital libraries offer a vast new potential. An opt-out structure is a straightforward mechanism

for facilitating the flourishing of digital libraries and for realizing their social promise, at a relatively modest cost to copyright owners.

Thirdly, I explore the best way for implementing an opt-out legal framework in the context of digital libraries. I examine two main options: incorporation under the existing fair use doctrine, and a special statutory-administrative safe-haven. Comparing the relative advantages and drawbacks of these alternatives I suggest that the optimal arrangement is a hybrid that combines both. I conclude that opt-out, rather than standing copyright law on its head, is a common and useful mechanism. If properly applied, in the context of digital libraries, it may be an important instrument in maximizing the vast social promise of these new informational tools.