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Google venture: no violation of copyright or antitrust laws

By Ed Black, president and CEO, Computer & Communications Industry Association - 06/10/09 01:04 PM ET

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Those opposing the legal settlement involving Google's book-search initiative have tried to turn it into a story about a big company with a "monopoly" on books. But a deeper read should lead those with real antitrust concerns to another conclusion.

If upheld, the settlement will require Google to pay fees to continue digitizing books from major libraries and make them available over the Internet. Opponents claim it creates a monopoly. Advocates point to the unprecedented opportunity to harness information and increase human knowledge.

Monopolies do threaten the high-tech industry. As the chief executive of a high-tech trade association I have fought monopolies for over 20 years, including IBM, AT&T, Microsoft, and Intel.

I know what a high-tech monopoly looks like. This isn't one.

This settlement is non-exclusive. And the non-profit "Book Rights Registry" the settlement creates can license works to others to compete with Google.

This increases competition for online book sales, and among books themselves. For instance, books dubbed "orphan" works, because the rights-holder can't be found, are suppressed from the market. No one can publish them because no one knows who owns them, so they currently don't compete with other books.

This settlement enables the sale of orphaned books, which drives down book prices. Critics who say Google will control these orphaned books are misinformed; scanned books naturally remain in libraries throughout the country, and competitors can use them according to copyright law.

If anything, those looking for the antitrust implications should search the

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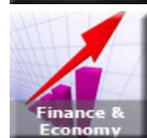
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underlying monopoly power the Copyright Act gives authors. In legitimizing VCRs, the Supreme Court said the government gives authors monopolies to encourage creativity. This intellectual property quid pro quo was never without controversy. Even Thomas Jefferson, our first patent commissioner, questioned the wisdom of intellectual property “monopolies.” I question whether this power was ever meant to enable Depression-era authors to prohibit the indexing of their work from beyond the grave.

Although Google properly maintains indexing books is fair use, incessant rights-holder saber-rattling and extraordinarily high punitive damages under copyright law deters all but the boldest from scanning and indexing books. Indeed, what keeps competition out of the market for book-search is not Google, but rights-holders who claim indexing is infringement.

The solution here is to reaffirm what copyright scholars and courts have already said: Indexing a body of work for searchability is valuable and must be permitted by copyright’s fair use doctrine. The government’s role should be to clarify that fair use applies not just to indexing websites, but books. Then, those holding back due to legal uncertainty can get into the business. When this happens, any monopoly fears — real or imagined — would evaporate.

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