

THE GOOGLE DIGITAL LIBRARY

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Presented May 8, 2006

MIPLA Stampede

Merchant & Gould

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The Ancient Library Alexandria

- founded by Ptolemy I, Alexander the Great's successor, around 300 BC;
- mandate to acquire every scroll of its time;
- contained over 500,000 books and scrolls; and
- supposedly destroyed by Julius Caesar in 48 BC.

Google's Digital Library

Two parts of the program:

- A. Google's Books Partner Program
- B. Google's Books Library Project

Google's Books Partner Program

1. Un-copyrighted works; and
2. Copyrighted works submitted by "owners"
 - ◆ "owner": controls the copyright
 - ◆ owners submit pages for re-publication
 - ◆ links to purchase books

Google's Books Library Project

1. Digitize the library collections from Harvard, Stanford, Oxford, Michigan, and the New York Public Library;
2. Within 10 years and including 15-30 million volumes; estimated cost: \$500-\$750 million;
3. Participating libraries get a digital copy for their own "use"; and
4. Boolean searchable text of each digitized copy, returns a list of books where term is found.

What is Google Book Search?

Allows a search of the full text of every book containing user's search term(s)

- **Copyrighted books**
 - ◆ **Either a "snippet" or a few pages**
 - ◆ **Depends on permission granted by owner**
- **Non-copyrighted books**
 - ◆ **Full text**

In all cases, provides a link to where to buy the book

Snippet View

- **copyrighted material;**
- **no-permission from book owner;**
- **shows information about the book plus a few "snippets";**
- **unknown exactly how big a "snippet" is; and**
- **link to buy book.**

Sample Pages View

- **Copyrighted material that the owner has given Google permission to print some pages from;**
- **Shows a few pages; and**
- **Shows how to buy or where it can be borrowed.**

View Full Book View

- **No copyright protection**
- **Full text of book available**

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What is the goal of this project?

Per Google: "[M]ake it easier for people to find relevant books – specifically books they wouldn't find any other way such as those that are out of print . . . to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers."

Elements of Copyright Infringement

- ownership of a valid copyright, and
- violation of one of the exclusive rights granted under copyright.

Feist Publishing, Inc. v. Rural Tel. Serv. Co., Inc.,
499 U.S. 340, 361 (1991).

Two Acts Raise Specter of Infringement

- Google's initial digitization of the body of work from Harvard, Oxford, etc.; and
- Google's search engine offering users a "snippet" of a copyrighted work.

The Lawsuits

- *Authors Guild v. Google, Inc.* filed Sept. 10, 2005
 - ◆ the largest society of book authors in the United States
 - ◆ class action suit

- *McGraw-Hill et al v. Google, Inc.* filed Oct. 19, 2005
 - ◆ only seeking injunctive relief
 - ◆ no preliminary injunction sought

Google's Defenses

1. Infringement is *De minimis*;
2. Library exception;
3. Fair Use - 17 U.S.C. § 107; and
4. Google's Opt-Out Proposal.

De Minimis

1. Copying falls below the quantitative threshold of substantial similarity to the copyrighted work;
2. generally found "only if the average audience would not recognize the appropriation";

Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74-77 (2d Cir. 1997)

3. here Google is copying the entirety of works.

Library Exception- 17 USCS § 108

1. Be a single copy;
2. Not be associated with any “direct or indirect commercial advantage”;
3. The reproduction must include a notice of the original copyright; and
4. Made by the library itself, *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991).

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Fair Use- § 107

1. The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

Kelly v. Arriba Soft Corp.

- Arriba Soft Corp used a spider software program to gather pictures on other websites;
- Arriba displayed these pictures on its own website; users could view a thumbnail size of the full-sized work;
- Users could then click on the image and would be directed to the website where the original work was located; and
- Kelly found his pictures being displayed on Arriba's website and sued for copyright infringement.

Fair Use Found

- District Court found Arriba Soft's use of the pictures was a fair use
- Ninth Circuit affirmed. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003)

Purpose and Character of Use

- Use of images was commercial, but was more incidental and less exploitative in nature than more traditional types of commercial use
- Arriba was not using Kelly's images to directly promote its web site nor trying to profit by selling Kelly's images
- Because the use was not highly exploitative, the commercial nature of the use weighed only slightly against a finding of fair use

Use Found to be Transformative

- Transformative nature of the use. Court found Arriba's use of the images did more than merely supplant the object of the originals
- Arriba's use added a further purpose and different character

Nature of the Copyrighted Work

- Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works
- Photographs are meant to be viewed by the public for informative and aesthetic purposes
- The fact that the work is published or unpublished also is a critical element of its nature
- Kelly's images were published and appeared on the internet before Arriba used them

Amount of the Work Used

- Wholesale copying does not preclude fair use but copying an entire work militates against a finding of fair use
- However the extent of permissible copying varies with the purpose and character of the use
- The court found that this factor favored Arriba over Kelly

Effect Upon the Potential Market

- Transformative work is less likely to have an adverse impact of the market of the original work
- Arriba's search engine would guide users to Kelly's website rather than away from it
- Thumbnails would not be a substitute for the full-sized images because the thumbnails lose their character when enlarged

Perfect 10 v. Google, Inc.

- How does this case compare to *Kelly v. Arriba Soft*?
 - Google displays copyrighted image
 - Google's use of the copyrighted images is commercial as Google profits from ads displayed on web pages
 - Google displays thumbnail of image
 - Significant difference: thumbnail images of Perfect 10 were not transformative but rather consumptive

Perfect 10 v. Google *continued*

- Perfect 10 has a monetary market for its thumbnail images, i.e. as display on cell phones
- Google's displayed thumbnail images could be used instead of the images offered by Perfect 10
- Injunction granted

Google's Opt-Out Proposal

- ***Authors: What if I don't want my book scanned as a part of the Library Project?***
 - Authors must tell Google which books to avoid when scanning
 - Google will verify that individual is indeed the owner of that particular book

Opt-Out is a New Theory

- Shifts the responsibility for preventing infringement to the owner instead of the user
- Cost Prohibitive for Google to contact each and every owner
- There is no current registry of copyright owners like there is in other industries such as ASCAP for the music industry