

UMUC's Center for Intellectual Property

Mass Digitization

*and copyright law,
policy and practice*

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Overview Congress Markets B Models Fair Use Google Books

Overview 1/3

Last [summer - June, 2007], at the International Creative Commons Summit in Dubrovnik, Croatia, Lawrence Lessig made a stunning announcement: he is [retiring] from copyfighting [to] take up a new career, fighting for a new issue. He's going to stay involved with Creative Commons as its CEO, but from now on, he's working to fry a bigger fish: the corruption that leads countries to make bad copyright laws and other regulations, even when they know that the laws are bad for their society

-- [Doctorow](#), 2007

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Overview 2/3

- *Forget Congress*
- *Watch the markets*
- *How-to: Business models*
- *Fair use*
- *Google Book Search*

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Overview	Congress	Markets	B Models	Fair Use	Google Books
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Overview 3/3

- Consumer resistance
 - Mass digitization projects
 - Enormous mass of freely available online content
 - Openness and convenience win
 - » The copyright sidestep: law steps aside or we sidestep law

Overview	Congress	Markets	B Models	Fair Use	Google Books
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Forget Congress

- DMCA
- Sonny Bono Copyright Term Extension Act
- TEACH Act

- Exception: NIH OA Mandate

- Orphan Works
- Section 108

Overview	Congress	Markets	B Models	Fair Use	Google Books
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Markets 1/5

- *So, what's happening in the vacuum?*
 - Normalizing demand for legitimate online entertainment
 - Creative Commons repudiates overly broad scope of protection
 - Orphan Works copyright evidence bases let us create and share knowledge about copyright status and ownership

Overview	Congress	Markets	B Models	Fair Use	Google Books
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Markets 2/5

- *Normalizing demand for legitimate online entertainment and literature*
 - Steve Jobs
 - Television
 - Films/videos
 - News
 - E- books
 - OA scholarly literature

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Overview	Congress	Markets	B Models	Fair Use	Google Books
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Markets 3/5

- *Creative Commons*
 - Music, images, educational materials
 - Minjeong Kim's study of how copyright owners use CC licenses

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Overview	Congress	Markets	B Models	Fair Use	Google Books
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Markets 4/5

- *Orphan works bills*
 - Don't hold your breath
- *Constructing the copyright evidence base*
 - OCLC
 - Google
 - Universities and libraries
 - Library of Congress
 - Collective rights organizations (CCC, for example)

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Markets 5/5

- *LC Flickr project*
 - Why these photos? ... they have no known restrictions on publication or distribution...
 - If you are providing additional information, it is helpful if you can also supply information about *how* you know what you know about the image...

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Business models 1/9

- *Looking back*
 - Lehman; Peters
- *Looking forward*
 - Rogers - Yahoo! Music - No more DRM; Convenience wins
 - Jobs - Thoughts on music
 - Kelly - Better than free
 - Anderson - Free
 - Masnick - Techdirt - 'Other things the infinite good makes more valuable'

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Overview Congress Markets **B Models** Fair Use Google Books

Business models 2/9

- *Bruce Lehman, 2007*
 - Clinton administration policies didn't work out very well
 - Attempts at copyright control have not been successful
 - We're entering a "post- copyright" era
- *Mary Beth Peters, 2005*
 - Congress made a mistake in extending the term of copyright in 1998

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Business models 3/9

- *Ian Rogers, Yahoo! Music's General Manager*
 - Speaking to a group of music industry representatives in October 2007, completely rejected DRM.
 - Convenience wins!

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Business models 4/9

- *Steve Jobs - Thoughts on Music, 2007*
 - Why would the big four music companies agree to let Apple and others distribute their music without using DRM systems to protect it? The simplest answer is because DRMs haven't worked, and may never work, to halt music piracy.

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Business models 5/9

- *Kevin Kelly, Better than free, 2008*
 - When copies are super abundant, they become worthless.
 - When copies are super abundant, stuff which can't be copied becomes scarce and valuable.
 - When copies are free, you need to sell things which can not be copied.

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Business models 6/9

- *Kevin Kelly, Better than free, 2008*
 - Trust
 - Immediacy
 - Personalization
 - Interpretation: software free; manual \$10K
 - Authenticity
 - Accessibility: get it anywhere, anytime, on any device (subscribe)
 - Patronage
 - Findability: millions of books, most of it free, being found is valuable

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Business models 7/9

- *Chris Anderson*
 - The Web is all about scale.... It's not about the cost of the equipment in the racks at the data center; it's about what that equipment can do. And every year, like some sort of magic clockwork, it does more and more for less and less, bringing the marginal costs of technology in the units that we individuals consume closer to zero.

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Business models 8/9

- *Mike Masnick, Founder of Techdirt*
 - The basic concept is simply that the traditional economics of supply and demand don't disappear when you have a product that is infinitely available. [W]hen a product is infinitely available, ... the price is going to get driven to zero. The trick then is *recognizing what other things that infinite good makes more valuable.*

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Business models 9/9

- *Impose a charge*
 - *Erect barriers of time, effort and expense*
 - *And inconvenience*
- *Compete with tons of free legal stuff*
- *If you want attention*
 - *Don't make it hard for people to give it to you*

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Fair use 1/4

- *The search engine cases transform transformative fair use*
 - *Kelly v Arriba Soft*
 - *Field v Google*
 - *Perfect 10 v Google & Amazon*

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Fair use 2/4

- *First factor: transformative use*
- *Second and third factors:*
 - *nah, just skip these*
- *Fourth factor: weigh potential harm to plaintiff against social benefit of search*
- *Outcome: So far search bats a 1000*

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Fair use 3/4

- *Courts have found that*
 - Thumbnails are fair use
 - Caching is fair use
 - Social benefit of search outweighs market harms so far
 - What kind of market harm would it take to outweigh the social benefit of search?

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Fair use 4/4

- *Perfect 10 v Google & Amazon is poised to further refine the law of secondary liability for infringement*
 - What does 512 (ISP liability limitations) require of a search engine whose results link to infringing copies?

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Google Book Search 1/4

- *Stepping up the pressure to put full-text online*
- *Stepping up the pressure on copyright law*
 - Supreme Court: go for it
 - Supreme Court: not so fast, big boy
 - Litigants can still settle
- *Either way, GBS changes the publishing industry forever*

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Google Book Search 2/4

- *Stepping up the pressure to put full-text online*
 - *We don't have a lot of tolerance for exceptions to the rule on the Internet, that search results yield [clickable links](#)*

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Google Book Search 3/4

- *Stepping up the pressure on copyright law*
 - Supreme Court: go for it
 - Supreme Court: stop right there
 - Litigants settle

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Google Book Search 4/4

- *Either way, GBS changes the publishing industry forever*

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Conclusion

- *Mass digitization's effect on copyright practice*
 - Facing down fear

Now what is scary is not getting seen, watched or listened to
- *Mass digitization's effect on copyright law*
 - Giving in to fear
 - Just as content that isn't online won't exist, maybe laws that don't "make it" in the reality of the digital world won't exist either

· **But watch out for term extension: 2017**

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Epilog

- So, [MS Live Search Books dies](#)
 - Termination was a **strategic** decision
 - Implications for our reliance on commercial partners to help libraries provide public benefit
- Implications for information policy
 - Is public policy in good hands when Congress entrusts it to stakeholders?

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