

Conferences/Copyrights

Three Years Later, Google Book Search, Mass Digitization, Continue to Spark Debate

Three years after search engine giant Google Inc. announced its plans to launch its groundbreaking Google Book Search project, questions about whether the law or the marketplace should be a central force in determining copyright policy remain ripe.

Still, technological and market-driven changes offer an alluring prospect for dictating how copyright policies should evolve in an era of mass digitization, user-generated content and collaborative works, most panelists concluded at the end of a three-day conference hosted by the Center for Intellectual Property at the University of Maryland University College Campus, Adelphi, Md., May 28-30.

Google Book Search. Georgia Harper, scholarly communications advisor at the University of Texas at Austin Libraries, kicked off the event by discussing the impact of copyright law on the most controversial card catalog ever to exist: Google's Book Search.

In 2004, Google announced that it had entered into agreements with five large libraries to digitize their collections and make the resulting database searchable over the Internet under its Google Print for Libraries project (70 PTCJ 109, 6/3/05). Google later renamed the project Google Book Search in 2005 (71 PTCJ 157, 12/9/05).

Harper, who currently holds the title of "visiting virtual IP scholar" at UMUC, said that mass digitization efforts such as Google Book Search have done a great deal towards forcing content owners to shift from limited single-source, provider-dictated distribution models, to models that favor ready and instant access to content.

Currently, Google has teamed up with 19 libraries, and has enlisted the support of more than 10,000 publishing partners for its Book Search program, including Random House, Hyperion Books, HarperCollins Publishers and the Penguin Group.

With the recent addition of Random House, Google has now signed up every major publisher in the United States, and is currently focused on adding foreign publishers, she said. "This is good for Google, good for readers, and may be good for publishers," she added.

To Harper, Google's influence over the publishing industry represents proof that future copyright policy will be dictated not by courts or Congress, but by the market itself. Unlike Congress, the market offers a livelier place to experiment with new copyright policies, she said. Moreover, marketplace solutions, unlike legislative ones, are seldom set in stone.

Still, we should avoid looking only at the market for our cure, Harper said, because relying on markets to "architect copyright law will have its risks too." As an example, she cited Microsoft Corp.'s recent announcement, May 23, that it would cease supporting its Live Search Books project. The company pulled the project, which was set to launch in June, after it announced in a blog post that it did not foresee a sustainable business model for the service (76 PTCJ 184, 6/6/08).

Harper also maintained that in some cases, the courts may in fact offer the best means for change. For example, two cases filed in 2005 by authors and publishers against the search company may offer a powerful way to define fair use rights, she said, referring to *Authors Guild v. Google Inc.*, S.D.N.Y., No. 05 CV 8136, filed 9/20/05 (70 PTCJ 571, 9/23/05) and *McGraw-Hill Cos. v. Google Inc.*, S.D.N.Y., No. 05 CV 8881, filed 10/19/05 (70 PTCJ 684, 10/21/05).

The suits against Google represent a "powerful way to change [copyright] case law," Harper asserted. On one hand, if the courts define Google's use as fair, "it will end the ambiguity around search" and let Google lift millions of orphaned works out of obscurity, she explained. But, if the courts conclude that fair use does not include an "indexing right," as the copyright holders have argued, publishers and authors will be vindicated, and Google would be required to negotiate individual licenses.

In 2005, the Authors Guild and a group of authors sued Google, challenging its unauthorized scanning and copying of their works for the Google Library program. Google responded by challenging the guild's standing, and asserting the affirmative defenses of fair use and free speech (71 PTCJ 191, 12/16/05).

In a separate action, McGraw-Hill and other publishing houses complained that copyright owners are under no duty to self-identify which among their works they do not want infringed as part of Google's "opt out" policy.

Orphan Works: A Librarian's Response. William Carney, a content manager for the Dublin, Ohio-based Online Computer Library Center Inc., agreed with Harper's conclusions, especially her support for market-based approaches that favor "cooperatively created and maintained copyright knowledge bases."

One question in urgent need of an answer is what to do with so-called orphan works, or works whose copyright owners cannot be identified. Fortunately, librarians represent a phenomenal resource for tackling this problem, Carney said.

Long before there was even talk of a legislative fix, librarians had been hard at work conducting copyright status investigations as part of their own online digitization efforts, particularly for copyright's "low hanging fruit," Carney said, referring to works published prior to 1923. As such, he said, "[t]he library community has the resources to perform the reasonably diligent search requirements" that are required in a pair of orphan works bills (H.R. 5889 and S. 2913 currently pending in the House and Senate) (76 PTCJ 7, 5/2/08).

To assist member libraries in their ongoing digitization efforts, Carney's OCLC began working on a project that will allow libraries "and other interested parties" to share the results of their copyright status investigations with others. The project, which is expected to launch in July, will consist of a centralized database built on existing information maintained by OCLC and its member libraries through its WorldCat service.

Carney explained that as librarians conduct future copyright status investigations, this information will be added to the existing WorldCat database to form a "Master Copyright Evidence Record," for each individual work searched. This information would be available in a "dynamically-generated view" in order to display what the public knows. However, Carney cautioned that the registry was not designed to provide legal conclusions on the status of a work.

Currently WorldCat contains over 106 million bibliographic records representing more than 1 billion individual items held by libraries and institutions around the world.

Are 'Creation Costs' Being Ignored? Patrick Ross, executive director of the Copyright Alliance, inquired whether authorship costs and artist rights were being ignored in the current rush to digitize.

Although Ross agreed that it is important to encourage authors to promote their works and make them accessible to the public, he stressed that "you're not going to encourage anything by taking [an author's] rights away."

Ross criticized programs like Google Book Search for assuming that just because digitization costs are negligible, the same calculation applies to the fixed costs of creation, including the author's sweat equity.

Still, Ross agreed that there is merit in having content creators do more to make the job of copyright identification and licensing easier. To that end, Ross praised the flurry of new licensing business models that have arrived on the scene, including the Creative Commons license. If there is a problem in the market, "it hasn't been solved because it hasn't been recognized, not because it can't be solved," he said.

Are New Technologies Dismantling Copyright? Mary Madden, a senior research specialist for the Pew Internet and American Life Project, said that with the technological sea change currently underway, it may be time to reconsider whether copyright, exclusivity, and ownership still remain viable concerns.

"We see that the Internet is permeating every aspect of our lives," Madden said. With cell phone ownership rising to 80 percent of the American population, and broadband access reaching upwards of 55 percent, both Internet access, and the very nature of the Net itself, have changed from being "slow and stationary to fast and mobile," she said.

Similarly, as the youth of America continue to plug in and interact, they are also changing the face of content, and how we view it, she said. Instead of being a passive audience, users are increasingly becoming active and participatory. And because much of the new "user-generated" creation is shared and collaborative, questions of exclusive ownership are routinely becoming a "backseat issue," for better or worse, she admitted.

Practically speaking, this "coming wave of young content creators . . . will inevitably force us to change the way we think about this content-creating public," Madden said.

Pat Aufderheide, professor and director of American University's Center for Social Media agreed. New technology, and particularly tools that allow users to construct a "participatory culture," are forcing a radical reevaluation of what copyright law is and should be, including a much-needed reassessment of the necessity—and normalcy—of fair use, she said. "Fair use is not a fringe behavior," she said.

But right now, this technological, legal and social upheaval represents "a wild, sloppy, messy spot of creation." Until new business models get established that can handle this sloppiness, both users and content will remain hostage to the whims of the market, she complained. And whether this upheaval ushers in new creative works and ideas, or instead provides a "stifling safety net for existing business models," remains the defining question for the next coming years, she said.

By Carey Lening