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Evolution in Slow Motion: Opting Into a Digital World

by

KRISTIN RICHARDS*

I. Introduction

Google, one of the most popular search engines in the world, derives its name from the mathematical term “Googol,” which means a number one followed by one hundred zeros.1 The company states that its play on the term “reflects the company’s mission to organize the immense amount of information available on the web.”2 As Google has grown, its mission has expanded to include what the company calls “Google Book Search,” which includes both a “Partner Program” and the “Library Project.”3 The Partner Program allows

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2. Id.
publishers to either send books to Google directly, upload books as PDF files, or have them scanned at a library. When an individual types in search terms that relate to one of the books, he or she can click on a link that will allow a limited number of sample pages from the book to be seen, and there will also be a “Buy this Book” link to an online retailer.

The Library Project is far more controversial, and allows users to view information about, and “snippets” from, books that have been scanned from library collections. The snippets are sentences relevant to the search term a user initially entered. If the book is no longer protected by copyright, the entire contents of it can be viewed, and if the publisher or author has given permission, sample pages can be viewed. Users will always see a link for the option to buy the book at an online store. While Google claims that they wish to “carefully respect authors’ and publishers’ copyrights,” numerous authors and publishing companies disagree.

On September 20, 2005, The Author’s Guild, along with individual plaintiffs, filed a class action lawsuit against Google for copyright infringement. The complaint alleges that Google is reproducing digitized copies of the plaintiffs’ and class’s works without their authorization, and that such acts will cause irreparable harm. On October 19, 2005, a similar suit was filed against Google on behalf of five major publisher members of the Association of American Publishers: The McGraw-Hill Companies, Pearson Education, Penguin Group (USA), Simon and Schuster, and John Wiley & Sons. Both lawsuits focus on the scanning of collections

5. See id.
7. See id.
8. Id.
9. Id.
from the University Library at the University of Michigan.\textsuperscript{14} Google gave publishers a November, 2005, deadline to provide Google with a list containing each book protected by copyright that publishers did not wish to have copied as part of the Library Project.\textsuperscript{15} The publishers' response to this request was that it is contrary to the requirements of the Copyright Act, and that the burden should be on Google to obtain permission from copyright owners to either use the copyrighted books or exclude them from the Project.\textsuperscript{16}

Part II of this note will provide background about Google, the claims of the plaintiffs in each lawsuit, and a brief overview of the purpose of Copyright Law. Part III focuses on specific provisions of The Copyright Act of 1976 and provides a fair use analysis in light of two recent court decisions in 2003. Part IV sets forth proposals for a resolution of the relevant disputes, and Part V summarizes the difficult decisions courts must make in the face of rapidly evolving technology.

\section{II. Background}

\subsection{A. More About Google}

Google is a publicly traded corporation that derives 98 percent of its revenue from advertising.\textsuperscript{17} To promote their products and services, advertisers can use the "Google AdWords" program, which provides targeted advertising based on search engine topic criteria.\textsuperscript{18} When an individual types in a particular word or phrase to be searched, a series of "sponsored links" appear which relate to that word or phrase, and the individual can click on one or more links if he or she desires.\textsuperscript{19} An advertiser pays Google each time a user clicks on that advertiser's particular link. Google has made billions of dollars in

\begin{footnotesize}
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\item See id.
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profits from this program.\textsuperscript{20} As Google continues to add new services, such as the Library Project, more users will likely be drawn to the site, potentially increasing advertising revenues.

Google claims that the ultimate goal of the Library Project is to “work with publishers and libraries to create a comprehensive, searchable, virtual catalog of all books in all languages that helps users discover new books and helps publishers discover new readers.”\textsuperscript{21} Works from various libraries throughout the world, including Harvard, Stanford, Oxford, the University of Michigan, and the New York Public Library, will be included in the project, which has the potential to draw large numbers of people to Google’s site to search for either all or part of the text of various books.\textsuperscript{22} Google claims that it is not violating any laws, but critics of the Project dispute this assertion.\textsuperscript{23}

B. Specific Claims of the Plaintiffs in Each Lawsuit

The lawsuit brought by the Author’s Guild and published authors (Author Plaintiffs) against Google states that the Author Plaintiffs have and will continue to suffer damages and irreparable injury from continued copyright infringement and new and further infringements.\textsuperscript{24} The Author Plaintiffs also claim there will be a depreciation in the value of their works, a decrease in their ability to license those works, and the potential for lost profits and/or opportunities.\textsuperscript{25} Moreover, the Author Plaintiffs claim that their goodwill and reputation will be damaged, and ask for statutory and actual damages, as well as injunctive relief.\textsuperscript{26}


\textsuperscript{21} Google Books Library Project, supra note 6.


\textsuperscript{24} Class Action Complaint, Author’s Guild v. Google, Inc., at 10, Civil Action No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005).

\textsuperscript{25} Id.

\textsuperscript{26} Class Action Complaint, Author’s Guild v. Google, Inc., at 10, 13, Civil Action No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005).
The five major publisher members of the Association of American Publishers (Publisher Plaintiffs) make similar claims in their lawsuit against Google.\textsuperscript{27} The Publisher Plaintiffs note that, in consideration for receiving books from the University of Michigan for scanning, Google will give a digital copy of each book that it scans to the University.\textsuperscript{28} While this is beneficial to patrons who use the University's library and useful in terms of preserving paper materials for generations to come, it is a small "price" to pay when Google will be able to use the digital copies it has made to gain millions of advertising dollars. Moreover, individuals are less likely to travel to the University of Michigan Library if they can simply go online to retrieve the same materials found in the library. While the publishers involved in the lawsuit actually support making books available in digital form, they want Google to receive permission from copyright holders before making any copies.\textsuperscript{29} Publishers typically receive royalties or licensing fees in exchange for allowing a party to copy a work. Through this program, Google is both depriving publishers of such opportunities and violating copyright law.\textsuperscript{30}

C. Purpose of Copyright Law

Article 1, section 8, clause 8 of the Constitution creates the Federal Government's right to legislate regarding copyrights and patents, and states that, "Congress shall have the Power...To Promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."\textsuperscript{31} This clause promotes the creation and dissemination of knowledge to enhance public welfare through an economic incentive. A monopoly right is given for a limited period of time, and the author is the direct beneficiary of this right. If authors were not given exclusive rights to their works, any individual could copy a work and prevent the original author from deriving any potential gain and taking appropriate credit for his or

\textsuperscript{28} Id. at 2.
\textsuperscript{29} See id. at 3.
\textsuperscript{31} U.S.\textit{CONST.} art. I, § 8, cl. 8.
her efforts. This would stifle creativity and innovation, and the “Progress of the Arts” would be severely curtailed.32

III. Analysis

A. Copyright Law Basics

Two fundamental prerequisites of copyright protection are originality and fixation.33 Section 102(a) of the Copyright Act of 1976 (hereinafter “the Act”) sets forth that “copyright protection subsists... in original works of authorship that are fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”34 Section 101 of the Act further explains that for a work to qualify as fixed in a tangible medium of expression, it must be embodied in a copy that is sufficiently permanent or stable to permit the work to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.35 The works which Google has copied, and continues to copy, qualify for copyright protection because they are original creative works written by authors and are fixed on paper in books.

Section 106 of the Act enumerates five exclusive rights of copyright ownership: the right to reproduce and adapt a copyrighted work, and the right to distribute, perform, and display it publicly.36 The Section 106(2) adaptation right gives the copyright owner the exclusive right to prepare derivative works based on the copyrighted work.37

B. Section 107: Fair Use

Section 107 of the Copyright Act of 1976 sets forth an exception to the exclusive rights in Section 106.38 If the use of a work is deemed to be “fair use,” there is no copyright infringement.39 Therefore, if a court finds that Google’s actions constitute fair use of the author’s and publisher’s materials, Google will be free to proceed with its

32. Id.
34. Id.
35. Id. at § 101 (2006).
36. Id. at § 196 (2006).
37. Id. at § 106(2) (2006).
mass-scale copying plans. To determine whether the use of a work is a fair use, four factors are considered:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The 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.40

These four factors are evaluated here in light of an opinion by the U.S. Court of Appeals for the Third Circuit in Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., and an opinion by the U.S. Court of Appeals for the Ninth Circuit in Kelly v. Arriba Soft Corporation.41 Each of the four factors is “to be explored, and the results weighed together, in light of the purposes of copyright.”42

C. Fair Use and the Kelly v. Arriba Soft Decision

In Kelly v. Arriba Soft Corporation, a professional photographer named Leslie Kelly sued Arriba for copyright infringement.43 Arriba operated a search engine that displayed small versions of the copyrighted photos taken by Kelly, and obtained its database of pictures by copying images from other websites.44 Users could click on the small pictures (“thumbnails”) to see a larger version of those same pictures.45 The district court determined that two of the fair use factors weighed in Arriba’s favor, and on appeal the Ninth Circuit held that Arriba’s use of the photographs was a fair use.46 The facts in the two lawsuits against Google are distinguishable and warrant a different result.

The first factor evaluated in the four part fair use inquiry is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.47 A commercial use, however, does not end the inquiry under this factor, and a court must evaluate whether the new work is transformative,

40. Id.
42. Video Pipeline Inc., 342 F.3d at 198.
43. Kelly, 336 F.3d at 815.
44. Id.
45. Kelly, 336 F.3d at 815.
46. Id.
determining whether it “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” The Ninth Circuit found that the commercial nature of Arriba’s use of Kelly’s images weighed slightly against a finding of fair use, but that the use was transformative because Kelly’s images were intended to engage viewers in an “aesthetic experience” while Arriba’s search engine “functioned as a tool to index and help improve access to images on the Internet.” However, the Ninth Circuit also noted that, “[c]ourts have been reluctant to find fair use when an original work is merely retransmitted in a different medium . . . [where] the resulting use of the copyrighted work [is] the same as the original use.” The court noted that “reproducing music CDs in computer MP3 format does not change the fact that both formats are used for entertainment purposes,” and that “reproducing news footage into a different format does not change the ultimate purpose of informing the public about current affairs.” In another case, the Ninth Circuit previously held that “copying a religious book to create a new book for use by a different church was not transformative. The second church’s use of the book was merely to make use of the same book for another church audience.” The court noted that “where the use is for the same intrinsic purpose [as the copyright holder’s] . . . such use seriously weakens a claimed fair use.”

By copying and indexing millions of books and allowing Internet users to see “snippets” of those books, Google will most likely increase traffic to its website and thereby attract more advertisers who pay for links to their ads to appear when a user runs a search. This will generate enormous amounts of revenue for Google, and it seems fair to say that Google’s use of the books is a commercial use.

The Ninth Circuit stated that Arriba’s use of Kelly’s images was “more incidental and less exploitative in nature than more traditional types of commercial use” because Arriba was “neither using Kelly’s images to directly promote its web site nor trying to profit by selling

48. Kelly, 336 F.3d at 818.
49. Id.
50. Id. at 819 (emphasis added).
51. Id.
52. Id. (discussing Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000)).
53. Kelly, 336 F.3d at 819.
Kelly's images." Here, Google is using the Library Project to help promote itself as a cutting-edge, ever-expanding company that provides more than just the ability to search for ordinary things on the Internet. Google recently released Google Earth, a geographic search tool which offers maps and satellite images for complex or pinpointed regional searches. The company also recently purchased a startup company named Upstartle, which makes an online word processor called "Writely." Writely is a web-based application that lets users compose and edit documents online, then publish them on the Internet. This service is especially useful to business employees who can collaborate online and review various versions of a document. Google's quest to provide users with the ability to search for and provide access to new things draws attention to its search engine, and allows it to attract advertisers who want to reach millions of people with subject-targeted ads. Google is indirectly using the copied works to promote its website and search engine, and touts the Library Project as "making it easier for people to find relevant books," which would not be possible without the copied works. The company is trying to profit by using the copies to attract users and, in turn, attract advertisers. Moreover, Professor John Sutherland wonders why anyone would expect the "biggest, most expensively compiled library in the world to be free." He illuminates the possibility that users may be charged to see any of the copied material. In other words, "you don't pay, you don't see." Peter Givler, Executive Director of the Association of American University Presses, also notes that Google has a patent application pending for such a pay-per-view system. If users are willing to pay to see the material, Google stands to make enormous profits.

When evaluating whether or not Google's use of the works is transformative, it is important to note that Kelly's photographs were

54. Id. at 818.
57. Id.
58. Id.
60. John Sutherland, All the World's Best Books at a Click, TIMESONLINE, December 19, 2004, http://www.timesonline.co.uk/printFriendly/0,,1-525-1408268,00.html.
61. Id.
62. Id.
63. Givler, supra note 30.
already on the Internet and could be seen by users.  

Arriba was making copies of images that had already been digitized and posted on the web by their copyright owners, while in Google's case the copyright owners have not done so. Here, the works that are being copied are found in libraries and are "merely transmitted in a different medium" when they are placed online, whether to be seen in full or as a "snippet." The Ninth Circuit held that the thumbnails did not "supplant the need for the originals," and attorney Jonathan Band states that "neither the full text copies in [Google's] index, nor the few sentences displayed to users in response to queries, will supplant the original books. Rather, they will bring the books to the user's attention." If a user is searching for a particular passage in a book, specific characters or events in a book, or for the book itself, the user is already aware that the book exists. If someone can find what they are searching for in a "snippet," however long that "snippet" might be, then the original copies of the books will be supplanted. For example, if a particular computer game tip is in the snippet, then there is no longer a need to purchase the book that also contains the information. Whether allowing a few sentences or pages of copied works to be shown or entire books for a fee, Google is not making a transformative use because the use is "for the same intrinsic purpose as the copyright holder's"—to disseminate information.

The second factor evaluated is the nature of the copyrighted work. The Ninth Circuit observed that "works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works," and that "published works are more likely to qualify as a fair use." Kelly's images appeared on the Internet before Arriba used them in its search engine, and the court determined that the second factor weighed slightly in favor of Kelly. Here, Google is copying and indexing both creative and fact-based published works. If the number of creative works substantially outweighs the number of fact-based works, it is likely that the second factor will weigh against Google. If, on the other hand, more fact-

64. Kelly v. Ariba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).
65. Id.; supra note 30.
66. Kelly, 336 F.3d at 819.
67. Id. at 820; supra note 15, at 3.
68. Kelly, 336 F.3d at 819.
70. Kelly, 336 F.3d at 820.
71. Id.
based works are being copied than creative works, the second factor may weigh slightly in favor of Google.

The third factor considered is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The Ninth Circuit noted that “copying an entire work militates against a finding of fair use,” and that the “extent of permissible copying varies with the purpose and character of the use. If the secondary user only copies as much as necessary for his or her intended use, then this factor will not weigh against him or her.” The third factor did not weigh for nor against either party in *Kelly*, and the court found that it was necessary for Arriba to copy the entire image so users could recognize it.

Here, Google is copying and indexing entire works. The mere fact that a “snippet” is shown does not bar a court from finding against Google under the third factor. The word “snippet” is defined by Google as meaning “a few sentences of a work,” but there appears to be no restrictions in place that would prevent Google from lengthening the amount of a work that qualifies as a “snippet” in the future. Jonathan Band states that “Google’s copying of entire books into its database is reasonable for the purpose of the effective operation of the search engine; searches of partial text necessarily would lead to incomplete results.” If a search of partial text would “lead to incomplete results,” this means that a user has a good chance of finding exactly the answer he or she is looking for when an entire book is copied. Since many students will likely be users of the Library Project’s features, those looking for an answer to a specific question might be able to find that answer and avoid purchasing the book that contains it. Google’s website states that when a book is found that contains a match for a user’s search terms, the “Snippet View” will show information about the book plus “a few snippets—a few sentences of [the] search term in context.” The website shows an example of a search for the term “pioneer life,” which results in three “snippets” being displayed from a book. The fact that three

74. *Kelly*, 336 F.3d at 820, 821.
75. *Id.* at 821.
78. *Id.*
“snippets” appear when a user runs a search increases the probability that a user will find the answer he or she is looking for, ensuring that “complete results” are found and resulting in the loss of a potential sale for an author. The goals of copyright law do not include protecting “effective operation of the search engine,” and the copying of entire works weighs against Google.\textsuperscript{81}

The fourth and final factor in the four part inquiry is the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{82} The reference to potential markets in Section 107(4) of the Copyright Act encompasses not only the unauthorized preparation of derivative works but also the conceptually much simpler act of exploiting the copyrighted work in media which the Plaintiff has not yet employed.\textsuperscript{83} Furthermore, a work that merely supersedes the copyrighted work is more likely to have an adverse impact on the market of the original than a transformative work.\textsuperscript{84}

In order to determine whether or not the use is a fair one, the impact of Google’s use on the Plaintiff’s legitimate market expectations must be weighed against the contribution that Google has made and will continue to make to the progress of science and art by copying. One must analyze how much the public will benefit from the Library Project versus how much harm is done to the publisher’s and author’s abilities to license and sell their products and make a profit.

In \textit{Kelly}, the court held that Arriba’s use of Kelly’s images did not harm Kelly’s ability to sell or license his full-sized images.\textsuperscript{85} Here, Google is potentially infringing upon authors’ and publishers’ abilities to both license and sell their works. While the existence of the Partner Program would allow publishers to license their works to Google in return for a fee, publishers may not want to do so.\textsuperscript{86} Moreover, if other sites such as Yahoo! begin providing the same services as Google, copyright holders have the right to be able to choose who they license their original works or digital copies of those

\textsuperscript{81.} Band, \textit{supra} note 15, at 4.
\textsuperscript{84.} Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003).
\textsuperscript{85.} \textit{Id.}
works to. The amount of money a copyright holder would obtain would clearly be larger if several sites were bidding to obtain an exclusive license to a work. Peter Givler states that members of the Association of American Publishers, who are nonprofit organizations, receive almost all of the money that is required to cover costs and stay in business from the sale and licensing of their publications. Therefore, Google "cannot legitimately claim to advance the public interest by increasing access to published information if, in the process of doing so, it jeopardizes the just rewards of authors and the economic health of . . . nonprofit publishers." 

Another factor to be taken into consideration is that Google will be indexing what is copied in a database, and it is not entirely against reason to imagine that an "unauthorized" person could gain access to this database at some point, possibly by hacking in. If even one copy of a scanned work falls into the hands of someone who places that copy online for all to see, both the value of the original work and its potential market value will be harmed, as no one will need to purchase it once they run a search online and the full text appears. Jonathan Band writes, "[t]o be sure, if a user could view (and print out) many pages of a book, it is conceivable that the user would rely upon the search engine rather than purchase the book." It may also be possible for a user to manipulate the "snippet" system to view more text of a book than an initial search offers. This could be done by performing subsequent searches, using the first or last words of the sentences that have already appeared as "snippets" to gain more information and effectively eliminate the need to purchase a book.

The fourth factor inquiry must take account not only of harm to the original but also of harm to the market for derivative works. The Section 106(2) adaptation right is infringed when a third party makes an unauthorized derivative work in which a preexisting work is recast, transformed, or adapted. Since the authors and publishers involved in the two lawsuits against Google have the right to "reproduce, adapt, distribute, and display the copyrighted work," a
question is raised as to who will authorize a derivative work to be made. If a user takes the snippets or pages of a work from the Internet and recasts, transforms, or adapts them, he or she should first have to seek permission from the original author of the work, just as Google should have to seek permission before making copies of any copyrighted works belonging to authors and publishers.

In favor of Google's position, it is arguable that their use of the copied materials will actually promote the sales of such materials by linking users with online retailers. Google's digital library is also a potentially valuable resource that promotes learning and serves the public's need for information. While this may be true, the company should still have to abide by the law and provide authors and publishers with some sort of consideration for their works.

Having considered the four factors in light of the decision in the Kelly case, it seems clear that Google's copying does not constitute fair use. The first, third, and fourth factors weigh in favor of the Plaintiffs in the two lawsuits against Google, and the second factor could weigh in favor of either side depending upon whether or not the majority of the copied works are creative or fact-based in nature.

D. Fair Use and the Video Pipeline Decision

In Video Pipeline v. Buena Vista Home Entertainment, the Court of Appeals for the Third Circuit held that Video Pipeline had committed copyright infringement when they copied and posted short two-minute segments ("clip previews") of Buena Vista's movies on the Internet without authorization. The court referred to the appellees collectively and individually as "Disney," as Buena Vista, Miramax Films and Walt Disney Pictures and Television are subsidiaries of The Walt Disney Co. The court performed a fair use analysis, considering each of the four factors in turn. The court's decision supports the position of the Plaintiffs in the lawsuits against Google, and the similarities between the two cases are worth noting.

When evaluating the purpose and character of Video Pipeline's use of Disney's films, the court held that the trailers Disney made

97. Id.
98. Id. at 197-203.
using portions of Disney films served the same informational and promotional purpose as Video Pipeline's clip previews. The short clips would serve as substitutes for the derivative trailers, however short they might be. Google's use of "snippets" taken from the Plaintiff's works in the Author's Guild and Association of American Publishers lawsuits is similar to the use of the short clip previews by Video Pipeline. The snippets are part of the expressive creations of the original works, just as the clips "are part of—not information about—Disney's expressive creations." VideoPipeline.net did not improve access to authorized previews located on other web sites, just as Google does not improve access to authorized previews. The court in Video Pipeline also stated that "a link to a legitimate seller of authorized copies does not here, if it ever would, make prima facie infringement a fair use." While Google provides links to legitimate sellers of authorized copies of author's and publisher's materials, this does not overshadow the fact that the company is committing copyright infringement when it uses "snippets." As in Video Pipeline, Google's "snippets" reveal "a dearth of transformative character or purpose."

When evaluating the amount and substantiality of the work copied by Video Pipeline, the Third Circuit noted that the third factor "calls for thought not only about the quantity of the materials used, but about their quality and importance, too." The court found that the portions copied and used in the clip previews did not go to the "heart" of the original movies, and therefore the third factor weighed in favor of finding fair use. Here, if a user runs a search on Google, and is able to find exactly what he or she is looking for, then it may be said that the "heart" of the original book has been taken.

Analyzing the effect on the value and potential market of the original films, the Third Circuit noted that Disney used, on its own websites, "the draw of the availability of authentic trailers to advertise, cross-market, and cross-sell other products, and to obtain valuable marketing information from visitors who chose [sic] to

99. *Id.* at 199.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 200.
105. *Id.* at 201.
106. *Id.*
register at the site or make a purchase there.”\textsuperscript{107} Just as Video Pipeline was indirectly hampering Disney’s opportunity to market and sell its products by diverting consumers from the need to use Disney’s websites to view “previews” of films, Google is preventing publishers and authors from controlling access to their works. Commenting upon Google’s Library Project, Elisabeth Hanratty writes, “The copyright holder . . . might plan to establish a similar online library and use its exclusive library to draw Internet users to its site.”\textsuperscript{108} Since it appears that Google is rapidly scanning books and will not stop unless it is ordered to do so, any library that would want to make its own online library would already be far behind and have suffered immeasurable damage to its marketing potential.\textsuperscript{109}

IV. Proposals

A. Are You In? The Future of Copyright Law in a Digital World

Google’s continued use of “snippets” without receiving authorization from copyright holders constitutes copyright infringement, and the company should not be allowed to continue scanning until changes are made. Allan Adler, the vice president for legal and government affairs for the Association of American Publishers, comments, “If copyright law worked the way Google would like to see it working, then everyone in the world would be able to use the material unless the copyright holder explicitly told them not to . . . that would be a very strange copyright system.”\textsuperscript{110} Seconds Text and Academic Authors Association Immediate Past President Michael Sullivan, “The authority to grant reproduction or distribution rights lies with the copyright holder, not with the person or organization seeking to exploit the work.”\textsuperscript{111} The goal of copyright law is to promote creativity and innovation, and this goal will be thwarted if an author or publisher is forced to police every work he or she puts forth. It is not fair to place the burden upon a copyright

\textsuperscript{107} Id. at 202.


\textsuperscript{109} Knowledge @ Wharton, supra note 95 (“Google will . . . digitize . . . seven million volumes in seven years”).


holder who might have to spend enormous amounts of time compiling lists of works he or she does not want to be included in Google's, or any other company's, program. The fact that the project is of such large scale is not the burden of publishers and authors to bear. Google should have to ask permission before using a "snippet" or any other portion of a copyright holder's work. An author or publisher should not be required to be proactive and police Google's actions.

Another worrying possibility is illuminated by John Sutherland. If converting printed books to digital form creates a new copyright, and Google begins using a pay-per-view system, users will be forced to pay if they want to access any works in the Google collection. Sutherland writes, "[w]orks in the public domain will effectively be privatized," and Google "and its library partners will be owners of the newly processed property." No copyright in the digital files created by Google should vest in Google, and works that have fallen into the public domain should be free to users. If Google succeeds with its Library Project, some form of policing the system needs to be implemented to ensure that works in the public domain, and works that fall into the public domain after the copyrights expire, are easily and freely accessible to all.

Google is not the only company leading the charge to make various forms of media available to users on demand. Before launching iTunes, Apple's online downloading system that allows users to pay to obtain songs to play on iPods (portable MP3 players), the company "got music publishers to buy into its digital distribution scheme." Amazon has developed a system, in cooperation with publishers who opt-in, that allows users to "search inside" books before purchasing them, and Random House has announced that it will work with online booksellers and search engines to offer portions of its books for a small fee. Richard Sarnoff, president of the Random House corporate development group, stated, "[w]e believe that it is important for publishers to be innovative in providing digital options for consumers to access our content." It is clear the face of technology is changing, and that more people want to get their

112. Sutherland, supra note 60.
113. Id.
114. Id.
115. Knowledge @ Wharton, supra note 95.
116. Id.
117. Id.
118. Id.
information online and purchase items online.\textsuperscript{119} While some companies seek the permission of copyright holders and respect the rights of publishers and authors, Google "seems poised to charge ahead without prior approval from the copyright holders."\textsuperscript{120} The Library Project may have advantages and be good for society because it enhances the ability to quickly access large volumes of information, but its social benefits do not outweigh the costs of copyright infringement.

\section*{B. Licensing Options}

Performing rights societies, such as ASCAP, have been formed within the music industry to protect the rights of members by "licensing and distributing royalties for the non-dramatic public performances of their copyrighted works."\textsuperscript{121} ASCAP's website states that the membership association "makes giving and obtaining permission to perform music simple for both creators and users of music."\textsuperscript{122} It is possible that groups similar to performing rights societies could be created to regulate the licensing of works that authors and publishers own copyrights in. Such groups would serve as contact points for companies, such as Google, that seek permission to copy all or a portion of a work. A fee would be paid by the company seeking a license, and the author or publisher would receive a pre-negotiated rate from the regulating group. This system would provide copyright owners with the security of knowing that their rights are being policed, while also saving the time and money that goes along with trying to monitor multiple works. A licensing system similar to ASCAP's would also prevent one company from having the exclusive right to use a work for its own profit, making it impossible for a company like Google to be the only search engine providing access to millions of volumes of scanned works.

\section*{V. Conclusion}

Google recently answered the Plaintiff's Complaint in the Author's Guild case, admitting that it has scanned some works without obtaining the copyright holder's permission, but averring that

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\textsuperscript{119} Graham, supra note 90. \\
\textsuperscript{120} Knowledge @ Wharton, supra note 95. \\
\textsuperscript{121} ASCAP, What is ASCAP?, http://www.ascap.com/about (last visited Mar. 17, 2006). \\
\textsuperscript{122} Id.
\end{flushleft}
such permission is not required. It is likely that Google will also deny the charges set forth by the five major publisher members of the Association of American Publishers, and it would be difficult for the parties involved in the two lawsuits to reach a compromise, as both Google and the various Plaintiffs believe that they are correct. Google's attempt to give publishers and authors the chance to "opt-out" of the copying process was met with a chilly reception, and it appears that only a court decision will bring about a resolution that the involved parties will have to abide by. It is clear that as technology advances, there will continuously be new legal challenges that need to be addressed. Today's consumers want to be able to obtain information and entertainment services on demand, while authors of creative works want to ensure that their legal rights are not violated. The progress of science and art does not call for a compromise of such rights. Courts addressing modern copyright issues must attempt to strike a delicate balance that respects creative entities while allowing room for technology to evolve and advance. As Professor Daniel Raff states, "[t]he book industry has been around since the earliest days of the republic and now it's at a moment in history where technology is forcing dramatic change. It's evolution playing out in slow motion."