The Google Book Project & Copyright

The internet has intensely reshaped the manner in which we interact and search for content in our world. As the development of the internet continued through the early 1980s and 1990s it was becoming increasingly evident that a more precise method was needed to accurately sort, structure and search the millions of databases and web pages that were being accessed across the planet. It was not until 1998 when two Stanford University students created a search engine called Google - which was more accurate in organising and indexing information than any of its predecessors – that the Internet truly exploded as a manner in which information could be distributed.

Google has now become a global leader in search technology and has undertaken numerous projects in an attempt to make content more accessible to everyone on the planet. One such project has been the Google Book project, an ambition that has directly questioned the nature of copyright and intellectual property law in general. The Google Book project is an initiative to digitise more than 10.5 million unique book titles from some of the largest libraries in the world. In return for granting access to these collections, Google will provide each library with a fully digitised copy of any book provided to it. This will save libraries millions of dollars in electronic transformation costs and will allow any person on the planet to search for content within books, as opposed to the existing limitations of just an author or a title search. The project is expected to take more than 10 years to complete and will cost in excess of $100 million dollars.

As Fitzgerald has stated in his comments[1], the obvious issues created by the Google Book Project are the questions relating to whether Google owes a direct responsibility to copyright owners, and whether the project is even viable if it was required to seek permission from each individual owner. Copyright awards the rights holder an exclusive licence to control the reproduction, display and distribution of a protected work. As a result, in order to use a copyrighted work, an entity must seek permission from the owner and negotiate the terms and conditions for use of the work. Google have claimed - as Fitzgerald comments - that *"the project would simply not be viable"* if Google had to acquire rights from every licence holder. Thus, there is an understandable imbalance of power between those that own the copyrights to the books, those that believe information should be digitized for all the world to use and Google's own interests in organising the world's information and monetising the

[1] Fitzgerald et al, *Internet and E-commerce Law*, Lawbook Co, 2007, p 279

digitization of these libraries. Fitzgerald also indicates that he is of the belief that Google should be afforded unprecedented rights to digitise the libraries, and only be required to seek copyright permission once this process has been completed. While this may be a practical solution, s36 of the Australian Copyright Act 1968 is definitively clear in its interpretation of when a copyright protected work is infringed[2] and US Copyright Law is no different.

While Fitzgerald puts forward the understandable argument that *'knowledge is not only power but also a core ingredient of the economy of all nations and lives of everyday people'*, he does not have regard to the fact that one organisation would control this entire body of knowledge. The very fact that Google would manage a database of more than 10.5 million books and only provide access to the libraries that provided such information is a monopolistic undertaking. Additionally, when Google first announced the project in 2005 it required that publishers who did not want their works to be digitised to provide Google with a list of titles that they could remove from their index. This has been the most contentious argument by copyright owners towards the project so far because Google is effectively providing itself with an implied licence of authorisation to use the copyright work without written permission. This implied licence has been argued in many cases that have related to a number of other Google search programmes.

In *Agence France Presse v Google Inc*[3], Google was required to defend claims of copyright infringement because it was automatically copying news headlines without permission. Google successfully argued that *Agence Grance Presse* had granted it an implied licence by not opting out of indexing through the inclusion of *'exclusionary Meta search tags'*[4]. This is a similar argument to the one being proposed by publishers who have filed litigation against Google[5] in an attempt to achieve injunctive relief from the Google Book project proceeding. The publishers propose that a hard copy book cannot be interpreted in the same manner as a publication on the internet in respect of an automatic implied licence since there is more control available to the copyright owner in digitising a hard copy book. The preliminary filing suggests[6] that *"the Google Library Project completely ignores (the copyright owners rights) in favour of Googles own economic self-interest....there should be no mistaking that Googles involvement in the Google Library Project is wholly a commercial undertaking.*

[2] Australian Copyright Act 1968, s32
[3] *Agence France Presse v Google Inc* 412 F.Supp.2d 1106 (D. Nev. 2006)
[4] Ibid 3
[5] *McGraw-Hill Companies, Inc. v. Google*, No. 05 CV 8881, *The Author's Guild v. Google*, No. 05 CV 8136
[6] *McGraw-Hill Companies, Inc. v. Google*, No. 05 CV 8881, http://www.publishers.org/press/pdf/40%20McGraw-Hill%20v.%20Google.pdf, Page 6, Viewed 10th November

While Google makes other digital copies available to the public...it does so in order to increase user traffic to its site, which enables it to increase the price it charges its advertisers".

Fitzgerald has commented that the benefit to society of digitising content is profound and that it will *'provide greater access to knowledge'*. While Google has also used this reasoning as a primary defence in this *Mc-Graw Hill Companies* case, its main legal defence against copyright infringement actions is the US Copyright Act[7] s107 'fair use' defence. This section suggests that if the reproduction of copyrighted content is *"for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright"*. Google has also pointed to the *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc*[8] case whereby it was commented that the *"courts (can) avoid rigid application of the copyright statute when, on occasion it would stifle the very creativity which the law is designed to foster"*. Additionally, Google has suggested that because fair use is an *"equitable rule of reason to be applied in light of the overall purposes of the Copyright Act"*[9] then other factors should also be considered. In broad reference to the decision in *Sony Corporation of America v Universal City Studios*[10], where the Court ruled that it was willing to balance new technological advancements against the fundamental underpinnings of copyright law if it was for the benefit of society as a whole – an argument that is used by Google heavily in defending the Book Search project and one that Fitzgerald also agrees with.

Google council believes that the *Kelly v Arriba Soft*[11] decision is no different in its interpretation than its Book Project in respect of fair use. Unfortunately, the critical point of difference between the *Kelly* case and the Book Project is that content owners uploaded their images to the *Arriba Soft* search engine voluntary with permission – whereas Google are copying material without permission to create a new database of searchable information. In both the case of *A&M Records Inc v Napster*[12] and the *Metro-Goldwyn-Mayer Studios Inc and others v Grokster Ltd*[13] *case*, it was concluded that the *'reliance on an opt-out scheme may not be viewed by copyright holders favourably'*. While the author agrees with Fitzgerald in respect of the Googles Book Project *'providing greater access to knowledge'* - it is

[7] US Copyright Act 1976, s107
[8] Dr. Seuss Enters, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, at 1399
[9] Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 448, 454 (1984)
[10] Ibid 8
[11] Kelly v. Arriba Soft Corp. 336 F.3d 811 (9th Cir. 2003)
[12] A&M Records Inc v Napster (2000) 50 IPR 232
[13] Metro-Goldwyn-Mayer Studios Inc and others v Grokster Ltd (2005) 3 IPR 645.

obvious that more consideration must be undertaken in regards to how this process is performed, and true intent of Google undertaking such a project.

While Google has not publically stated its organic aim in regards to the Google Book Project, it is apparent that their underlying intention is to commercialise the Book Search Results with advertising. According to the information contained on the Google Book Project site[14], Google undertakes two steps before making the books available. The first is that it creates a digitised copy of the entire work, and the second is that it provides users with small section of the work in response to a users search string. Google suggests that it does not place advertisements on pages where digitised copies of the book exist – only on the initial results pages. Additionally, they also suggest that Google does not earn income if a user purchases the book. It is plausible in this regard – as expressed in the *Kelly*[15] decision – that even though the overall business model is aimed at generating revenue, the purpose of the project is *"more incidental and less exploitative"* with many positive potential impacts.

Thus in conclusion, while Fitzgerald comments echoes the defences presented by Google in allowing the project to proceed, it is also critical to respect and uphold the rights of copyright owners as currently written and interpreted in copyright legislation. Copyrights fundamental aim is the impartial grant of protection over a work for the effort that was required in creating the work - it is evident that Google is attempted to infringe this right. Equivalently, there is also the understandable argument that the benefits of digitising this content and providing it freely to society are wholeheartedly beneficial to the world now and into the future. Ultimately however, copyrights fundamental structure is in facilitating the protection over an authors work, and ensuring that only the owner of the copyright has control in its distribution and licensing. Fitzgerald suggests that Google should be afforded an exclusive privilege over all other copyright holders so that the project can benefit everyone. It is obvious that under current copyright law this cannot be the outcome regardless of evidential benefits to society as a whole. Copyright law ignores intermediaries and focuses only on the end-users and the rights of these users, and it is in this regard that the Google Book Project cannot co-exist under current law unless the rights of these end-users are obtained. Realistically, to suggest otherwise would destabilise the very core of copyright legislation, and the fundamental purpose it was created. Perhaps, if anything, Google is helping to advocate reform of

[14] Google Books Libary Project, http://books.google.com/googlebooks/library.html, Viewed 11th November
[15] Ibid 10

copyright law, so that all society can benefit from technological advancements and projects such as this one.