

Running Head: Universal Digital Library, Google and the Copyright law

**Universal Digital Library, Google and the Copyright law: Why the Cinderella Slipper  
would not fit the Ugly Step Sister.**

Literature review

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Nov, 2011

## Introduction

From ancient times the idea of Universal library of any form has been coveted and attempted by many, unsuccessfully. Even though all previous attempts have failed, the notion of granting access to unlimited resource of knowledge and wisdom has inspired Google, Inc. and has led to this groundbreaking moment in history, when we can witness the creation of something so ambitious, so grandiose, and so utterly important for human society in a worldwide sense, as Google Books<sup>1</sup>. Unfortunately, the developments that followed the initiation of this project are even more surprising than the fact it took so many years for human kind to be so close to the realization of this project.

In in this paper, through review of the articles listed in the reference section we will attempt to show the impact Google Books project will have on society, and how the current United States (US) Copyright law affects Google Books, the progress of the digital world and society. The arguments we will present will be applied only to the territory of the US, not because the project does not have a global impact or all the arguments for and against are not valid internationally and for different universal libraries as well. On the contrary, the project is of global importance, but because this would be far too broad a topic for such a short literature review to address, we

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<sup>1</sup> *Due to a change in the name of the main project we are going to discuss in this review, please note that Google Book Search (GBS), Google Print (GP) and the current title Google Books (GB) are one and the same project and these titles might be used interchangeably throughout this review in both citations and text.*

will limit our comments to the facts applied only for its importance for the US. We will also bring to focus literature that both supports and opposes Google Books, thus presenting both arguments to the attention of the reader, in an attempt to show the complexity of the situation.

### **What is Google Books and why do we need it?**

It is important for the reader to understand the nature of Google Books project before we focus on the issues it is facing and the proposed solutions to these issues. Although Google Books is a relatively young project, it has quite a long history of development. Google have started its Google Books Partner Program, which was purposed to be online book marketing program (Bisk, 2007, p.281) and then developed the idea of creating "an enhanced card catalog of the world's books. It is based on agreements with libraries in which the libraries agree to allow Google to scan and digitize books in their collection in return for an electronic copy of each scanned work for the library's use "(Bisk, 2007, p. 281). Google Books is an example of what human creativity and human knowledge can do when combined. The main idea behind this ambitious project is to digitalize every book ever written and using Google's search engine algorithms, to organize book search within every book included in it, the same way we are conducting Google search on the web now (Bisk, 2007, p. 237). In other words, using keywords we will be able to do a full text search, locate citations and bibliographic information inside any book that is in the Google Books database (Kousha et al, 2011, p. 2153).

How Google Books will benefit society is we believe apparent. Imagine what can be achieved, when an unprecedented amount of information that has been hidden (in the sense of not being

available for the common reader), forgotten and all in all lost for humanity for centuries is unleashed. The possibilities are limitless, starting from simple preservation purposes that will safeguard cultural history, to reshaping society and human interaction, perceptions and beliefs as we know them (Travis, 2006, p. 20). Google as a search engine has already revolutionized the way we search for information, learn and live, it has become a symbol of bottomless information and knowledge well, that is fast, reliable and efficient (Carpo, 2010, p. 578), and now it is attempting to revolutionize book use as we know it. Although nobody can predict exactly how this will affect the printed works in existence, some bring the idea that such a technology can make the use of printed works obsolete, “for better or worse” (Carpo, 2010, p. 589). This of course is the way every technological innovation is received. Predictions that the use of paper will be deemed impractical and inconvenient have always been in the air, but the facts show that “the most new innovations in IT seem to increase paper consumption” (Von Ungern-Sternberg, 1999, p. 230). There is also a big academic commotion about this project as well, causing the need of the information gap on the effects of free online accessibility of books, to be filled. An experiment by Snijder (2010), showed the benefits of Google Books in comparison to an academic repository (Amsterdam University Press), and the results were in favor of Google Books, which was classified as more efficient (Snijder, 2010, p. 301). This stands to show that Google with its Google Books project is on the right path. There is a need, no, there is a hunger for a project like Google Books and Google has proven times and again, that if nothing else, creating a quality search tool is its specialty. It is of little surprise then, that Google became “a metaphor for a particular form of digital information, namely, content that is simultaneously fixed and fluid yet decontextualized for use and reuse in ways that may in no way represent the original intent of the creator [14] (Conway, 2010, p. 63). This is a main factor in the emergence

of a new “ digital humanities scholarship—intensely collaborative, interdisciplinary, and enabled by computing tools for finding new meaning through data mining, creative visualizations, and other ways of pushing the boundaries of existing documentation and evidence” (Conway, 2010, p. 63) . This is one of the reasons that makes the Google Books project unprecedented in history- pushing forward not only scholarship, but promoting literacy on a global scale for the common user. Not only that, but the proposed Google Books search will provide something no other project of such a scope has ever done before - “anonymous access to information without human mediation” (Conway, 2010, p. 63). This is a powerful shift from what we are used to and it is understandable that it creates a lot of controversy. On one hand people are excited about all the possibilities and benefits, on the other they feel uneasy about the future and how such a project will impact their lives in the long run. All in all, Google Books raised many questions that we will attempt to present in this paper.

### **Google Books – a friend or a foe?**

With all the magnificent ways that Google Books will benefit society, however, the project has grown to be very controversial, as well. Two opposing view are forming in this climate- one side states that Google Books clearly violates the currently existing US Copyright law and is trying to profit from other people’s talent and creations, the other side of that argument perceives Google Books as revolutionizing the global wealth of information, that will promote knowledge and literacy in gigantic proportions (Bisk, p 273-274). It is argued that the copying of whole books by Google weakens the copyright holder’s exclusive rights (Chick, 2011, p. 332) but on the other hand it cannot be denied that Google Books’ index is unique and would not be the same

or serve its purpose for that matter, without being able to perform full text search. In other words, Google has to scan whole books to achieve the purpose of its project (Lichtman, 2009, p. 67). Even in the light of this fact, a popular opinion is that the implementation of the Google Books project will most likely increase the demand for printed books “ by making it easier for people to identify books that might be of interest”( Lichtman, 2009, p. 71), thus benefiting the copyright holders of these books. That is a big economic factor in favor of Google Books not only for Google, but for the right holders as well, which even the people opposing the project cannot deny.

Considering the scope of Google Books and the impact it is expected to have on book sales, by providing free marketing and exposure (Chick, 2011, p. 338-339) for the printed works it uses, it is understandable that this project should be under a lot of scrutiny before its fate is decided. As expected, actions in that direction promptly followed. First the alarm was sounded by Google’s competitors and the government, by proposing anti-trust and anti-competition agenda implemented in Google Books by Google. Later, the US Authors and Publisher’s guild moved forward with litigation measures against Google (Chick, 2011, p. 335), concerning copyright infringement. They have focused on the fact that Google is a commercial entity and as such it is expected its Google Books project to be simply a commercial undertaking (Espantaleon, 2011, p. 698), with obvious fiscal benefits for the company. That Google will indeed profit from Google Books is true as much as it is true that the project is transformative and “it would put into the world a product that is both socially valuable and meaningfully distinct from the works that are

being infringed” (Lichtman, 2009, p. 64-65). But does it have to be one way or the other? Why cannot Google Books be a commercial undertaking and benefit the public, or can it?

Google Books is suffering criticism on other levels as well. Individuals and organizations are voicing their privacy and security risk concerns (Lichtman, 2009, p. 69) for the scanned books and the data that the project will collect at registration, which resonates proportionally to the issue of IP addresses and their consideration as personal data (Moyni, 2011, p. 356- 361). Another issue is the concern about Google Books metadata. “Faulty, misleading, and confusing metadata can pose potentially serious problems for users of Google Books Search “(Pope et al, 2011, p. 3) and there are activists who lobby for the creation of metadata user error log as well (Pope et al, 2011, p. 8). Google’s history has shown their good will and the way they learn from their mistakes. To support this fact, the company currently is putting effort into correcting the metadata errors that were created. Human error is a fact of life and mistakes are easy to make but difficult to find and correct, especially in a large body of data. That is why; this is going to be a long process for Google. However, if Google Books overcomes the litigation challenges, the time is on its side to work on and correct all other issues that might impede the absolute success it is expected to have.

In the beginning of the creation of Google Books, it was often perceived on international level as a project favoring English language materials (Lowood, 2008, p. 299). However, it is noticeable that the opposition to the project in Europe is fading and foreign governments are currently

participating or negotiating participation in Google Books. One of the reasons for this change of heart might be the realization that such task is impossible for the public budget (De La Durantaye, 2011, p. 15). That poses the question: “if Google does not do the job, who else has the resources” (Luck, 2011, p. 10)? As it was stated in our review before, this is not the first time somebody, a private or public sector entity, has undertaken this Sisyphean task with an unfavorable outcome and indeed, if there is anyone who can finish it, that would be Google.

All of the issues that we discussed concerning Google Books do not point that the project does not have a future. They simply show that the present state of Google Books needs a lot of improvement before it reaches the level of usefulness it is so vehemently striving to achieve (Pope et al, 2011, p. 11). We must consider the fact that the project is still young, and since its very inception it has been facing all kinds of challenges, which inevitably have reflected upon the speed the project is transforming with, thus significantly impeding the progress it would have made if these obstacles did not exist. This, however, is not new to Google; as a search engine by now it should be used to its “multifaceted role as: archiver, advertising agent, technology innovator and search market optimizer” (Chick, 2011, p. 332) and all the implications that follow from that. As a creator of a unique project like Google Books we are sure these complications did not come as surprise. What this situation shows however is that the challenges the digital technology’s evolution presents cannot and are not “adequately or satisfactorily” (Chick, 2011, p. 332) addressed by the existing copyright law.

In summary, whether Google Books should be considered a friend or a foe largely depends on the way we perceive the existing copyright law and it’s usefulness in the digital age.



**Copyright, fair use, opt-out system and how long the orphan books will be orphans.**

One of the characteristics of copyright law is the fact that it is valid on the territory of the country it is created in (excluding international agreements of course). Although we acknowledge the fact that the copyright infringement lawsuit against Google (and most particularly Google Books project) has implications of international character, we cannot discuss them in this paper, since they present an issue which is much larger than the scope of this literature review. Therefore, all comments made about copyright law are presumably addressed to copyright law on the territory of the United States. According to Copyright Act of The United States, copyright owners have five exclusive rights- “reproduction, distribution, adaptation, performance, and exhibition” (Kierkegaard et al, 2011, p. 426). For the purpose of understanding the litigation issue Google is facing, it is prudent to familiarize the reader also how a copyright is infringed.

“Copyright infringement consists of two elements:

"(1) ownership of a valid copyright, and

(2) copying of constituent elements of the work that are original."124

In creating the Google Book Search archive, Google scans in the actual book.<sup>125</sup> This is literal and complete copying. Thus, because Google does not secure the permission of the rights holder before its scan, it is relatively simple to make out a prima facie case of copyright infringement against Google.”<sup>126</sup> (Bisk, 2007, p. 287)

From what we have learned, there are basically two sides of copyright infringement- the one of the holder of the copyright and the one of the infringer, who used the copyrighted work without

permission from the right holder. The rights of the copyright holder are protected by the copyright law, which has a “dual role - to encourage development and distribution of creative works and the ways it is distributed through technology” (Lichtman, 2009, p. 55-56). To understand better the case against Google, we must clarify what exactly is the process of including works in Google Books, and why it might be considered infringing the copyrights of the publishers and/or authors as right holders of the works included in the project. . We have already mentioned that in order for the Google Books project to serve its purpose, Google needs to scan an entire book, what was not mentioned is that this book is being saved locally on Google’s servers. How much of this scanned information is actually accessible for the end user of Google Books is a completely different story, however. Google Books users do not have access to the whole text of the book in question; they do see only snippets of the content, concerning their keyword search. Even more, Google has restrictions on the quantity of snippets that a user can review at a time. The facts are simple - the end user never sees the whole book and the way the books are presented in the project can even be considered a marketing strategy, a perfect solution to produce just a sample of a work and “if the user wanted to read the entire book, he would have to actually go out and purchase it” (Bisk, 2007, p. 296). That shows that Google Books is not doing harm to the copyright holder, but in fact benefits him/her, as well as society. It creates an opportunity for the copyright holder to make a sale and it creates an opportunity for the user to find the exact book that he/she is looking for before purchasing it.

Why there is an issue with copyright infringement then? When we are discussing copyright infringement, it is important to mention what statutory exceptions and defenses of copyright infringement exist and what their goals are.

“The goal of these exceptions is the same as that of general copyright, "to put copyrighted works to their most beneficial use by enabling new generations of authors to build on the works of authors who preceded them."<sup>128</sup> Most exceptions and defenses were created to "excuse uses that would have been licensed but for insurmountable transaction costs." <sup>129</sup> (Bisk, 2007, p. 287)

One of the mentioned exceptions is the fair use doctrine that presumably will be the basis of the defense that Google will use to fight the copyright infringement litigation it is facing, for the creation of its Google Book project, and the works it has used without obtaining permission from the copyright holders. To understand better how the fair use exception of copyright infringement works, the reader needs to get familiar with the four claims of fair use.

“Fair use claims:

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.

“(Lichtman, 2009, p. 62)

Having in mind the four claims of fair use, we must not overlook the fact that the fair use doctrine does not excuse copyright infringement on the basis how big of a benefit would a

certain use present (Lichtman, 2009, p. 59) or the fact that the fair use doctrine is by no means a straightforward and a clear one. Therefore, we cannot immediately consider Google Books' use of copyrighted work a fair use as well. Things are much more complicated and present a unique legal precedent, the outcome of which will affect not only the Google Books project, but the future of Universal Digital libraries as a whole. So, the question is, if Google Books is exempted of the fair use doctrine, would its work be considered with great enough public cause to change the current law and expropriate the authors/creators works' rights (Espantaleon, 2011, p. 699), or would it be shut down? This is absolutely due to the court to decide, and we do not attempt to make a prediction in this direction, which even people with considerable experience in law do not dare. In the meantime, because of its significance to the future of all attempts to create a universal digital library, and because of the effect this project will have in a global sense, all eyes are on Google Books and how its case is going to unfold.

The dilemma in this respect that Google Books is facing is similar to many other innovations with a wide social impact in the past, like the introduction of highways, railroads, cable television, videocassette recorders (VCRs), digital audiotapes (DATs), digital video recorders (DVRs), and computer software (Travis, 2006, p. 8). What can happen in situations like this (and what is threatening to happen now with Google Books) is that if Google Books is forced to obtain copyright permissions for each and every book that ever existed, the individual right holders that can actually be found might deliberately "hold out" on the project in order to increase the value of what they own (Travis, 2006, p. 8). This obviously will greatly influence the outcome of a project of such magnitude. This clash of personal and public interests is only the beginning, because "the relationship between digital technology and creative imagination is

becoming more complex and less predictable every day” ( Vaidhyaathan, 2005, p. 122). That is not helped by the fact that “a fierce global battle is raging over the terms of access, use, reuse, combination, recombination, execution, and distribution of cultural materials” (Vaidhyaathan, 2005, p. 123). It is then of no surprise that a government panel found that current copyright law is the “single most significant barrier to preserving our cultural heritage" in digital libraries <sup>n169</sup> (Travis, 2006, p. 8). In fact, it is considered that if the copyright holders (publishers and authors) win the case against Google Books, it will be “essentially impossible to maintain a search engine <sup>n59</sup> [\*244]” (De La Durantaye, 2011, p. 5). We find that fact rather disturbing, in the light of the fact that where money are involved, people tend to take the most unreasonable and selfish course possible. Our only hope in this respect is that on this stage of human evolution we are capable of making decisions that will benefit all humankind.

To focus back on the copyright infringement claims that Google Books is facing, a significant problem is the opt-out system that the project uses to obtain copyright permissions. The opt-out system basically concerns the fact how a copyrighted work user acquires the right to use that work. In this case, Google gives a yearlong opt-out notice for all copyright holders who do not want their work to be included in the Google Books project, to contact Google for their work to be excluded of use. This part of Google Books project receives “the most opposition” (Bisk, 2007, p. 281), because it heavily concerns a category of books that are “nobody’s books” or as they are also known- orphan books. Orphan books are works that have an unknown or an untraceable copyright holder. Many call for Google to reconsider its position on the opt-out system and choose instead opt-in system, which will allow Google Books only to include works that their copyright owners have specifically requested ( and went into agreement with Google

for) to be included. This might seem like a reasonable solution, if it wasn't for the fact that the clause for transferring electronic publishing rights was not included at all in the contracts between authors and publishers until recently. This fact makes the books included in programs like Amazon's Search Inside the Book with questionable copyright as well, even though the authors might have signed an agreement with Amazon (Bisk, 2007, p. 278). Not to mention the fact that if Google decided to implement the opt-in system in Google Books it would be next to impossible and absurdly expensive (Travis, 2006, p. 13) to include orphaned books and making orphaned works available is what this project is all about. That is why there is a unanimous concern for the future of these orphan works, and the way they are handled by law is considered "a major obstacle" (De La Durantaye, 2011, p. 5) for the creation of universal digital libraries of any kind. In the meantime society is missing on the opportunity to benefit from the treasure these "lost" works represent, due to their lack of online presence. "Their absence from the Web makes them "invisible," if not dead, to most of the world<sup>n13</sup>" (Travis, 2006, p. 2).

Nevertheless, the future might not be so gloomy, because in 2008 Google and the plaintiffs in the case against Google Books reached an agreement. Alas, that agreement was short celebrated, because

"Judge Chin recognized the value of digitizing the world's books, but decided the deal gave Google an unfair advantage. Copyright was of most concern to him, but he also raised international issues and questions of privacy: While the creation of a universal digital library would benefit many, the agreement would go too far. Indeed, it would give Google a significant advantage over competitors, rewarding it for engaging in wholesale

copying of copyright works without permission ... It would give Google a *de facto* monopoly over unclaimed works” ( Luck, 2011, p. 7).

Although this agreement was revisited twice its finalization was denied in March, 2011. Now the sides in the case are taking a break to reconsider and reinvent their agreement provisions. While we would not focus in detail on the changes that this agreement went through, it is important to mention that in one of the proposed agreements included the option “to turn orphan works into kind of private public domain.” (Picker, 2009, p. 400) In that case Google Books project will continue and the beneficiaries from the profits generated by it will benefit both Google, and the active right holders. However, the simple fact that this agreement was revisited more than once shows the good will both sides are exercising in resolving the issue. Unfortunately, that does not change the fact that it is extremely difficult to navigate such a complicated process in the restrictions posed by the current copyright law and the lack of legislation regarding orphaned books.

To use a metaphor, Google Books project with its power to change the lives of so many people might be compared to the coveted and shiny Cinderella shoe. The current copyright law on the other hand with its outdated understanding and exceptions very well resembles the older Ugly Step sister with big feet, who stubbornly refuses to acknowledge, that the elegant crystal slipper would not fit her, no matter how much she tries. The copyright law was crafted in different times when it indeed met the needs of the situations it has addressed. However, times change and the digital technology brought new opportunities and challenges on the table, like Google Books. It is counterproductive to delude ourselves that a simple makeover will make the copyright law

accommodate the exception Google Books represents. Therefore, it is imperative that these issues are addressed as soon as possible, so the process of creating one of the most important (and beneficial) projects in human history can continue.

We also have to consider that not everyone feels that way, and one such person is Siva Vaidhyanathan.

“The hubris of the project (Google Books Search) clashed with the values I believed libraries and librarians should cherish: deliberate, judicious, respectful approaches to the spread of knowledge. Google was all about doing things fast and big with scant regard for quality or respect for its users (Vaidhyanathan, 2011, p. 2)

Whether his opinion should be considered to bring a significant value to the argument, it is up to the reader to decide. However, it is considered that Google is a company Vaidhyanathan “loves to hate” (Luck, 2011, p. 7), so the truth and objectivity of his statements cannot be considered without caution.

### **Solutions**

The right solution to the impasse, in which Google Books finds itself, is very hard to predict. There are many suggested resolutions and it is worth mentioning some of them. The most significant presents the need for Google to differentiate in its agreement proposals between orphaned books and books with available copyright holder (Lichtman, 2009, p. 66). A change in the Google Books proposal that will accommodate a compromise consisting of an opt-out system for orphan books and an opt-in system for books with traceable right holders is also a popular



suggested solution (Bisk, 2007, p. 297-298). However, it is unclear how realistic that solution is, because the “simple” process of differentiating between the two categories- orphaned books and copyrighted books is going to be tedious and expensive, considering the amount of materials we are discussing.

Another solution for a copyright law is the legal reform “within the existing Internet intermediaries’ law and copyright framework in relation to Google’s functions, in a manner that will also be applicable to similar functions offered by other Internet intermediaries (Chick, 2011, p. 332). That reform recommends an “extension of statutory safe harbors, creating of new exemptions or enhancing the fair use complexity to accommodate the new technological functions regarding search engines and their derivative technological innovations, thus allowing technological progress to thrive and not impede its evolution” (Chick, 2011, p. 343-344).

At the end of the day, this is what this is all about. Change is long overdue and the longer we wait, the stronger we will feel the consequences of that delay. What was working years ago is no longer working for the greater good due to the changes of technology we have experienced. It is time to change with the times we live in.

### **Conclusion**

In conclusion, Google Books is a project with a tremendous potential to change history and our lives that faces challenges and critiques, which might change its original intent. Google Books’

existence is received with mixed feelings, from a widespread excitement of the possibilities it presents to accusations of hidden commercial agenda. However, even Google Books' critics cannot deny the positive impact Google Books will have on humankind, as well as the boost the economy could receive if it becomes a reality in the complete scope it was planned for. True, the project still needs a lot of work to reach its potential even after the legal issues it faces are resolved, but the good will and perseverance to do so are obviously present at Google. We have no reason to doubt the fact that given the circumstances to work on improving the project, Google will seize the opportunity to do so. In our literature review we also have concluded that the Google Books project's benefits are spreading far further than to Google's headquarters. The benefits it presents for society as a whole and the copyright holders as private entities are obvious but whether the court will consider this project important enough to change the copyright law and history with it, only time will tell. What we know however is that change is in the air and it will be better to come sooner rather than later.

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