

Get it on Google: Google Book Search

A review of the US actions against Google Inc. and the implications in Australia

By Kasey Ekert

Google Book Search – does it mean the end of libraries, as we know them today?

Google receives more than 380 million unique search queries per month¹ and now enjoys a market capitalisation of around \$100 billion².

This paper will take you through one of Google's recent projects – the 'Print Project'.

- Firstly, I'll describe the 2 areas of the project -the 'Partner Program' and the 'Library Project';
- Secondly, I'll discuss the basis of the actions that have been commenced against Google in the US and consider whether Google is likely to succeed in defending its actions as a 'fair use'; and
- Thirdly, I'll briefly touch on the Australian position.

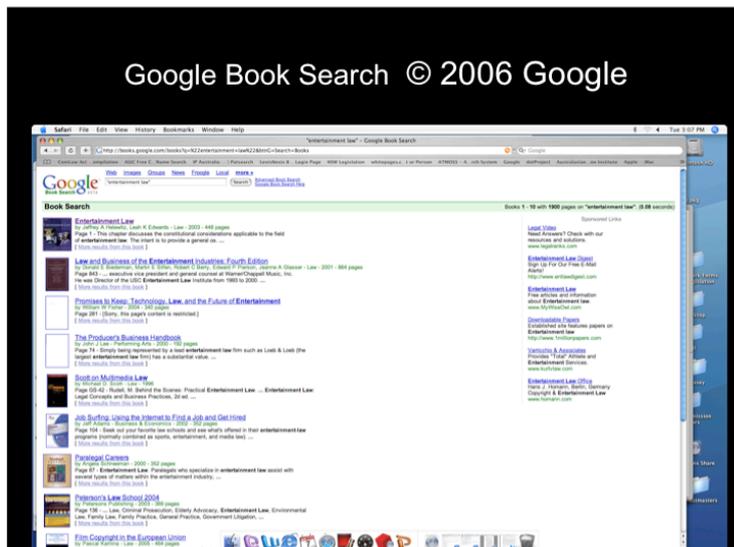
In November 2004, Google announced the introduction of the Google Print Project. There are 2 parts to the Print Project: the 'Partner Program' and the 'Library Project'. The Book Search, which is the search engine connected with both projects, searches the full text of books from two sources: publishers and libraries.

The first part of the program – which is not controversial, is the Google 'Partner Program'.

Google Partner Program

Google describes its Partner Program as a 'free, worldwide sales and marketing system'³. Through the Partner Program, a publisher identifies works that it wants to include in the program, and authorises Google to scan and store the full text of those books in its Book Search database. A user of the Book Search enters a search term and is then able to view bibliographic information concerning the book and a couple of sample pages around the search term.

Example of a search using the search term 'entertainment law'. This is the search results page.



An additional incentive, though probably of limited value, is the shared revenue the publisher receives from contextual adverts appearing on the results page. Publishers receive a payment related to the number of times a user clicks on the adverts.

Because the scanning in the Partner Program is done with the publisher's permission, there are no copyright issues raised by the project.

On the other hand – the second facet of the Print Program, the Google Library Project, is highly controversial and raises a number of copyright issues.

Google Library Project

The Library Project, is an ambitious project, even by Google's standards.

What is the Library Project?

Google has begun scanning into its Book Search database, material from 5 leading research libraries – the libraries of Harvard, Stanford, Oxford and Michigan Universities and the New York Public library.

Once Google has scanned a work from a participating library into its database – the work is then searchable through Google's Book Search in the same way I've described for the Partner Program. If the book is no longer protected by copyright, users can view the full text of the book.

Leaving aside the legalities of the project – the potential benefits of a program like the Library Project are enormous. Google is creating a user-friendly search engine, which enables the user to search the worlds leading research libraries with one click. Google has described the project as its 'man on the moon initiative' saying 'We see a world where *all* books are online and searchable'⁴.

Unfortunately, not everyone shares Google's enthusiasm. There has been a significant negative reaction to the project from both authors and publishers around the world.

Following Google's announcement of the project, the Association of American Publishers immediately raised its concerns about copyright infringement. In an attempt to comfort the publishers, Google announced an 'opt out' mechanism. If a publisher notifies Google of a book within one of the participating libraries that they don't want indexed – Google won't scan and index that work.

Not surprisingly, this did not relieve the concerns of the publishers or authors.

In September 2005, the Authors Guild, the largest society of published authors in the US⁵, as well as 3 individual authors, commenced a class action against Google in the US Federal Court⁶. Since then, a number of other actions have also been commenced against Google⁷.

⁴ <http://books.google.com/googlebooks/vision.html>

⁵ http://www.authorsguild.org/news/sues_google_citing.htm

⁶ Ibid.

⁷ For example, *The McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. v Google Inc.*

Section 106 of the United States Copyright Act 1976 sets out the exclusive rights of a copyright owner. . As you can see, one of those rights is the exclusive right to ‘reproduce the copyrighted work in copies’ .

Google is potentially exercising the exclusive right to reproduce the work in 2 areas of the Library Project.

- Firstly, there’s Google’s initial step of scanning the full text of a book into its search database. Here, Google is making a complete digital copy of the whole of a work.
- The second area is when the search results, the ‘snippets’, are published on a user’s screen as a result of a search query.

Presumably, Google’s justification is that both of these acts fall within the scope of the fair use exception under the US Copyright Act. The defence of ‘fair use’ is set out in Section 107 of the US Copyright Act 1976. It provides, inter alia, that a fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.

It also sets out a four-factor test for determining if a particular use of a copyright work is fair¹⁰ . The Court will consider the following factors:

- (a) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes¹¹ ;
- (b) the nature of the copyrighted work¹² ;
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole¹³ ; and
- (d) the effect of the use upon the potential market for or value of the copyrighted work¹⁴ .

Google will be seeking to establish that its scanning of the full text of works is a fair use. In attempting to establish the defence, Google will no doubt be relying on a decision handed down by the United States Court of Appeals in 2003. The case of *Kelly v Arriba Soft Corporation*¹⁵ . I’ll quickly run through the facts of

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http://www.authorsguild.org/news/sues_google_citin

[g.htm](http://www.authorsguild.org/news/sues_google_citin)⁹ *United States Code*, Title 17, Chapter 1,

Section 106(1)

¹⁰ *United States Code*, Title 17, Chapter 1, Section 107(1) – 107(4) ¹¹ *United States Code*, Title 17, Chapter 1,

Section 107(1) ¹² *United States Code*, Title 17, Chapter 1, Section 107(2)

¹³ *United States Code*, Title 17, Chapter 1, Section

107(3) ¹⁴ *United States Code*, Title 17, Chapter 1,

Section 107(4)

¹⁵ 336 F.3d 811 (9th Cir. 2003)

Arriba Soft was a search engine operator for images on the Internet. Arriba compiled its image database by copying images from websites. That copying was done without the consent of the copyright owners. Arriba reduced the images to thumbnail size and stored the thumbnail images in a database that was searchable by users. When a user selected a thumbnail image – they were provided with a link to the image on the original website from which the image had been sourced. Kelly, a professional photographer, commenced copyright infringement proceedings against Arriba when he discovered that thumbnail copies of his photographs had been included on Arriba's website. The Court of Appeal held that Arriba's reproduction of the photographs was a fair use. In reaching that decision -the Court considered Arriba's conduct, in detail, in light of the 4 factor 'fair use' test set out in section 107.

Going back to those 4 factors:

First Factor

The first factor the Court will look at is 'the purpose and character of the use, including whether the use is of a commercial nature'¹⁶.

In the Arriba case, the Court clearly acknowledged that Arriba's website was operated for a commercial purpose. Like Google, Arriba was selling ad space on its website.

However, interestingly, the Court described Arriba's use as 'more incidental and less exploitative in nature than the more traditional types of commercial use'¹⁷. In Arriba's case, Arriba was neither using the images to directly promote its website nor was it trying to profit from selling the images¹⁸.

When examining the *purpose* of the use made by Arriba – the Court held that the thumbnail images served a distinctly different purpose to the original images¹⁹. The Court compared the *artistic nature of the original works* - the purpose of which was to inform and engage the viewer in an aesthetic manner -to Arriba's purpose of providing a 'tool to help index and improve access to images on the internet'²⁰.

The Court even went as far as to say that Arriba's use of the images 'promotes the goals of the Copyright Act and the fair use exception'²¹ because the thumbnail images 'do not supplant the need for the originals'²² as they serve a different purpose. They clearly 'benefit the public by enhancing information-gathering techniques on the internet'²³.

¹⁶ *United States Code*, Title 17, Chapter 1, Section 107(1)

¹⁷ *Kelly v Arriba Soft*, 336 F.3d 9059 (9th Cir. 2003), 9070

¹⁸ *Kelly v Arriba Soft*, 336 F.3d 9059 (9th Cir. 2003), 9070

¹⁹ *Ibid.*

²⁰ *Ibid.*, 9071

²¹ *Ibid.*, 9073

Ibid.

²³ *Ibid.*

If you consider the Library Project -there are clearly a number of similarities.

- Firstly, Google will only make snippets of the books available, like the thumbnails.
- Secondly, although there is a commercial component to the Library Project, Google isn't using the books to promote its website nor is it attempting to sell the books in question.

That said, there is a clear distinguishing factor. Arriba sourced its images from those that were already published on the internet. Search engine operators have often argued that most website operators want their websites copied into search engine databases so that users find their site²⁴. They argue that an implied licence exists for such copying. The same cannot necessarily be argued in Google's case. Google is digitising many of these works for the first time.

Second factor

The second factor considered by the Court is 'the *nature* of the copyright work'²⁵. In Arriba's case – they were published, artistic works. The Court conceded that the photographs, being artistic works, were creative in nature and they were therefore 'closer to the core' of intended copyright protection than a fact-based work.²⁶ On the other hand, they were published works – and the use of a published work is more likely to qualify as a fair use because the first appearance of the artist's expression has already occurred.²⁷ In Arriba's case, the Court found that this factor weighed slightly in favour of Kelly.

Google

When comparing Google's conduct here – Google will actually be in a better position than Arriba. Google is reproducing published works, a significant majority of which will be non-fiction. On Arriba's reasoning, fact based works are not as 'close to the core' of intended copyright protection. And given that the works are published, this factor will weigh in favour of Google.

Third factor

The third factor is a consideration of 'the amount and substantiality of the portion used in relation to the copyright work as a whole'²⁸. Here, the Court confirmed that copying an entire work weighs heavily against a finding of fair use.²⁹ However, the Court held that the copying must be considered in light of the purpose and character of the use.³⁰ If a secondary user, (such as Arriba), only copies as much as is

²⁴ <http://www.arl.org/newsitr/242/google.html>

²⁵ *United States Code*, Title 17, Chapter 1, Section 107(2)

²⁶ *Kelly v Arriba Soft*, 336 F. 3d 9059 (9th Cir.2003), 9074

²⁷ *Ibid.*

²⁸ *United States Code* Title 17, Chapter 1, Section 107(3)

²⁹ *Worldwide Church of God*, 227 F.3d at 1118

³⁰ *Campbell*, 510 U.S. at 586-87

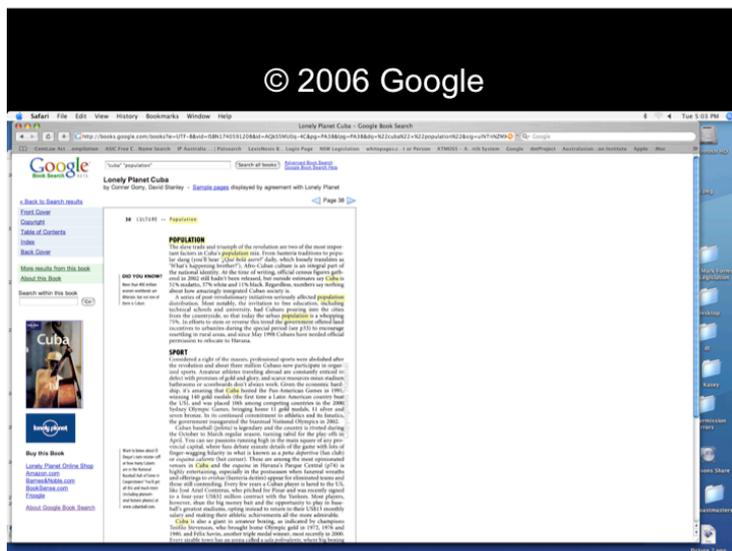
Similarly with Google. Google is likely to be successful in arguing that its copying of the whole book is a necessary step in providing a comprehensive book search engine.

Fourth factor

The final factor considered in determining whether the defence is available is 'the effect of the use upon the potential market for or value of the copyrighted work'.³² In Arriba's case, the Court was of the view that this factor actually weighed in favour of Arriba. The court found that the search engine would guide users'³³ to the original website, thereby potentially enhancing the value of Kelly's works. Further, the Court held that Arriba's use of the thumbnail images would not impact on Kelly's ability to sell or license the works because there was no way to create a clear full-sized image from the thumbnail copies.³⁴

This factor is a little more complex when considering Google's conduct in the Library Project. Google will no doubt argue that books in the Library Project will be brought to the attention of users who, in the absence of the Book Search, may not otherwise have been aware of them. That's true and it's fair to say that the Book Search is likely to prove a success at promoting some titles. However, when you consider fact-based books such as reference books, travel books and cookbooks, these books are not read from cover to cover. They are typically used to find a particular fact, explanation, definition or recipe. It's quite easy to retrieve this type of information from the Book Search without purchasing the book.

For example, here I searched for "Cuba" and "population". You can see that you can retrieve quite a bit of information about a particular destination. In my view, there is a real potential for the Book Search to erode sales of these types of books.



That said, on balance, and in light of Arriba's case – in my view, the factors weigh slightly in favour of a finding of fair use for Google.

Google describes the ultimate goal of the Library program as a simple one – to make it easier to find books specifically books that you wouldn't find any other way, all the while carefully respecting authors and publishers rights.³⁵ I believe it will be the significant potential

public benefit of the project that will weigh heavily in Google's favour – both in the eyes of the Court and the consumer. That's the situation in the US. I'll now briefly walk through the copyright implications of the Library Project in Australia.

³¹ Kelly v Arriba Soft, 336 F. 3d 9059 (9th Cir.2003), 9074 ³² Ibid. ³³ Kelly v Arriba Soft, 336 F. 3d 9059 (9th Cir.2003), 9075 ³⁴ Ibid., 9076 ³⁵ <http://books.google.com/googlebooks/library.html>

It's important to remember that copyright laws are territorial. Google will only infringe Australian copyright law, if Google commits an act of copyright infringement *in Australia*.

The current actions in the US indicate that the scanning of the full text of the books takes place in the US. Accordingly the more liberal fair use defence set out in the US Copyright Act will apply to Google's conduct in scanning the books.

However, Google is likely to be considered to be causing a copy of the search results – a couple of sentences either side of the search term – to be made on the user's computer in Australia.³⁶ As Jules has mentioned, in many cases, this is not likely to be considered a substantial reproduction. On the other hand, if Google reproduces a key phrase for example like one from Lewis Carol's *Jabberwocky* or another key phrase from a poem or say a short story, it is potentially making a substantial reproduction of the work.

Unless Google can rely on a defence for its actions, it may be liable for copyright infringement in Australia.

Leaving aside the potential reforms to the fair dealing provisions that Kate has discussed, at present, fair dealing in Australia is a set of specific exceptions that allows copyright material to be legally copied.

Google may attempt to rely on the defence of 'fair dealing for the purpose of research or study' set out in section 40 of the Copyright Act 1968 (Cth).

The relevant part of section 40(1) provides that a fair dealing with a literary work for the purposes of research or study does not constitute an infringement of the copyright in the work.

Like the US Copyright Act, section 40 sets out a number of matters which the Court will consider in determining whether the particular use constitutes a fair dealing for the purposes of research or study.

They include:³⁷

- (a) the purpose and nature of the dealing;
- (b) the nature of the work or adaptation
- (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary price;
- (d) the effect of the dealing upon the potential market for, or value of the work or adaptation; and
- (e) in a case where only part of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

³⁶ <http://www.arl.org/newsltr/242/google.html>

³⁷ Section 40(2) *Copyright Act 1968 (Cth)*

The critical question that would need to be asked is: Can it be said that Google's dealing with the works in question is carried out by Google for the purposes of research or study? The short answer is no.

The Courts have consistently held that it is the purpose of the person making the dealing, rather than the ultimate use to which the material is put, that is relevant when assessing whether the dealing can be regarded as a fair dealing for the purpose of research or study³⁸. While users of the Book Search may be engaging in research or study, Google clearly isn't. For that reason, Google is highly unlikely to succeed in arguing that its copying in the Library Project was a fair dealing for the purposes of research or study.

In summary:

Personally, I believe the Google Book Search is a fantastic research tool. Unfortunately, in my view, Google has approached the project in the wrong way by not liaising with, or involving the copyright owners in the Project.

Given the significant potential public benefit of the program, I believe Google has a high chance of successfully defending its actions as a fair use in the US.

In Australia however, if Google was found to substantially reproduce a work on the search results page (without the consent of the copyright owner), Google could not defend its actions as a fair dealing for the purposes of research or study under section 40 of the Copyright Act 1968 (Cth).