

Google Books

A policy panel event

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STRATEGIC
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Summary

The Strategic Advisory Board for Intellectual Property Policy (SABIP) organised a breakfast panel debate in February 2010 to discuss the issues raised by the proposed Google Books settlement. It was attended by representatives from Google, authors, publishers, the European Commission, and a wide array of stakeholders from the UK creative community.

The aims of the event were:

- To consider the economic, cultural and political advantages and disadvantages of the Google Books initiative;
- To consider the existing solutions and possible interventions for the public and private sector; and
- To consider the implications for the future of digitisation in the UK and in Europe.

SABIP's policy recommendations are:

1. Doing nothing is not an option. The proposed settlement raises many fundamental legal, cultural, economic, political and societal issues. If the settlement does go ahead, it will have profound effects in the US and therefore it will probably in turn affect thinking, if not markets, in Europe. Even if the settlement does not go ahead it has unleashed many issues related to mass digitisation. It is of vital importance therefore that the Government, building on Digital Britain, considers how best to encourage putting more digital information online. This is also a high priority for Europe and a new digital agenda paper has been published which is looking to simplify copyright clearance¹.
2. UK copyright law, as it currently stands, is unlikely to facilitate mass digitisation. Following the decision not to include a provision for orphan works² in the Digital Economy Act 2010, the Government should consider whether amendments could be made to existing copyright law to facilitate mass digitisation allowing more digital information to be made available online, and how the orphan works challenge should be resolved. The current copyright framework has, for the analogue world, many elements that take account of the wider public interest. These need to be adapted to the digital world in the light of the desirability and probable inevitability of mass digitisation.
3. Policy-makers should investigate and assess the costs and benefits of mass digitisation, the potential for public/private partnerships, and the extent (if any) to which an element of public financing might be needed. The Government should also consider the value of new and 'open' information models.
4. If a purely privately funded model is chosen, policy-makers should examine the regulatory options to guard against potential abuse of a dominant market position.
5. In order to maintain the world class status of the UK's educational institutions, publishing and creative industries, and the role of the English language internationally, UK policy-makers should guard against being overtaken by events and should consider how the UK can best help to drive the public policy debate at European and international levels.

¹ http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf

² The term 'orphan works' is used to describe works protected by copyright in circumstances where the copyright holder cannot be traced - even after a diligent good faith search has been carried out - and hence the copyright work cannot be used without infringing copyright. Any use of a work that is considered to be 'orphan' runs the risk that a copyright owner may come forward at a later date, and take legal action for unauthorised use of their work.

Background

The United Kingdom has some of the best libraries in the world in terms of the breadth and depth of their collections. Digitising these collections and putting them online, combined with new computer search technologies, has the potential to expand access to knowledge exponentially with enormous cultural, economic and social benefits. However, it is vital that intellectual property rights (IPRs) are respected. In order to obtain the maximum possible benefits, it is essential to ensure that digitisation takes place in a technologically-neutral way that enables a competitive marketplace to develop and evolve.

This is not an easy balance to achieve. The recent debate around the proposed Google Books settlement has raised some significant policy questions and through this policy bulletin SABIP aims to explore the key issues around mass digitisation and the complex legal, economic, cultural and political context.

Box 1: Google Books

Google Books (previously known as Google Book Search) is a service launched by Google in 2004 that searches the database of books Google has scanned. Partnership agreements between publishers and Google allow this for certain in-copyright material. Books in the public domain are available to view in full, while publishers can select how much of their copyrighted works can be made accessible. Some publishers (e.g. Michelin guide) opt to have their works 100% viewable. Technological measures are in place to prevent material under copyright from being printed or copied, while the interface offers links to the publishers' websites and booksellers.

To generate this database, Google has scanned a very large number of new and existing books to make them available to search online. In many cases, publishers and libraries have worked alongside Google on this project. However, Google has also scanned in-copyright books without consulting publishers. It is estimated that the initiative has scanned 10 million titles to date (both in and out-of-copyright) in America, Japan and Europe. One European library Google partnered with was the Bodleian Library in Oxford.

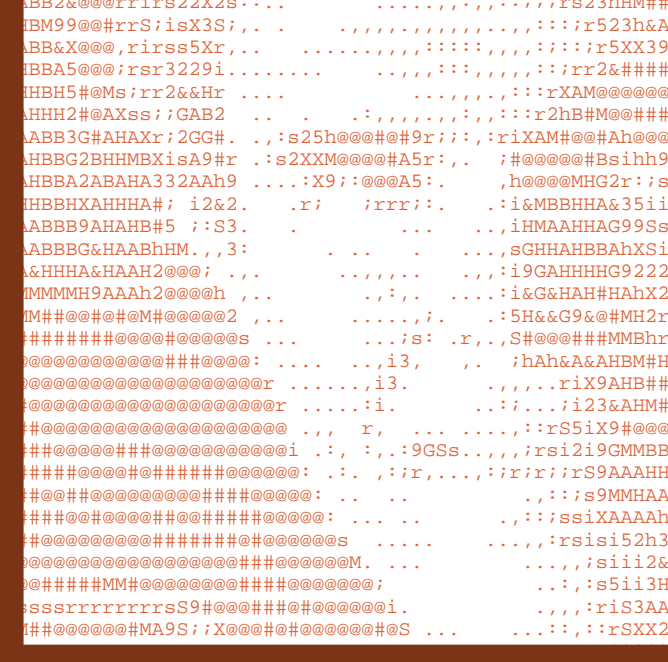
1. The Google Books debate

Google states that the scanning activities it undertakes as part of the Google Books project (see Box 1) are legal and are covered by the US copyright doctrine of "Fair Use"³. That is to say that scanning the books and giving access to only snippets of the books (between 3 and 15 lines) on its website promotes learning, is not substitutable for a purchase, and does not undermine the prime economic interests of the rights holders.

Google was however sued for copyright infringement in 2005 by the Authors' Guild and the Association of American Publishers (AAP) for scanning books which were still in copyright. Most 20th century books are protected by copyright and therefore most types of reuse require the permission of the author. Copyright laws differ from country to country, but in general protection extends for the duration of an author's life plus 70 years.

An out-of-court settlement was agreed between the Authors' Guild, the APP and Google in October 2008, enabling Google, subject to court approval, to continue to digitise and give access to the books in the US. The deal included an agreement by Google that it would establish a \$125m fund to compensate those whose works it had published online, and that a "Book Rights Registry" would be established so that authors could be paid when their material was viewed online.

3 Fair Use is an open-ended and flexible test that at its most basic is a defence against infringement, allowing for use of copyright works without the permission of the rights holder for certain specific purposes such as teaching, news reporting, criticism or research. In the UK, as with most continental European countries, no open test exists, but rather there are specific "exceptions" to the monopoly right created by copyright law. For example, in the UK there is an exception which allows for the copying of a "fair" amount of a copyright work for private non-commercial study or research.



In the US, Google aims to commercialise those in-copyright works it digitises in three ways:

- o Advertising supported previews of books.
- o Online print-on-demand editions.
- o Institutional sales to universities of the entire corpus.

Authors and publishers are given the option to opt out of the settlement, if they do not want their works included on Google Books.

2. Why is this controversial?

The nature of the US legal system (class action law) means that any settlement reached, once approved by the court, automatically applies to all authors and rights holders regardless of whether they were involved in the class action in the first place, and whether they are US authors or not.

Though authors and publishers are given the option of “opting out” of the initiative, there is some concern that this is not in line with copyright law which requires permission to be granted before a work is used. Furthermore there is a risk that Google could acquire a de facto monopoly on the digitisation of books and a particularly strong position as regards orphan works.

What is happening in the courts?

Before the settlement can be enforced, it has to be approved by the US courts. When the settlement was first in front of court in September 2009, a number of stakeholders submitted concerns and recommendations.

Among these, the US Department of Justice (US DoJ) made a submission saying the settlement presented “significant legal concerns”. Concerns were raised of an anti-trust / competition law nature around market dominance, and the power given to publishers to restrict price competition. The US DoJ encouraged parties to continue negotiations to modify the settlement. The US Copyright Office publicly criticised the settlement for creating de facto law around orphan works (works where the rights holder is not known or cannot be traced) which they assert is the prerogative of the legislature and not the courts⁴. The French and German Governments have publicly criticised the Google Books initiative; however the UK Government has not yet taken a position.

A revised settlement was submitted in November 2009. This new proposal limits the scope of the settlement to works registered with the US Copyright Office or published in the UK, Australia, or Canada. The publishers excluded from the proposed agreement will retain the right to sue Google (as is currently happening in France). Snippets will continue to be displayed from these publishers in the US as Google maintains that this activity constitutes ‘Fair Use’.

On 18th February 2010 a ‘Fairness Hearing’ took place in a New York court but no decision was made. Since this date no further pronouncements from the court have been forthcoming.

4 <http://www.copyright.gov/docs/regstat091009.html>

Implications of the Google Books settlement

The complex issues raised by the proposed settlement have led to much discussion amongst the various stakeholders – citizens, authors, libraries, publishers, digital civil society groups and booksellers. Given that Google's activities have very important implications for society and the economy, the European Commission and Parliament as well as the French and German Governments have been very proactive in the debate and have made submissions to the US courts.

The potential public and private benefits from easy and convenient access to tens of millions of titles, many of which are currently out of print, are obvious. However, there are also many potential disadvantages and costs.

Funding

Digitising books en masse is expensive. There are very few private companies that have the resources to match Google. The digital objects (scanned books) are owned and held by Google and any onward usage is dependent on Google's own goals and strategies. Due to the restrictive nature of the contracts signed between Google and the research libraries, this also includes those books already in the public domain.

There are a number of publicly funded projects from around the world trying to do the same as Google, or something similar. These include the US National Science Foundation-funded Million Book Project; the European Commission's Europeana⁵, and Gallica in France. Publicly funded projects have not been able to scan as many books as Google and have focussed primarily on out-of-copyright books.

Competition policy

A market-led solution to mass digitisation along the lines of the Google activities has inevitably led to concerns about competition issues. Concerns raised by the US DoJ and other stakeholders centre around the de facto monopoly position the settlement would create for Google (as only Google has control of the digitised books, and through the class action procedure would be the only organisation able to use this material). Through the settlement Google will have created a legal and market position that will be unachievable by any other market player. According to the US DoJ this will "make it difficult if not impossible to engage in lawful large-scale book digitisation projects, thereby denying the public the full corpus of 20th century books and, perhaps, unknown benefits of future creativity and economic innovation."⁶

- 5 The Commission has published a roadmap for allowing orphan works to be digitised which can be accessed via http://ec.europa.eu/governance/impact/planned_la/docs/114_market_orphan_works_digital_libraries_en.pdf
- 6 The Department of Justice's Statement of Interest regarding proposed amended settlement agreement, available at http://thepublicindex.org/docs/amended_settlement/usa.pdf

3. Broader cultural and societal issues

Digital access and culture

The benefits of mass digitisation are likely to be great for those who have access to works online as it will enhance access to a rich national cultural heritage and intellectual strength in the global knowledge economy. Unrestricted access to millions of published items, combined with new technology, is likely to lead to new forms of creativity, learning and cultural progress. The many individuals who live in rural areas far from any library, are not affiliated to a university, or are visually impaired, will benefit greatly from greater access to knowledge online from any internet-connected place. However, the current settlement means that such access would be restricted to the US (and not available in the EU). Even when it comes to books in the public domain, online access in Europe is more restricted than in the US as different copyright laws mean that an estimated 500,000 books that are on Google's book platform are available in the US but not in Europe. The nature and diversity of copyright regimes in the EU means that it is unclear whether an initiative such as Google Books could take place in the EU.

Whether access to knowledge should be controlled by one corporate entity or by the State in some form is a debate being held not only in the US but also in many European countries (See box 2 below for a description of current EU initiatives). Public intervention in information policy has a long history through such mechanisms as lower tax rates on books, the public lending right, the establishment of public libraries, etc. Whilst there are clear benefits to the Google digitisation programme it is unclear what might happen in the future to the corpus, and whether the current 'free at the point of access' business model will continue.

Box 2: EU initiatives

Since 2005 the European Commission under the banner of “i2010” has been looking at the issue of convergence of media as well as how to encourage mass digitisation of library holdings – including looking at copyright law and funding. As a result of this there have been a number of European initiatives aimed at trying to stimulate the digitisation of 20th century in-copyright material, including:

- The establishment of a High Level Expert Group on Digital Libraries (2006) chaired by Viviane Reding, Commissioner for Information, Society and Media. (UK participation included the British Library and the Scientific, Technical and Medical Publishers Association).
- The establishment in 2007 of Europeana (a digitisation initiative and search platform that links together digital objects on library, gallery and museum websites across the EU), funded by the European Commission.
- The publication in 2008 of a European Green paper entitled “Copyright in the Knowledge Economy”. The paper focussed on many research / library / education issues such as orphan works, whether new exceptions for Google-style snippets should be introduced, digital preservation, etc.
- The Commission is currently assessing amendments to the European Copyright Directive to facilitate digitisation of orphan works by libraries, universities, etc.
- These European initiatives are complemented by national initiatives. For example in France President Sarkozy announced €750 million for the digitisation of French publications in the face of growing concerns regarding Google potentially privatising French culture through digitisation.

Education and research

There are enormous benefits for education and research in having available a large scale corpus of works online. It will transform scholarship and learning and aid the knowledge economy. For this reason Google Books has the support of a number of large US research libraries. While recognising the social and educational desirability of access to millions of books online, questions have been asked about the long-term sustainability of the books digitised (in terms of whether the digital copies are at an optimum level to guarantee longevity of the digital item), as well as the restrictions placed on academics and private companies (such as Yahoo, Microsoft etc) who wish to perform computational analysis of the contents of the books in the corpus.

Censorship and data privacy

Whereas currently reading habits in libraries are private, Google routinely analyses the activities of its online customers. The proposed settlement says little about privacy and Google has announced that its general privacy policy will apply. This could allow Google to “track a reader’s past and present online actions and locations through some unstated combination of cookies, IP addresses, referrer logs, and numerous distinguishing characteristic of a reader’s hardware and software.” Google has also come under criticism in the past for its censorship activities in China as well as Thailand, leading to questions regarding its policy to select and deselect works from the book corpus.

SABIP Policy Breakfast Event

This section summarises the proceedings of the day.

1. Presentation: The Google Books initiative - Sarah Hunter, Google

Google's aim is to organise the world's knowledge and information. It currently searches over one trillion web pages. However there are around 174 million books in existence and digitisation is considered important in order to provide access, especially to the increasing amount of users who are dependent on online content for information.

There are around 600,000 books published in the UK each year; however bookshops are limited in terms of how many titles they can stock at any one time and the length of time they are stocked. Google Books (previously known as Google Book Search) has worked with a number of publishers to scan new and existing books and make them available to search online. Books in the public domain area are available to view in full, while publishers can select how much of their copyrighted works can be made accessible. Some publishers (e.g. Michelin guide) opt to have their works 100% viewable. Technological measures are in place to prevent material under copyright from being printed or copied, while the interface offers links to the publishers' websites and booksellers.

Google's aim is to provide increased access to copyright content, including out-of-print and orphan works. Google has indicated its willingness to help address issues such as orphan works, including support for legislative intervention.

2. The European dimension - Grazyna Piesiewicz-Stepniewska

The European Commission considers that one of the key issues is that of who controls cultural heritage and makes it accessible. In this context, the EU is exploring the matter from the angles of competition, culture and copyright:

- **Competition**; including issues related to the monopolisation of orphan works. To date no official formal complaint has been received but the Commission is closely monitoring the situation;
- **Copyright** – the Google settlement was revised to include rights holders in the US, UK, Australia and Canada only. However it is clear that rights holders in other territories will be affected. There are still some European issues to the settlement: was there adequate notice to publishers? Is there adequate representation of EU publishers and authors in the Books Registry?
- **Cultural impact** – The Google settlement could bring real benefits to culture online and has the potential to breathe the real life into works that are not currently accessible. However, this access is currently limited to the US.

Overall the Commission were sympathetic to the goals of the Google initiative but considered that they were against the general approach of making law through litigation.

The audience heard that there were a number of existing European digitisation initiatives. This includes the European Commission-funded Europeana, whose objective is to provide a single access point for cultural material across the EU. This includes not only books, but other digital objects such as maps, radio broadcasts, paintings or films, provided by museums, galleries, archives and audio-visual collections. This is a publicly funded initiative and has no commercial backing or sponsorship, and is therefore unable to rival the Google initiative in terms of scope or funding.

The audience also heard that the European Commission had agreed to undertake an impact assessment on the scale of the orphan works problem. This study highlights important sectoral differences: up to 50-60% of photographs are orphaned, but the proportion is relatively low for books. The results of this work would be published by mid-2010.

Box 3: Audience responses to Google and the European Commission

Audience discussion highlighted that:

1. Each sector has its own specific set of problems – caution should be taken by policy-makers not to legislate for a solution to cover all sectors on the basis of the evidence from one sector alone.
2. Smaller stakeholders need to be taken into consideration – they cannot afford teams of lawyers to help them negotiate complex settlements.
3. A UK-only solution might be ineffective. These issues need to be looked at in an international context.
4. The rights of individual authors and artists need to be taken into account when developing solutions.

3. Views from the Publishers Association and Bloomsbury Publishing

Copyright is fundamental to the UK economy - it is estimated that around 8% of GDP is contributed by copyright industries, and the knowledge economy is growing. Copyright is also vital to creators as it gives them ownership of their works. The argument that users do not understand copyright does not stack up: consumers understand copyright when it is in their interests, as was demonstrated in the recent case of Facebook members rejecting the use of their photographs and images by the website owners for publicity purposes.

With developments in technology, data storage and hardware, this could be the most exciting period in literature ever. However, Google Books as a solution to digitisation could not have happened in Europe due to the current legislation framework, where each European country has its own distinctive copyright framework and licensing arrangements. Whilst very few agreed with the methods Google employed, a major element of the publishing community in the UK has taken the pragmatic decision to strike a deal with Google Books. This has ensured that UK publishers have representation on the Books Rights Registry. The initiative could even help reduce the number of orphan works as authors sign up to the Books Rights Registry to obtain remuneration. However, the Books Registry needs to make it easy for authors to administer their rights. The Google Books initiative was currently filling a policy vacuum until alternative solutions for digitising and providing access to digital works come forward.

Such an initiative can work very well and within the copyright framework – Google Scholar for example offers a model of best practice: it was developed in coordination with academic and scientific publishers and offers a portal to scholarly journals or freely available papers, as applicable.

In relation to the orphan works problem it was considered that there needed to be much greater cooperation at a European level and that extended collective licensing was a possible solution that needed to be explored.

European countries who are against the Google Books initiative are investing heavily in digitising creative and cultural works. However, the UK Government has yet to invest on a similar scale. In many cases the onus remains on industry to find creative and practical solutions to these issues. It is felt that if governments are unwilling to invest, their entitlement to critique the solutions industry comes up with is limited.

4. An author's perspective

It is vital to find the correct balance between ensuring the rights of content holders and the need to promote access. However, as is often the case, most people forget that it is the authors, not the publishers, who are the rights holders here. Indeed the rights for any works handed over to Google actually remain with the author. Yet authors are not being considered in the debate. The current settlement turns copyright on its head, as without prior approval and consent from creators to use their works there is no copyright.

It is misleading to assume that those authors who protest against the Google settlement are out-of-touch luddites who are set in their ways. In fact, it is the more tech-savvy authors who are debating how to remove their works from the initiative.

The web currently allows niche readers and authors to work closely together and sustain a living culture. It would be preferable to have a diverse e-book market than a Google monopoly.

5. Views from the audience

The Google Books settlement

Some members of the audience felt that the settlement offered a pragmatic solution to the problem. The initiative would increase access to authors' work but would not preclude them from publishing elsewhere. Technology is here and worldwide and practical solutions are needed.

The US DoJ, amongst others, has suggested an opt-in rather than an opt-out as a solution to the debate. An opt-in solution would demonstrate respect for individual authors and their IPRs. However it was felt that this would not necessarily solve all the issues (particularly that of orphan works), and would not be attractive to the key investor, Google. More generally any solution, whether opting in or out, has a cost. The key question then becomes: who bears the cost? Authors or publishers?

The nature of the settlement was also discussed. Some audience members felt that the settlement was heavily biased towards Google's interests – it does not bind Google to digitise books or display them even if a publisher has entered the agreement and therefore most liabilities have been removed.

Finally, it was pointed out that the Google settlement case may in fact be held in court for years. Subsequent to the event it should be noted that a class action taken by photographers has been launched. However, it has highlighted a number of issues that need to be addressed by policy-makers now.

Implications for policy-makers

There is an opportunity for the UK to take a lead role in Europe and to drive the debate. Copyright remains high on the European Commission's political agenda, and any potential solutions for mass digitisation, would need to respect copyright and competition rules.

Rather than law-making through litigation, a proportion of the audience felt that legislation was needed to address these issues. Copyright legislation is left to national Governments and these must ensure that broader issues are taken into account when legislating, including:

- The impact on visual works;
- The impact of legislative solutions, such as extended collective licensing, on moral rights;
- The preservation of innovation on the Internet;
- The implications for a broad range of stakeholders, such as the educational and wider public benefits of mass digitisation;
- How would mass digitisation be funded and who the public could trust to be the gatekeeper to knowledge; and
- Where and how value is derived from content in the digital world.



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