



Digital mediums: champions or monsters?

Copyright law is yet to scratch the surface of what is commercial and non-commercial, says Jay Rosenthal of Mitchell Silberberg & Knupp

Do you think, in light of the criticism levelled at Google Books in its dispute with the Authors Guild, that mass digitisation is a path that must be tread carefully?

It's a path to tread very carefully. The case impacts on copyright owned by major companies, as well as small artists and independent companies representing those artists. It's a case that is very troubling to the content and artist community and, therefore, we should definitely tread carefully into mass digitisation.

How likely is it that mass digitisation will happen—are we already there, with the Google Books litigation and the drive towards digitising everything?

I think we are headed in that direction. When you open the door, it's hard to close. The big copyright question for mass digitisation is what kind of protections and comfort can the companies engaged in these projects give to the content and artistic communities so they are comfortable that their property is not being infringed or their business model damaged.

Whether or not the use can be characterised as commercial or non-commercial is also very challenging. It is a grey area at this point.

In the past, it was fairly easy to conclude that a library project was non-commercial and beneficial to our culture, and in some instances a clear example of 'fair use'. That is not the case today. Mass digitisation projects contemplated today can certainly be commercial in nature. This changes the whole tenor of these initiatives. This is where a lot of the concern lies. Libraries never sold music—now they can sell or rent music tracks. It's a new world.

We have yet to scratch the surface of what is commercial or non-commercial. This is a red flag for the content community moving forward. And the content community is trying to express that to Congress, to companies and organisations engaged in mass digitisation. I think we're just starting the process of figuring out what to do and what protections to have. But mass digitisation is moving forward. It is simply a by-product of our new digital world.

You have to embrace it, but the goal is to make sure it's a win-win for all involved. We cannot create a system whereby content creators are collateral damage. We did this with piracy and it was a disaster for content creators. It is time to figure out how all the parties can emerge as winners because, if artists lose the incentive to make money, it will end the creation of art.

You say that in an ideal situation, 'everybody wins, but it seems right now that Google is the only winner. Is this fair?

I do not deny that Google and other digital service companies are ahead, but it is more of a race, than a one-day event. Google and other companies engaging in mass digitisation are far ahead, but it does not mean that content creators cannot catch up.

In historical context, this is how copyright has always worked. New disruptive technologies are developed, and copyright owners have always had to fight for their rights after the fact—in other words, they chase after the new technologies by filing lawsuits and seeking changes in copyright law. But once the content community begins to take action, whether it's through copyright reform or in the courts, the playing field becomes more balanced—at least hopefully.

It's one of the reasons why I think there has been such an increase in compulsory licensing since the beginning of the 20th century. This

has always been a fall-back position of government and when a market fails, and compulsory or collective licensing seems to be the more efficient answer, the government—for good or bad—steps in. This is not the perfect solution, but this is better than piracy because at least the copyright owner is paid.

The question, however, is how much do companies pay, and is it a fair price for the content. Compulsory licensing, frustratingly, devalues the intellectual property, but it's good that they pay for it once they take a compulsory licence.

Is that a likely outcome of mass digitisation?

Perhaps. The frightening potential is that mass digitisation could become a way to expand fair use. That's what the Google Books case is about, as well as other entities doing the same thing. We need to stay away from an expansion of fair use.

Fair use needs to be narrow and limited. We should be focusing on how to pay artists—not on how not to pay them.

Do you think fair use will be narrowed?

No. On one level, if fair use is not expanded, the content owners have 'won'. But much in Congress is not a matter of winning, but a matter of keeping the status quo. I am not optimistic that fair use is going to be limited.

If Google, libraries and universities are considered to be practising fair use, how are rights owners affected?

If fair use is expanded into what would be considered 'commercial' activity, rights owners will be deprived of royalties that they would rightly receive from a clean commercial endeavor. The worst thing is that rights owners would lose an otherwise commercial market and would stop making art because they are not being compensated properly. I think this is something lost on everybody. We cannot incentivise the creation of amateur art—we must incentivise the creation of professional art.

Quality art is lost unless companies protect their copyright. Without paying the artists, you do not get quality art. The Founding Fathers did not want copyright to help create Justin Bieber—they wanted copyright to help create the next American Mozart.

Did Google ignore the public cries for quality art, then, for commercial gain?

Google's goal is to share everything and to make as much money doing it as possible. Helping artists to create quality art is a secondary matter to them.

I don't begrudge them for that, but I do begrudge them that they are ignoring, the constitutional imperative to protect artist's rights.

Both individuals and institutions are fighting for an ecosystem that supports these artists, and allows them to get the money they deserve in

a way that keeps them moving forward. Maybe there needs to be more conflict between the two sides before we come to any realisation that if you don't have art, then you won't have Google, except if you think that Google and companies that create these technologies, do not care about the creation of new art: perhaps they think we have enough music out there, or movies, or users can just create it, and that's all that matters. Then we really have a problem with professional art, and the quality of the art that is coming out of the artistic community.

On the flipside, is the June 2014 Aereo decision the antithesis of the Google Books case? Does it offer rights holders any hope?

The Aereo case hit upon one great headline: you're not supposed to use technological gimmicks to get around paying royalties. That's not what the copyright law is, it is not a game.

Aereo's technology of thousands of tiny antennae was a gimmick to avoid paying a public performance. It's ingenious. But the case might represent the crest of the wave for minimalist copyright.

Maybe it is rolling back and Aereo is a good example of that. We can only take so much of this juvenile approach to art, and those involved in making the TV programmes.

I agree that, if you're looking at the Google Book case as 'bad' for copyright, the Aereo case is 'good' for copyright.

There are more Aereo-style companies out there. The sector may also see major copyright lawsuits against the larger companies too, such as Grooveshark and MegaUpload.

Grokster has gone, and everybody has recognised that the copyright community on the piracy side has handled the technological companies involved in piracy and those companies are coming to a realisation that now, they cannot steal copyrighted property.

The question now is how much are they paying. Companies such as, Spotify and Google have agreed to license—whether or not these small licensing fees adequately substitute for the loss from piracy is the great question. And this is where a lot of the fight is going to be.

So there still is hope that even in the face of mass digitisation by companies like Google, the rights holders will be properly compensated. [IPPro](#)



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