

Fair Use or Fair Dealing? A Proposed Approach towards Digital Intermediary Copying in Australia

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The aim of digital library projects, like Google Book Search in the US, is to digitize books all over the world and make them fully searchable. Google's books contain both books in the public domain and copyrighted books. As to the copyrighted books, Google chooses to show a chapter excerpt (typically 3-7 pages) to the users after the users perform a full-text search. One main dispute raised by the actions against Google Book Search is that whether the chapter excerpt viewed by the users constitutes a fair use in the US.

As Google Book Search project is a significant progress in the digital file-sharing world, the ultimate purpose of the courts is to seek a balance between copyright holders and one of the world's great innovators, and the decisions reached by the courts will have profound implications for digital copyright development. Because of the great significance of the digital library project which can not be ignored and the great influence on the further copyright reform, copyright law in Australia also faces to solve the same problem in a proper way.

This article will use Google Book Search as a frame for discussing whether the fair dealing in Australia will have a desirable result on intermediary or informational use, and propose certain affirmative defense of fair use or fair dealing which will benefit the digital environment in Australia. The narrow scope of fair dealing exceptions in Australia, newly amended in 2006, embraced a range of specific exceptions. However, some scholars argue that a more flexible fair use exception is still worth re-considering. And both United Kingdom and Australia share general similarity in fair dealing due to their common law history, thus, the UK copyright will also be taken into account in this article.

First, this article will provide a comparative study between fair use and fair dealing on their legislative history, and analyze their copyright theories, such as natural right theory, economic incentive theory, in the digital environment. Second, this article will give a brief introduction on how Google Book Search program operates and clarify the fair use dispute in Google Book Search's actions. Third, the article will examine whether Google Book Search can be exempted under the fair dealing exception in Australia. Fourth, the article will discuss the benefits and defects of the US approach towards Google Book Search and explain the positive and negative effects which the copyright law in Australia will have on the intermediary or informational use such as digital library projects. Fifth, this article will describe how the Australian copyright law can accommodate the Google Book Search within its existing scheme of exceptions,

take the Australia-US FTA and other international treaties into account, and propose some possible changes in the fair dealing defense in Australian copyright law. From this particular digital perspective, this article seeks to offer some reflections on whether it is beneficial for the copyright law in Australia to adopt a more flexible fair use defense which is similar to the US.