Welcome to a new volume of The CRIV Sheet. I am grateful to Carmen Brigandi, head of acquisitions and serials control at California Western School of Law, for her tutelage last year during my tenure as assistant editor. Ms. Brigandi has stood me in good stead for my year as editor. Getting this issue out has found me obsessively referring to the excellent documentation she handed down. I am also grateful to Amy Eaton, senior librarian at Perkins Coie LLP in Seattle, who is serving as assistant editor this year. Together we hope to provide a quality newsletter that reflects the mission of the Committee on Relations with Information Vendors.

We begin this issue with a message from new CRIV Chair Nina Platt, director of information resources at Faegre Benson LLP in Minneapolis. Ms. Platt reviews some of the changes members can expect to see in the CRIV in the coming years, introduces the CRIV’s newest members, and announces the CRIV subcommittee assignments and activities for this year.

In keeping with tradition, this issue also includes reports on some of the educational programs with CRIV-related content that were presented at the 99th AALL Annual Meeting held in St. Louis. First, the aforementioned Ms. Eaton reviews “Preservation of Digital Information: Global Trends in Digital and Analog Archiving.” Then Roberta Woods and Kathy Fletcher, both of the Franklin Pierce Law Center in Concord, New Hampshire, relive the excitement of their well-attended program, “Give Me One Box to Access Our Electronic Resources: The Pioneering Google Search Appliance Beta Test.” Next, outgoing CRIV Chair Kevin Butterfield, head of technical services at the College of William and Mary Law Library, gives us the highlights from “Legal Publishers and Business Practices: AALL’s Ongoing Role in Monitoring the Information Industry.” Finally, “What the #! Is a ‘Snippet’? Copyright Issues Related to the Google Book Search Project” is reported to the membership by Tom Gaylord, reference librarian at the Chicago-Kent College of Law Library. My sincere thanks go out to all of these reporters.

This issue wraps up with a request for nominations for next year’s New Product Award. Please consider submitting a worthy contender.

Is there something else you’d like to see addressed in these pages? Amy Eaton and I welcome your input and ideas. Please consider contributing to The CRIV Sheet. You are invited to contact us at tracy.thompson@yale.edu or aeaton@perkinscoie.com.

I believe that the old cliché says it best: “The only constant is change.” We continue to see change in the information industry, and the CRIV is on a path of change needed to meet the challenges ahead. While we all know that the landscape in which we purchase information resources has changed dramatically, the changes have never been as dramatic as what we’ve seen in the last few years. Last year’s CRIV chair, Kevin Butterfield, wrote about the efforts underway to address how the CRIV would change to meet today’s needs. This year you will start to see the results of last year’s CRIV’s, the AALL Vendor Relations Task Force’s, and the AALL Executive Board’s evaluation of what changes might be needed.

The CRIV had a strong year leading up to the St. Louis Annual Meeting, which was thanks to Mr. Butterfield’s excellent leadership. We are grateful to him and outgoing CRIV members Carmen Brigandi, Thomas Gaylord, Larry Meyer, Jason Raymond, Paul Seeman, Mary Lou Wilker, and Board Liaison Merle Slyhoff for their hard work and dedication. The current CRIV will build upon the foundations they and past CRIV chairs and members have lain.

As in the past, the CRIV’s work is accomplished through the ongoing efforts of its various subcommittees. Here is a quick overview of where we stand.

I will chair the Publisher Communication Subcommittee for the coming year. JoAnn Hounshell and Charles Finger will join me in responding to requests for assistance from AALL members. The CRIV’s charge instructs us to facilitate communication. We take that charge seriously. Should you have any issues communicating effectively and constructively with a vendor, please contact the CRIV for assistance. We can be reached by e-mail, phone, or most easily via the Request for Assistance form on the CRIV Web site, The CRIVPage, or see page 12.

The CRIVPage and CRIV Tools are supported by Mr. Butterfield, with the assistance of the CRIVPage Subcommittee: Joanne R. Mosel Beal, Jennifer Berman, and Marjorie Crawford. The site as a whole will undergo a renewal as the year progresses.
The CRIV Sheet is edited this year by Tracy Thompson, with the assistance of Amy Eaton. As always we welcome your ideas for articles for this publication as well as ideas for additional means for communication.

The New Product Award will continue to recognize achievement in the area of information resource development. Mr. Finger chairs this CRIV subcommittee, joined by Ms. Berman and Ms. Crawford. Please consider nominating a product you consider worthy of recognition (see page 10).

The CRIV’s Education Subcommittee submitted four programs for the next AALL Annual Meeting. Three of those programs were submitted in co-sponsorship with the Private Law Libraries Special Interest Section. By the time you read this we should know which programs have been selected for presentation in New Orleans. Our hope is to provide AALL members with education opportunities beyond the Annual Meeting. Look for opportunities to learn more about the AALL Guide to Fair Business Practices and the Licensing Principles. Committee members include Mr. Butterfield, Ms. Eaton, Kammie Hedges, Ms. Hounshell, Ms. Thompson, and me as chair.

Our Site Visits Subcommittee, chaired by Rochelle Cohen Cheifetz, joined by committee members Ms. Beal, Mr. Butterfield, Ms. Hounshell, and me, is working with Wolters Kluwer Law and Business to plan a site visit in the fall. Our next CRIV Sheet will include reports on that visit.

As we continue to support the tasks our charge directs us to work on, the biggest change you will see this year is in the education area. The CRIV will take on a larger role in this area, principally to provide education on fair business practices and licensing. The focus in the past has been on responding to issues raised by members and site visits. Our role in these tasks is still very important, but with the tools we now have in place (the Guide to Fair Business Practices and the Licensing Principles), our focus is on being proactive instead of reactive. We look forward to supporting AALL members in that role and welcome your input on our current and future activities.

St. Louis 2006—Educational Program Summaries

Editor’s Note: The handouts and recordings for these programs are available for purchase at www.aallnet.org/products/products_educational.asp.

Amy Eaton  Perkins Coie LLP, Seattle

Program A-4: Preservation of Digital Information: Global Trends in Digital and Analog Archiving

Speakers:
Russell Burkle
Analogue Imaging LLC

Stephane Cottin
Constitutional Council of France

Jerry Dupont
Law Library Microform Consortium

Pascal Petitcollot
General Secretariat of the French Government

Opening the session, Stephane Cottin discussed the status and best practices for digital preservation in Europe. The essential question Mr. Cottin asked is, how does the European Union (EU) choose and enter in to force the best practices in digitization? The EU uses portals, such as Europe’s Information Society Thematic Portal to develop and manage policies and activities related to the digitization of information.

The EU also finances programs that establish priorities for research and technological development in a global information society. After the standards are developed, they are published in the official gazette with technical notes. In order to enforce compliance, the EU will only finance research projects that meet the terms of the established standards.

Mr. Cottin next focused on France as an example of how the system works. The National Archives in France is the main player in establishing standards for the long-term preservation of digital documents. The archives has been involved in the process for a very long time, and there are many norms in force. The French feel a legal obligation to preserve digital information, which has led to a multitude of regulations and standards.

The focus of Pascal Petitcollot’s presentation was on the preservation and accessibility of exhaustive...
digital collections. Mr. Petitcollot posted a list of questions centering on the preservation, accessibility, ownership, and archiving of digital legal materials. He then focused on France as an example of how these questions are being answered.

In 2001 France passed a law giving digital works the same conclusive force as written documents, as long as the item was authenticated and archived so as to guarantee its integrity. In 2004 France began producing the Official Journal (OJ) in two formats, paper and electronic. Both formats have the same authority, although differences are already starting to show between the two formats, primarily due to privacy laws. In addition to authentication, it is important to set a technical standard to ensure that the data is regularly archived for long term retention.

France provides free online access to the OJ via Legifrance. The Council of the European Union is also developing a program that will make it possible for any member state to research the legislation of another member state. The archiving of legal material is not the exclusive province of the state. Commercial vendors also provide value-added access to legal documents.

Russ Burkle quoted Paul Wheatley saying, “We’re lucky Shakespeare didn’t write on an old PC.” As our dependence on technology increases, our ability to ensure access decreases. If you want your grandchildren to read your words of wisdom, don’t use digital technology to preserve them.

So why hasn’t the IT industry provided an electronic preservation solution equal to that provided by paper and microfilm? Standards are costly to develop and are not a profit center. Everyone wants to use only their proprietary technology and not follow someone else’s standard. Lastly, most standards have a short life span.

What can we do about it? Is it possible to provide digital access and analog preservation in one system?

Mr. Burkle argues that we can, if we can develop an OCR system that is 100 percent accurate, alleviating the need for human editing. If we were to do this and standardize our documents to facilitate efficient conversion, we would be well on our way.

Ultimately, the media we use to save this data must be technology independent. Media that is not only machine readable but also human readable by a simple means of projection allows control of the archival process to remain with the user, not with the technology.

Jerry Dupont pointed out that there are two kinds of preservation that should concern librarians: the preservation of our print heritage and the preservation of information that is “born digital.” Our current systems are changing so quickly that we find ourselves with saved information we can no longer read. The Law Library Microform Consortium (LLMC) decided that items that are saved digitally must also be saved in analog form if they are to be considered preserved. Each piece of paper that LLMC digitizes is also saved in analog form on silver halide preservation-quality film. The soul of what they do is to save items on film and store them in the archives at Harvard University.

LLMC also paired up with Legal Information Preservation Alliance (LIPA) to focus on print preservation and is working on a project to make sure a few copies of each printed item are saved in print format. A key part of this process is also to make sure we know who has saved what. This information is maintained on a database that can be accessed from the LLMC Web site.

Although LLMC’s focus is on the preservation of print materials, it recognizes that the growing problem of information preservation is born digitally. LIPA is focusing on that problem, and Mr. Dupont urged the audience to attend some of the sessions sponsored by LIPA. In conclusion, he emphasized that LLMC is firmly committed to preserving information in both digital and analog format.

**Kathy Fletcher and Roberta Woods**

**Franklin Pierce Law Center, Concord, New Hampshire**

**Program B-1: “Give Me One Box to Access Our Electronic Resources”: The Pioneering Google Search Appliance Beta Test**

Speakers:
- Jerry DuPont
  Law Library Microform Consortium
- Kathy Fletcher
  Franklin Pierce Law Center Law Library
- Tracy Thompson

Roberta Woods
Franklin Pierce Law Center Library

Kathy Fletcher introduced the program by describing the lead up to the Franklin Pierce Law Center’s pioneering beta test of the Google Search Appliance. In 2004 Franklin Pierce Law Center Library surveyed students to learn how they used the collection,
especially the licensed databases and the OPAC. The survey results were not a surprise to the library staff. Information-age students do not use the OPAC, licensed databases, or much of anything beyond Westlaw and LexisNexis. When they need to go beyond Lexis and Westlaw, they don’t ask for research help. Rather, they search the Internet and trust Google’s search algorithms. Libraries spend a great deal of money on electronic resources that students don’t bother to learn to use.

The Beginning—Exploring Federated Search

Roberta Woods offered the bulk of the presentation describing the steps Franklin Pierce took, beginning with its exploration of federated search products. However, the product demonstrations were disappointing. All were conducted on small database samples controlled by the vendor. A full blown search of “live” databases with real patron load was never demonstrated. As part of the sales pitch, sales people entered a canned search, clicked “Search,” and then pitched their product. The “chatting” during the search artfully disguised how long a search actually took. Vendor reps offered excuses for the search slowness that generally blamed the library’s Internet access or load. Often the technology was clumsy. Questions concerning relevance ranking, de-duplication, lack of legal databases available to search, and implementation difficulties went unanswered.

Even more troubling was information presented on the topic of “Federated Searching: Digital Promise, Digital Reality” at a meeting of the Association of College and Research Libraries (ACRL). Presenters at that meeting had attempted to implement different federated search products in their libraries with varying degrees of success. Most could not go live with their product after years of development. The collective finding was that federated search was difficult to implement, required a significant amount of time and human resource investment, and could take years to implement. Search results could not be repeated, and the average search took 35 seconds (an eternity to information-age patrons). Search vendors were not responsive once the product was purchased.

Mostly federated search vendors did not seem to have taken into account the complex commercial relationships libraries have with content providers. Licensing issues are not trivial in a practical or legal sense, and it seemed as though the information vendor was the forgotten partner in the information delivery triad of search providers, information vendors, and libraries. Yet content providers need a “one box” solution as much as libraries because library budgets are shrinking. Libraries must be able to justify expenditures, and if no one is using expensive electronic resources, they are easily targeted. For a search solution to be viable, all partners need to get something out of it.

The reason federated search did not and cannot deliver on its promise is based on its search paradigm. A search query with federated search is submitted simultaneously in real time to live databases. The results cannot be repeated because they depend on too many variables (the speed of the Internet, the speed of the database load, etc.). These variability issues cascade into the presentation of search results. Which result is on top? Is it the first returned, or are some databases being preferenced above others? Are results streamed to patrons? How can results be de-duplicated? How is relevance ranking done?

Google Search Appliance

Following the ACRL meeting Franklin Pierce abandoned its quest for a federated search product and looked beyond current library technologies to the Google Search Appliance (GSA), a product for knowledge management within corporate organizations. The GSA uses an entirely different search paradigm. Instead of simultaneous, real time search, an index of content is created either by crawling a site, by feeding the data into the appliance for indexing via an XML feed, or by extracting the information from a database. Patrons search the index, which is fast because it is already organized and de-duplicated. Information is ranked and presented according to Google’s already familiar algorithms. Retrievals of actual information go directly to the content provider’s database. However, indexing third-party content would be the first such use of the appliance. Until then, the GSA had only been used internally within corporations.

However, would a large, well-known company like Google work with a small, independent law school located in New Hampshire? Not likely, so Franklin Pierce asked the New England Law Library Consortium (NELLCO) for backing and got it. With NELLCO’s support, Franklin Pierce made a proposal to three vendors — Hein, Oceana, and the Law Library Microform Consortium (LLMC) — to trial the GSA. Each vendor agreed to allow the GSA to index some of its content for the trial. Google offered a free GSA for the trial.

The trial began with indexing free Web sites, essentially to better learn how the GSA worked. By inputting a handful of URLs into the GSA, the appliance “spiders” were released to crawl the sites. Within minutes a small index had assembled, and overnight the spiders had indexed much more.

In addition to crawling sites, the GSA offers the ability to feed XML content into the index or to extract content from databases. The XML feed option
seemed a viable alternative for third-party vendors reticent to open the doors of their databases to hungry software robots. However, the feed required the data to be formatted to comply with Google’s GSA schema. Once over that formatting hurdle, feeding the GSA worked well.

The real beauty of the GSA solution, other than the repeatability of search results and its speed, was that the GSA is a Linux server that resides in a server rack at the library. Franklin Pierce controlled access to the contents. The GSA offered a win-win-win situation for the library, Google, and content vendors. The drawback to using the GSA was its price.

Google uses a document pricing model. A “document” was ill-defined by Google and could be one MARC record in the OPAC, one record from LLMC, or one article on Hein Online. Considering that vendors are adding electronic content daily, scalability is an issue not easily overcome. A GSA that indexed one million documents would quickly fill to capacity.

Tracy Thompson addressed the role of the consortium in this venture. The team envisioned the consortium hosting a “mothership” GSA. That GSA would serve up index results to those member libraries that participated in the purchase of the largest possible GSA. Access to the mothership would be controlled by IP authentication. This model would serve several purposes.

First, each library would not need to purchase and maintain its own GSA. Given the pricing model that Google has adopted, it was unlikely that any library would be able to afford to do so. It would defeat the purpose of the one-box goal for a library to acquire a GSA that doesn’t have the capacity to index all of its e-content (OPAC, subscription-based resources, and free resources). With the consortium model, the costs could be shared and the one-box goal could be realized.

Second, the consortium model limits the amount of spidering that has to occur regularly. Rather than having multiple libraries hitting vendor servers to harvest data for indexing, you have a single GSA creating a single master index, which minimizes the demand on third-party servers.

Finally, this model centralizes communications and technical support between the information vendors and the libraries that would choose to implement this type of searching technology.

In the end, Google’s GSA model proved to be unsustainable. The team at Franklin Pierce continues to seek one-box solution and is in talks with Thunderstone, another search appliance vendor. Stay tuned.

Kevin Butterfield
College of William and Mary Marshall Wythe Law Library, Williamsburg, Virginia

Program E-4: Legal Publishers and Business Practices: AALL’s Ongoing Role in Monitoring the Information Industry

Speakers:
Kevin Butterfield
College of William and Mary, Marshall-Wythe Law Library
Merle Slyhoff
University of Pennsylvania Law School Biddle Law Library
Tracy Thompson
New England Law Library Consortium
Kay Moller Todd
Paul Hastings Janofsky Walker LLP

This program served as a reporting session of the past year’s activities regarding legal publishers, as well as a look ahead into the coming year. Each of the four speakers represented an AALL group, committee, or task force whose charge included a vendor relations component. Kevin Butterfield was the outgoing chair of the Committee on Relations with Information Vendors (CRIV), Merle Slyhoff was an outgoing member of the AALL Executive Board and liaison to both the CRIV and the AALL Vendor Relations Task Force, Kay Todd was the chair of the AALL Guide to Fair Business Practices Implementation Task Force, and Tracy Thompson was the chair of the Special Committee on Licensing Principles for Electronic Resources.

Mr. Butterfield discussed the activities of the CRIV in the last year. The CRIV conducted a full site visit with LexisNexis at its headquarters in Dayton, Ohio. A report from that visit was published in The CRIV Sheet.

The CRIV responded to 25 requests for assistance from the AALL membership involving 14 separate vendors. As a result of the CRIV’s work with the AALL Fair Business Guide Implementation Task Force, all sample letters available on the CRIVPage now include citations to the AALL Guide to Fair Business Practices.

The CRIV also established a new mailing list. The list serves as a vehicle for chapter and SIS CRIV
committees to communicate with the CRIV and with each other. A meeting was held in St. Louis with the CRIV and representatives from each of the chapter and SIS CRIV committees to discuss possible training and/or educational programs. The CRIV’s three-year action plan was also presented.

Ms. Todd presented the activities of the Fair Business Practices Guide Implementation Task Force. The committee’s three-year effort to promote the guide was discussed. During the past year, the task force focused on reviewing the principles and sub-principles of the guide and looked at whether the practices presented were still clear. The group concluded that the principles and sub-principles were still appropriate and no changes were made.

The group did add 13 additional practices to follow or avoid as annotations to the guide. In addition, greater references were made to the Principles for Electronic Licensing. The group proposed that a revised guide be published, and the AALL Executive Board approved this at the St. Louis Meeting. Ms. Todd encouraged librarians to reference the guide in their communications with vendors as a way of reinforcing the continued use of the guide.

Ms. Thompson then presented an overview of the Licensing Principles for Electronic Resources Special Committee. She gave a brief history of the committee and the origin of the Licensing Principles. The committee met during the course of two years in an effort to review and update the Licensing Principles. The original 1997 document, which the group was charged to review, required little change. The revised document has 37 principles, a list of terms that need to be defined, and a bibliography of resources. The committee reviewed the document and vetted the principles with both vendors and the AALL membership.

As a conclusion of the group’s work and to further implement the principles, a full-day workshop on licensing and acquisition was held at the San Antonio Meeting, and the principles were posted on AALLNET. Ms. Thompson recommended that users review the principles and the AALL Guide to Fair Business Practices in conjunction when negotiating a license with a vendor and use them to develop a model license for their institutions.

Ms. Slyhoff concluded the reporting session with an overview of the AALL Executive Board’s actions with regard to vendor relations in the past year. She reviewed the charge of the AALL Vendor Relations Task Force, appointed by former AALL President Tory Trotta, and presented a summary of that group’s report to the board. In addition to this group, the work of a subsequent Task Force on Vendor Relations appointed by the board was reviewed. Ms. Slyhoff reported on the recommendations of this task force to the board.

The floor was then opened to questions. Issues raised concerned monopolistic practices of legal vendors, pricing issues and the availability of accurate pricing information, access to online materials internationally, and suggestions for educational and training programs.

**Program I-2: What the #!*? Is a “Snippet”? Copyright Issues Related to the Google Book Search Project**

**Speakers:**
Jonathan Band  
Jonathan Band PLLC  
Jeffrey Cunard  
Debevoise Plimpton LLP  
Mark Sandler  
University of Michigan

In the words of moderator Alison Ewing, head of access services and reference librarian at the Arizona State University Ross-Blakley Law Library, and to set up the premise of this program for those who might be unfamiliar with the issue involved:

In 2003, Google unveiled a service that would provide Internet access to quote, “All the world’s information.” In 2004, Google announced that it had reached an agreement with five large research libraries to digitize and provide full-text search capability to most of the University of Michigan [sic] and Stanford’s collections along with portions of public domain works from Oxford, New York Public, and Harvard. Google Book Search and the Google Library Project are seen by some as a giant step towards democratization of the world’s information. Others view it as a blatant violation of copyright law.
Speaking on this issue were Mark Sandler, who was a librarian at Michigan at the time Michigan signed on to the program; Jonathan Band, arguing Google’s side of the issue; and Jeffrey Cunard, on the side of the publishers.

Mr. Sandler began by telling us that Larry Page, co-founder of Google and a Michigan alum (as well as a Stanford alum), brought the idea of digitizing the Michigan collection to the University of Michigan in spring of 2002.

Mr. Sandler described the way the basic Google Book Search works (at the time of the program). A search (such as a search for “Clarence Darrow” as used in the program) returns hits that allow the searcher to see the results, including those from books both in and out of copyright. The returns that are out of copyright will be available in full-text to the searcher. Returns from books that are still in copyright will display as “snippets,” a brief part of the text in which the search term occurs so that the user can get an idea of the context of the use. The current default is set so that a searcher will not be able to view more than three snippets from a work still in copyright (although the searcher will know how many hits there were within the work).

According to Mr. Sandler, Google has been very careful to respect copyright in the way that it has set up Book Search. Google, according to Mr. Sandler, believes that the limited display of copyrighted works, the snippets, conforms to fair use. As a policy matter, Mr. Sandler argued that the project promotes the use of the materials by allowing them to be found by users, similar to a library catalog or a reference librarian. Thus, the project allows users to be able to find books that they might wish to purchase or find in libraries.

By analogy, Mr. Sandler described a Michigan library project from 1998. The library digitized 10,000 volumes from its storage facility. Although there was a potential interest of 40,000 campus readers, the likelihood that any of them would use the volumes was miniscule. But by digitizing them and making them available to the world, they become a resource with some 700,000 hits a month.

Mr. Sandler does not believe that the Google Book Project spells the end of libraries. Rather, it’s not about the books, but about facilitating communication and moving libraries beyond the function of warehousing.

Jonathan Band stated that Google concedes, as it must, that in order to “serve up” the snippets, it must copy the complete work into its search index, using optical character recognition (OCR) software. Thus, Google is creating a searchable database of full-text works, both in and out of copyright.

From Google’s perspective, this is simply taking the search engine as it works in cyberspace and applying it to the real world. Search engines, similar in concept to the Book Search Project, in essence copy the entire Internet (more or less) and index it in order to provide fast results. First-generation search engines, like the Yahoo! directory, were human-indexed. Second-generation search engines used robotic “spiders” to crawl the Web and copy the metadata. Today, however, search engine spiders copy the full-text of Web sites. Thus, according to Google, they are doing the same thing with the Book Search Project that they (and others) have already applied to the World Wide Web.

The leading case, under Google’s line of thinking, is *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) in which a photographer sued a search engine provider for copyright infringement for the use of thumbnails of the photographer’s work. The court held that the use was transformative and a fair use; however, Arriba’s use was not for aesthetic or artistic purposes, as it was for the photographer, but for information location. The thumbnails, when clicked, took the searcher to the full-size photos on Kelly’s own Web site.

Central to Google’s argument is the court’s treatment of the fourth of the fair use factors, the harm to the market. In *Arriba*, the court held that there was no harm to the market because the thumbnails were too small and lost resolution upon enlargement. On the other hand, it was possible that the thumbnails enhanced the market for Kelly’s works because they directed searchers to Kelly’s Web site. In addition, Google contends that although it is necessary to copy the entire work for indexing and searching purposes, the snippet, which displays only a few sentences of the work at most, is less of an infringement than the case in *Arriba*, in which the thumbnail nevertheless displayed the entire copyrighted work.

Mr. Band then explained the counter-argument, against Google’s reasoning: *Arriba* applies to cyberspace and not to the analog world. By putting his photos up on a Web site, Kelly knew they would be searched and thus gave an implied license for their use in such a manner. Mr. Band’s “counter-counter-argument” was that the ninth circuit did not rely on any such implied license, but applied the fair use factors straightforwardly. Also, Google has allowed publishers the ability to opt out, analogous to a Web site’s designer writing a script that excludes search engine spiders from reading/copying the site. However, it appears to be an issue of how well this opt-out program is working.
Mr. Band also tackled the issue of whether the ninth circuit got it right in labeling Arriba’s use as transformative in that Arriba did nothing to change the work being used (other than making it smaller). However, the second circuit, where the publishers’ suit against Google is pending, recently cited the Arriba decision in a transformative use case (holding that the use of the entire image of a Grateful Dead concert promotional poster in a coffee table book was transformative in that the original purpose was to inform people as to the date and location of a concert, whereas the “transformative” use was educational and historical).

Mr. Band proceeded to address the counter-argument to Google’s contention that there is no market harm (i.e., that the display of snippets does not decrease the market for the books). There is an emerging market for the licensing of the indexing rights. For instance, publishers have licensing agreements with other Web sites to provide some book text searching, such as with Amazon.com. According to the same second circuit case that dealt with the Grateful Dead posters, however, the fair use factor on market harm does not look at harm to “derivative” markets, only primary markets.

Mr. Band would contend that indexing rights is a derivative market in this situation. According to the second circuit, if harm to derivative markets could be taken into account, fair use would never apply because it would always be possible to find a derivative market that was harmed.

Mr. Band believes that ultimately a court will look at the benefit of the project versus the alternative transaction costs of clearing the rights to seven million or 25 million books, and that there is no real harm to the publishers, and conclude that this is a fair use.

Jeffrey Cunard began by asking for a show of hands, concluding that only about 10 percent of the audience was on the side of the copyright owners. The two suits pending in the second circuit are a suit brought by five major publishers (represented by Mr. Cunard) and a class action suit brought by the Authors’ Guild on behalf of all copyright-owning authors.

Mr. Cunard proceeded to point out that nowhere in the comments made by Mr. Sandler and Mr. Band was there any mention of Google’s interest in the project. Not only does Google stand to profit via advertising (such as “sponsored links” to the right hand side of search results), but via the wealth of valuable data Google will accumulate on the search habits of the users of Google Book Search. Thus the exclusive commercial beneficiary is Google and, secondarily, the participating libraries who, for their participation, receive a digital copy of their books. Thus, the publishers, who are not receiving anything, do not see this as respecting the copyright balance.

Mr. Cunard also believes that implicit in all of Google’s arguments is an admission that but for the fair use doctrine, the project would be a violation of copyright. He then proceeded to counter Google’s three main arguments.

First, Google argues that making millions of books available for searching on the Web serves an enormous public benefit (what Mr. Cunard referred to as the “greater good” argument). Second, Google argues that it is impossible or too difficult to get permission on a book-by-book basis, to identify all the owners, etc., in other words, to follow the usual “get permission first, copy later” process. Mr. Cunard refers to this as the “scalability” argument. Finally, Google argues that snippets are merely analogous to thumbnails and that this is just a 21st century version of indexing, what Mr. Cunard refers to as the “transformative use” argument.

However, Mr. Cunard’s clients think that these arguments “gloss over some fundamental issues of copyright law.” First, the public benefit should cut in favor of allowing copyright owners to exploit new and emerging markets, arguing that, among other things, online searching and digitization are traditional markets for publishers. Second, public libraries already exist to allow for the searching of the contents of books, and copyright laws prevent libraries from copying their entire collections, regardless of the reason. Thus, “why should Google, an unabashedly for-profit enterprise ... be allowed to reap the exclusive commercial benefit of massive digitization of copyright owners’ books notwithstanding the public benefit?” he asked.

As far as the scalability argument is concerned, that might be an interesting policy argument to be taken up by Congress, but Mr. Cunard has five publishing clients with lists of identified books. The owners are identified and want out of the project and, according to Mr. Cunard, had to file suit to do so after Google’s “summary dismissal” of attempts to resolve the matter.

With respect to the transformative use argument, Google does nothing to transform the works. There are, according to Mr. Cunard, “lots and lots and lots and lots” of cases that hold that “medium-shifting” does not rise to the level of a transformative use. Thus, the publishers dispute that Google is making an “index.” Mr. Cunard said, “We know what an index looks like.”

The publishers would phrase the query like this: “Whether a commercial entity like Google can stock the shelves of its for-profit virtual library without paying for a single volume?” In other words, is this fair use?
In this case, the publishers would draw a distinction between the online and the real world. While it may be true that no one pays when spiders crawl Web sites and that there may be an implied license to do so when posting material on a Web site, there can be no implied license where, as here, the copyright owners are vociferously objecting to the copying of their works.

As far as the transformative use is concerned, Mr. Cunard distinguishes the Grateful Dead case from the case at hand. There the posters were being used in a biography, such that there was a newly created, original work. Here, merely the medium of the works is being altered with no new content added.

With respect to snippets, Mr. Cunard argues basically that the snippets are a red herring. It matters not under the copyright law what the user sees or does, but what Google does. And what Google is doing is massive amounts of copying of entire copyrighted works.

Finally, addressing the market harm factor of the fair use doctrine, there will be cases where the use of snippets will be the entire consumptive use. Thus, it does not have to be the principal market, and there are surely markets (such as Amazon’s “Search Inside the Book”) for online digitization, searching, and indexing. So, while Google pays licensing fees for putting copyrighted videos online, book publishers would only see a return on the sale of the book itself and be shut out of the other markets.

**Do you have something to say?**

Are you a librarian with a vendor-related issue on your mind? Are you a vendor who wants to clarify a position? We welcome your input in *The CRIV Sheet*. Please contact Tracy Thompson (tracy.thompson@yale.edu) or Amy Eaton (aeaton@perkinscoie) with your submissions.

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**New Product Award Nominations Sought**

We encourage you to suggest the AALL Best New Product Award for 2007. The AALL Best New Product Award honors a new and innovative commercial legal information product that enhances or improves existing law library services or procedures. New products may include, but are not limited to, printed material, computer hardware and/or software, or other products or devices that aid or improve access to legal information, the legal research process, or procedures for technical processing of library materials.

A new product is one that has been in the library-related marketplace for two years or less. Recipients of the award need not be members of AALL. Nominations may be made by any AALL member and by vendors nominating their own products.

**To Submit a Nomination for the 2007 Award:**

Please visit the CRIVPage to see the form for submission, www.aallnet.org/committee/criv/news/newprod.htm, or fill out the form on page 11.

If you are a librarian and wish to nominate a product, please give as much information about the product as possible. The New Product Award Subcommittee will contact the publisher of the product for any further information required.

If you are a vendor or publisher nominating a hardcopy product, please submit the form along with a sample product, if available. If you are nominating a Web-based product, please submit the form, which should contain all necessary contact information, including URL(s) and temporary passwords, if required. See the form for further details.

If you are submitting a hardcopy product, brochures, and other materials, we recommend that you send eight copies, one copy for each member of the New Product Award Subcommittee and the AALL Awards Committee.

Please submit the completed form and documents to:

Charles Finger  
Collection Development Librarian and  
Research Attorney  
340A Myron Taylor Hall  
Cornell Law Library  
Ithaca, NY 14853-4901  
607/255-5862  
Fax: 607/255-1357  
cf72@cornell.edu

**The deadline for submissions is January 12, 2007.**
American Association of Law Libraries
New Product Award Nomination Form

Please use this form to submit a nomination for the New Product Award.

Name of Vendor

________________________________________________________

Year of Introduction (product must be no more than two years old) ________________________________

Primary Contact Person within Your Organization if further information or confirmation of receipt is required.

Name ________________________________________________________

Title _________________________________________________________

Telephone number ____________________ Fax number ________________________

E-mail address ____________________________________________________

Product Name. If this is a Web-based product, please include the URL for the product. If a username/password is required, please include that also. If you are concerned with submitting a username/password, please indicate who should be contacted within your organization for this information. Usernames and passwords will be kept confidential but may be necessary to properly review the product.

__________________________________________________________

Brief Description (250 words or less) of the Product. Please describe: (1) the purpose of the product; (2) the intended audience of the product; and (3) how this product is innovative and better than similar or preceding products. A demonstration of the product or a sample of the product may be offered to the committee for review.

__________________________________________________________

Submit by January 12, 2007, to:

Charles Finger
340A Myron Taylor Hall
Cornell Law Library
Ithaca, NY 14853-4901

Phone: 607/255-5862
Fax: 607/255-1357
cf72@cornell.edu
Request for Assistance: Committee on Relations with Information Vendors

Note: Prior to filing a request for assistance, individuals are expected to have made a reasonable attempt to resolve the issue at hand. To avoid duplication of effort, please provide a complete account of your efforts to communicate with the vendor. Copies of notes from conversations with the vendor are helpful.

Date: __________________________________________
Name: __________________________________________
Library: _________________________________________
Address: _________________________________________
Telephone: _______________________________________
Fax: _____________________________________________
E-mail: __________________________________________
Vendor: __________________________________________
Nature of problem: __________________________________
________________________________________________________________________________________
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Please send this form and supporting documentation to:
Nina Platt
CRIV Publisher Communication Subcommittee
Faegre Benson LLP
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, MN 55402
Fax: 612/766-1600
nplatt@faegre.com

You may also complete this form online at:
www.aallnet.org/committee/criv/publisher_communication/requestform.htm