

# Google Books story comes to the end

By declining to review an earlier decision regarding Google Books, the US Supreme Court has agreed that the copying of 4m books is fair use, says Ernest V Linek

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On 18 April, the Supreme Court of the US issued an order declining to review a decision by the Court of Appeals for the Second Circuit in the copyright infringement lawsuit *Authors Guild v Google*. The Supreme Court's decision not to hear the case leaves in place the Second Circuit's ruling that Google's copying and providing access to some 4m copyrighted books was a fair use under the Copyright Act.

On 16 October 2015, the Second Circuit held that Google Books and the Google Library Project, both of which included making digital copies of full published books, was not copyright infringement, but was instead fair use under Section 107 of the Copyright Act.



In its December 2015 petition to the Supreme Court, the Authors Guild – a membership organisation of published authors – argued that the Second Circuit's unanimous decision represented “an unprecedented judicial expansion of the fair use doctrine that threatens copyright protection in the digital age”. In its petition requesting *certiorari*, the Authors Guild asked the court to review the following questions:

- Whether, in order to be “transformative” under the fair-use exception to copyright, the use of the copyrighted work must produce “new expression, meaning, or message,” as this court stated in *Campbell v Acuff-Rose Music*,<sup>1</sup> and as the Third, Sixth, and Eleventh Circuits have held, or whether the verbatim copying of works for a different, non-expressive purpose can be a transformative fair use, as the Second, Fourth, and Ninth Circuits have held.
- Whether the Second Circuit's approach to fair use improperly makes “transformative purpose” the decisive factor, replacing the statutory four-factor test, as the Seventh Circuit has charged.
- Whether the Second Circuit erred in concluding that a commercial business may evade liability for verbatim copying by arguing that the recipients of those copies will use them for lawful and beneficial purposes, a rationale that has been flatly rejected by the Sixth Circuit.
- Whether a membership association of authors may assert copyright infringement claims on behalf of its members.

In its March 2016 opposition brief, Google argued that the Second Circuit's unanimous decision in the case is correct and does not conflict with any decision of the Supreme Court or any other court of appeals and therefore does not warrant review.

Google argued that the appeals court correctly found that the scanning of books from library shelves was transformative. The appeals court further found that the scanned copies do not compete with original works. Instead, the copies are used solely for indexing and discovery purposes, benefiting users as well as the original rightsholders. In other words, the Google Books process simply enables users of the system to find the books they want to read or purchase.

In its March 2016 reply brief, the Authors Guild again argued that the Second Circuit decision expands the definition of a transformative use well beyond accepted bounds and essentially sanctions the wholesale copying of creative works, putting copyright holders at risk. According to the Authors Guild, the heart of this conflict is a fundamental disagreement about how to apply the Copyright Act in the digital age. Assuming that the primary means of distribution for books will soon be digital, the Authors Guild argued that it would be alarming for courts to authorise any and all entrepreneurs to build digital collections of the entire canon – with no specific security requirements – and then display whatever portions they choose.

## Background

Google Books is an internet tool that lets users conduct keyword searches through tens of millions of books to find particular passages of interest. The resulting passages are displayed in snippets of text, which for a typical book may entail three lines of text containing the keyword. The search results may also identify libraries where the book can be found and can provide links to merchants from whom the book may be purchased.

Since 2004, Google has scanned, rendered machine-readable and indexed more than 20m books, including both copyrighted works and works in the public domain. A majority of the books are non-fiction, and most are out of print. All of the digital information created by Google in the process is stored on servers protected by the same security systems Google uses to shield its own confidential information.

The digital works created by the scanning of these millions of books serves as the data-set for the Google Books search engine. Members of the public who access the Google Books website can enter search words or terms of their own choice, receiving in response a list of all books in the database in which those terms appear, as well as the number of times the term appears in each book.

## District court

The plaintiffs in this case are authors of published books who claimed their books were scanned without their permission by Google, which then made them available to internet users for search and snippet views on its website. The plaintiff authors include: Jim Bouton, author of *Ball Four*; Betty Miles, author of *The Trouble with Thirteen*; and Joseph Goulden, author of *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms*. Each author has a legal or beneficial ownership in the copyright for his or her book.

On 14 November 2013, the district court granted summary judgment in favour of Google, based on its conclusion that Google's copying is fair use under 17 USC § 107 and is therefore not infringing.

## Appeals court

As previously discussed, the Second Circuit also concluded that Google's copying is transformative within the meaning of *Campbell*, does not offer the public a meaningful substitute for matter protected by the plaintiffs' copyrights and satisfies § 107's test for fair use.

## Fair-use analysis

Section 107 provides that "the fair use of a copyrighted work [...] for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work."

The court analysed each of these factors and found as follows:

### Purpose and character of use

Addressing the first factor, the purpose and character of the use, the court found that the Google Books search function was a highly transformative use, in that the function did not supplant the books, but rather provided information about the books to make the books easier to find.

### Nature of the copyrighted work

The court downplayed the significance of the second factor, the nature of the copyrighted work. In particular, the court noted that this factor is commonly used to confer greater degrees of copyright protection to works of fiction and lesser degrees to works that are factual, but expressed disagreement that this should be the case.

The court acknowledged that the transformative nature discussed in the first factor can also influence this second factor and concluded

that the second factor favours a finding of fair use, because the resulting work provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original.

### **Amount used**

As for the third factor, the court acknowledged that Google has made copies of the books in their entirety, but the court also noted that such a complete copying can still be considered a fair use if it was reasonably appropriate to achieve the copier's transformative purpose without supplanting the original.

In evaluating this factor, the court noted that while Google made complete copies, it does not reveal that copy to the public. As for the snippet view, which reveals portions of search results to the public, the court found that it does not reveal enough of the books to risk becoming a competing substitute for the books.

### **Effect on market**

As for the fourth factor, the court found that the "cumbersome, disjointed and incomplete nature of the aggregation of snippets made available through snippet view" was unlikely to provide a meaningful substitute for the underlying book.

The court noted that the possibility, or even the probability or certainty, of some loss of sales does not make the copy an effectively competing substitute that would tilt the weighty fourth factor in favour of the rightsholder in the original works. There must be a meaningful or significant effect "upon the potential market for or value of the copyrighted work."<sup>2</sup>

### **Discussion**

The Second Circuit was largely swayed by what it deemed the highly transformative nature of the work completed in the Google Books project. The court found that the purpose of the copying is highly transformative, the public display of text is limited and the revelations do not provide a significant market substitute for the protected aspects of the originals.

According to the court, Google's commercial nature and profit motivation do not justify denial of fair use. The company's case was bolstered by the steps it took to secure the digital copies, limit the search result content viewable by users and provide additional statistical data about the books.

Google Books will continue and more literary content will become available for public searching on the internet. Likewise, it is expected that the Library Project will be expanded to include even more libraries.

### **In-house action items**

Make full use of Google Books when searching for information on the internet. The confirmation of the appeals court decision by the Supreme Court confirms that copyright owners of the original works cannot successfully sue for copyright infringement.

Review your own works regarding copyright protection. Original works are protected upon creation. Works derived from or based on previous works may require a transformative use of the original work to qualify as non-infringing fair use of the previous works. Look to the four factors of the fair use analysis as discussed earlier.

### **Footnotes**

1. 510 US569 (1994).
2. (17 USC § 107(4)).

### **Author**

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