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ISSUE BRIEF:
Second Circuit Court of Appeals Affirms Fair Use in Google Books Case[1]

On October 16, 2015, the US Court of Appeals for the Second Circuit unanimously affirmed the lower court's fair use decision in *Authors Guild v. Google*, also known as the "Google Books" case. Google, through its Library Project, made digital copies of tens of millions of books submitted to the project by libraries. Google then included these copies in a search index that displays "snippets" in response to search queries. The Second Circuit held that the copying of the books and the display of snippets is transformative and a fair use. Furthermore, Google's provision of digital copies to its partner libraries that submitted the particular works is not an infringement.

This decision follows directly from last year's positive fair use decision in *Authors Guild v. HathiTrust*. There were two main differences between the two cases: Google is a commercial party, while HathiTrust is nonprofit; and Google displays snippets, while HathiTrust provides page numbers only. Judge Leval, the federal judiciary's foremost expert on fair use (he developed the concept of transformative use), carefully explained why these differences did not affect the fair use analysis in the Second Circuit's Google Books decision.

Background

In 2004, Google initiated its Library Project, in which Google partnered with major research libraries. These libraries submitted books from their collections to Google, which then scanned, indexed, and made the books machine-readable. Since 2004, Google has scanned and indexed more than 20 million books, most of which are nonfiction and out-of-print. The public can perform searches on the Google Books database, which, in response to a query, lists books containing the search term. Sometimes links are provided to where a particular book can be purchased or a library where the book can be located. No advertising is displayed to the user of the search function.

If a user clicks on a specific book in the search results, Google Books displays a maximum of three "snippets" containing the search term. The interface does not allow a user to increase the number of snippets viewable through the same search term and also "blacklists" snippets and portions of the book from view. Google Books disabled snippet view for works where the snippet would satisfy the need for the book and, since 2005, excludes the use of snippet view if the rightsholder requests that.

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[1] Prepared by Krista L. Cox, director of public policy initiatives, Association of Research Libraries, on October 16, 2015.

Google allowed each participating library to download the digital image and machine-readable versions of the books that particular library submitted for scanning. The agreements with the libraries required libraries to abide by copyright law in using the downloaded copies and to prevent dissemination to the public at large.

In 2005, the Authors Guild and several authors sued Google, asserting that the project infringed their copyright. Google filed for summary judgment, arguing that its use was a fair use and, in 2013, the district court ruled in favor of Google.

The plaintiffs, which include three authors (the Second Circuit previously held in *Authors Guild v. HathiTrust* that the Authors Guild did not have standing to sue on behalf of its members), appealed to the Second Circuit, contending that 1) Google's copying of entire books and providing snippet views provided a substitute for plaintiffs' works and was not transformative; 2) Google's status as a commercial entity precludes a finding of fair use; 3) Google Books infringes on the plaintiffs' derivative rights in search and deprives them of the ability to license their works in search markets; 4) Google's storage of digital copies exposes a risk that plaintiffs' books will be made freely or cheaply available on the Internet; and 5) distribution of the digital copies to Google's library partners could cause plaintiffs to lose copyright revenues if libraries make these copies available.

Fair Use Analysis

The Second Circuit begins its analysis by examining the purpose of copyright:

> The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption. This objective is clearly reflected in the Constitution's empowerment of Congress "To promote the Progress of Science…by securing for limited Times to Authors…the exclusive Right to their respective Writings." U.S. Const. Art. I, §8, cl. 8. Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.

The court notes that the fair use doctrine was developed in order to support this purpose of supporting progress and that this doctrine was eventually codified under Section 107 of the Copyright Act of 1976. However, as confirmed by the Supreme Court, this statutory codification did not change the judicial doctrine of fair use.

Courts look at four fair use factors in evaluating whether a use is fair: 1) purpose and character of the use; 2) nature of the copyrighted work; 3) amount and substantiality of the portion used in relation to the whole; and 4) effect on the potential market.

First Factor: Purpose and Character

Turning to the first factor, the court focuses on determining whether the use is transformative while noting that a finding against transformativeness does not preclude a fair use finding. However, "transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge."

The Second Circuit first examined whether the Google Books search function has a transformative purpose, quickly noting that in *HathiTrust*, it found that "the creation of a full-text searchable database is a quintessentially transformative use." (As noted above, Judge Leval wrote the court's decision. Judge Leval first coined the phrase "transformative use" in a law review article in 1990. Some have argued that the recent fair use jurisprudence strays from Judge Leval's vision of transformative use because it has permitted the copying of entire works without transforming the works themselves. Judge Leval's conclusion that Google's creation of a full-text database is transformative lays this criticism to rest.)

Turning to the differences between the Google Books search and HathiTrust, the Second Circuit considered whether the snippet view is also transformative. The court finds that:

> Snippet view adds important value to the basic transformative search function, which tells only whether and how often the searched term appears in the book. Merely knowing that a term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book, because it does not reveal whether the term is discussed in a manner or context falling within the scope of the searcher's interest.

The court notes that the snippet provides "just enough context" for a user to evaluate whether the book is responsive to her interests, but does not reveal enough to threaten the copyright interest.

Additionally, the court examines the case in light of Google's status as a commercial entity, which also distinguishes this case from *HathiTrust*. While the plaintiffs rely on dicta in the Supreme Court case *Sony Corp. v. Universal City Studios* that commercial uses are presumptively unfair, the Second Circuit states, "while the commercial motivation of the secondary use can undoubtedly weigh against a finding of fair use in some circumstances, the Supreme Court, our court, and others have eventually recognized that the *Sony* dictum was enormously overstated." The Supreme Court later ruled that Congress could not have intended a rule finding such a presumption and the Second Circuit has "rejected the contention that commercial motivation should outweigh a convincing transformative purpose and absence of significant substitutive competition with the original." Ultimately, the Second Circuit concludes:

> We see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as

> reasons for granting fair use. Many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.

Second Factor: Nature of the Work

The Second Circuit notes that the second factor "has rarely played a significant role" in a fair use determination. While courts have suggested that uses of factual works may be more favored than fictional ones, the court finds that the distinction between factual and fictional works is not dispositive in a fair use determination:

> While each of the three Plaintiffs' books in this case is factual, we do not consider that as a boost to Google's claim of fair use. If one (or all) of the plaintiff works were fiction, we do not think that would change in any way our appraisal. Nothing in this case influences us one way or the other with respect to the second factor considered in isolation.

The court also notes that, in relation to the first factor, "the second factor favors fair use not because Plaintiffs' works are factual, but because the secondary use transformatively provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original."

Factor Three: Amount and Substantiality Used

As in its decision in *HathiTrust*, the Second Circuit finds that the amount used was appropriate for the creation of a search database. Here, the court notes that,

> Notwithstanding the reasonable implication of Factor Three that fair use is more likely to be favored by the copying of smaller, rather than larger, portions of the original, courts have rejected any categorical rule that a copying of the entirety cannot be a fair use. Complete unchanged copying has repeatedly been found justified as fair use when the copying was appropriate to achieve the copier's transformative purpose and was done in such a manner that it did not offer a competing substitute for the original.

Thus, "[a]s with *HathiTrust*, not only is the copying of the totality of the original reasonably appropriate to Google's transformative purpose, it is literally necessary to achieve that purpose."

With respect to the amount used in the snippet view, the court acknowledges that "enabling searchers to see portions of the copied texts could have determinative effect on the fair use analysis." However, Google's snippet view "does not reveal matter that offers the marketplace a significantly competing substitute for the copyrighted work." The snippet view contains significant protections including limiting the size of the snippet to one-eighth of a page, blacklisting of one snippet per page, providing no more than three snippets for each term searched, and excluding certain books, such as dictionaries and cookbooks, from snippet eligibility. As a result, "a searcher cannot

succeed, even after long extended effort to multiply what can be revealed, in revealing through a snippet search that could usefully serve as a competing substitute for the original."

Furthermore,

> The blacklisting, which permanently blocks about 22% of a book's text from snippet view, is by no means the most important of the obstacles Google has designed. While it is true that the blacklisting of 22% leaves 78% of a book theoretically accessible to a searcher, it does not follow that any large part of that 78% is in fact accessible. The other restrictions built into the program work together to ensure that, even after protracted effort over a substantial period of time, only small and randomly scattered portions of a book will be accessible. In an effort to show what large portions of text searchers can read through persistently augmented snippets searches, Plaintiffs' counsel employed researchers over a period of weeks to do multiple word searches on Plaintiff's book. In no case were they able to access as much as 16% of the text, and the snippets collected were usually not sequential but scattered randomly throughout the book.
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> [...] The fragmentary and scattered nature of the snippets revealed, even after a determined, assiduous, time-consuming search, results in a revelation that is not "substantial," even if it includes an aggregate 16% of the text of a book. If snippet view could be used to reveal a coherent block amounting to 16% of a book, that would raise a very different question beyond the scope of our inquiry.

Thus, the amount used for both the search function and snippet view is appropriate.

Fourth Factor: Effect on the Market

The Second Circuit notes the importance of the fourth fair use factor, which "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire in preference to the original."

With respect to the creation of a search database, the court again references its decision in *HathiTrust,* which found that search does not serve as a substitute for the original work.

With respect to the snippet views, the court found that this feature of Google Books does not harm the value of the original, due to the fact that snippets provide tiny fragments that are not continuous and, in the aggregate, amount to no more than 16% of a book. Thus, the snippet view "does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue." The Second Circuit acknowledges:

> We recognize that the snippet function can cause some loss of sales. There are surely instances in which a searcher's need for access to a text will be satisfied by

> the snippet view, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect "upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).
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> Furthermore, the type of loss of sale envisioned above will generally occur in relation to interests that are not protected by the copyright. A snippet's capacity to satisfy a searcher's need for access to a copyrighted book will at times be because the snippet conveys a historical fact that the searcher needs to ascertain. For example, a student writing a paper on Franklin D. Roosevelt might need to learn the year Roosevelt was stricken with polio. By entering "Roosevelt polio" in a Google Books search, the student would be taken to (among numerous sites) a snippet from page 31 of Richard Thayer Goldberg's *The Making of Franklin D. Roosevelt* (1981), telling that the polio attack occurred in 1921. This would satisfy the searcher's need for the book, eliminating any need to purchase it or acquire it from a library. But what the searcher derived from the snippet was a historical fact. Author Goldberg's copyright does not extend to the facts communicated by his book. It protects only the author's manner of expression. *Hoehling v. Universal City Studios, Inc.,* 618 F.2d 972, 974 (2d Cir. 1980) ("A grant of copyright in a published work secures for its author a limited monopoly over the *expression* it contains.") (emphasis added). Google would be entitled, without infringement of Goldberg's copyright, to answer the student's query about the year Roosevelt was afflicted, taking the information from Goldberg's book. The fact that, in the case of the student's snippet search, the information came embedded in three lines of Goldberg's writing, which were superfluous to the searcher's needs, would not change the taking of an unprotected fact into a copyright infringement.
>
> Even if the snippet reveals some authorial expression, because of the brevity of a single snippet and the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view, we think it would be a rare case in which the searcher's interest in the protected aspect of the author's work would be satisfied by what is available from snippet view, and rarer still—because of the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view—that snippet view could provide a significant substitute for the purchase of the author's book.

Thus, the Second Circuit concludes after evaluating all four fair use factors that Google's creation of a searchable database and providing the public with snippet views is fair use and not an infringement.

Derivative Works

The Second Circuit rejects the argument that plaintiffs have a derivative right over the search and snippet view functions, stating that "there is no merit to this argument." The court points out that copyright "does not include an exclusive right to furnish the kind of information about the works that Google's programs provide to the public. For substantially the same reasons, the copyright that protects Plaintiffs' works does not include an exclusive derivative right to supply such information through query of a digitized copy."

The court similarly dismisses the argument that Google Books harms the existence or potential for paid licensing schemes. While the plaintiffs cite the Google Books Settlement agreement that was eventually rejected by the district court as evidence for a licensing market, the Second Circuit notes that the settlement would have allowed users to read substantial portions of the books and therefore distinguishable from the current project, which "in a non-infringing manner, allow the public to obtain limited data about the content of the book, without allowing any substantial reading of its text."

The court also finds that there is no unpaid licensing market because the snippets displayed are "arbitrarily selected snippet[s] of text…the snippet function does not provide searchers with any meaningful experience of the expressive content of the book. Its purpose is not to communicate copyrighted expression, but rather, by revealing to the searcher a tiny segment surrounding the searched term, to give some minimal contextual information to help the searcher learn whether the book's use of that term will be of interest to her." Thus, the court rejects the plaintiffs' arguments that Google Books infringes on their derivative rights.

Exposure/Security Risks

Although the plaintiffs' assertions that Google's stored digital copies could pose risks if hackers accessed them is "theoretically sound, it is not supported by the evidence." The court points out that Google's scans "are stored on computers walled off from public Internet access and protected by the same impressive security measures used by Google to guard its own confidential information. As Google notes, Plaintiffs' own security expert praised these security systems."

Distribution to Participant Libraries

The Second Circuit also rejects the notion that Google's distribution of digital copies to the participant libraries that submitted the particular works is infringement, pointing out that the libraries are only permitted to use the copies in a non-infringing fair use manner.

> The libraries propose to use their digital copies to enable the very kinds of searches that we here hold to be fair uses in connection with Google's offer of such searches to the Internet public, and which we held in HathiTrust to be fair uses when offered by HathiTrust to its users. The contract between Google and each of the participating libraries commits the library to use its digital copy only

> in a manner consistent with the copyright law, and to take precautions to prevent dissemination of their digital copies to the public at large.
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> In these circumstances, Google's creation for each library of a digital copy of that library's already owned book in order to permit that library to make fair use through provision of digital searches is not an infringement. If the library had created its own digital copy to enable its provision of fair use digital searches, the making of the digital copy would not have been infringement. Nor does it become an infringement because, instead of making its own digital copy, the library contracted with Google that Google would use its expertise and resources to make the digital conversion for the library's benefit.

The court acknowledged that while libraries could make infringing uses of these copies, this outcome is "sheer speculation" and there is no evidence on the present record to hold Google liable as a contributory infringer based on such speculation.

Conclusion

The Second Circuit's decision in the Google Books case is a strong affirmation of fair use and demonstrates the importance of the fair use doctrine in responding to new technological developments. The search and snippet functions of Google Books allow for important research, including research conducted through text and data mining, that would not be possible without the large searchable database created by Google. Additionally, Google's digitization of certain works from library collections demonstrates an important partnership, which has allowed libraries to make fair uses of these copies, including providing access for those who are visually impaired.

The Authors Guild plans to appeal the case to the Supreme Court of the United States, though it is far from clear whether the Supreme Court would grant certiorari in this case. In its litigation with *HathiTrust*, the Authors Guild decided to settle the preservation issue (the sole outstanding issue after the Second Circuit's ruling in favor of fair use for the creation of a full-text searchable database and creation of accessible formats for those who are visually impaired or print disabled) and declined to pursue an appeal.