P Alert: Google Books Affirmed as Fair Use



GOOGLE BOOKS AFFIRMED AS FAIR USE

By Steve S. Chang

The Court of Appeals for the Second Circuit has affirmed a lower court's finding that the Google Books project constitutes fair use, and is not an infringement of the copyrights in the millions of books contained in the project. The case is The Authors Guild et al. v. Google, Inc., No. 13-4829 (2nd Cir. Oct. 16, 2015), and the discussion below provides the highlights of the issues and analysis involved in reaching this decision.

What's Google Books?

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. Id., pp. 6-7.

As part of developing the Google Book service, Google implemented a Library Project, by which it reached agreement with various libraries to allow Google to digitally scan the libraries' books for inclusion in the Google Book service. In return, the libraries were entitled to download digital copies of the books that the libraries submitted to Google (but not books from other libraries).

What's the Issue?

The plaintiffs in the case represent various authors and publishers who claim that Google Books (and the Library Project) is an unauthorized infringement of their copyrights. Following a trial in 2013, the U.S. District Court for the Southern District of New York ruled that Google Books constituted a fair use, and was not copyright infringement.

Plaintiffs challenged this finding on appeal to the Second Circuit. In particular, the plaintiffs argued that: 1) Google Books was not a fair use; 2) Google Books infringes their derivative rights in the books; 3) Google's storage of the digital copies of the books exposes plaintiffs to a risk that hackers will make their books available for free on the Internet; and 4) Google's distribution of digital copies to participant libraries is not a transformative use, risks loss of copyright revenues, and accordingly is also not a fair use.

What Happened on Appeal?

In a nutshell, the Second Circuit affirmed the lower court's decision, and found that Google's use was a fair use.

The Second Circuit began by noting that the purpose of copyright is to expand knowledge by incentivizing independent creation of expression, and that from the birth of copyright protection in England, courts recognized that giving authorsabsolute control over all copying of their works could, in some circumstances, work to limit, rather than expand, public knowledge. Id., p. 13. Some degree of copying can help expand public knowledge, and this type of use gave rise to the fair use defense, now codified at 17 U.S.C. 107. Section 107 states 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." 17 U.S.C. § 107. The Act goes on to list four key factors that a court should consider when evaluating a claim of fair use:

"In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work."
   17 U.S.C.§ 107.

The Second Circuit then proceeded to consider the Google Books features (searching and snippets) in view of these four factors.

FACTOR ONE – PURPOSE AND CHARACTER OF USE/COMMERCIAL/NON-PROFIT

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. The court also noted that as part of the searching, Google Books offers users insights into statistics of word usage (e.g., frequency of usage of words across different historical periods), and that this statistical capability was another transformative use that added to the body of public knowledge without supplanting the books. Id., p. 22.

The court also found that the snippet view feature was a transformative use, because it provides useful context for the transformative use of the search feature mentioned above. Id., p. 23.

The first factor also includes consideration of the commercial nature of the use, and on appeal the plaintiffs argued that Google was commercially benefitting from the Google Book search capability. In considering this issue, the court noted that many of the most universally accepted forms of fair use (e.g., news reporting, commentary) are also done for commercial profit, and that this factor must be weighed in context against the transformative nature of the accused work. Id., p. 26. Ultimately, the court decided that the Google Books uses were sufficiently transformative to outweigh the commercial nature of Google's use.

FACTOR TWO – 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 actually be the case. Id., p. 28. The plaintiffs' books happened to be factual, but the court found that its reasoning would not change even if the books were fictional. This factor was a bit of a wash, although the court acknowledged that the "transformative" nature discussed in the first factor can also influence this second factor, and concluded that the second factor favors 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." Id.

FACTOR THREE – AMOUNT AND SUBSTANTIALITY

As for the third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” the court acknowledged that Google has made complete 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, 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 Google’s snippet view does not reveal enough of the books to risk becoming a competing substitute for the books. This is certainly due in part to the steps that Google took to ensure that the public could only ever see small portions of the books. Google Books displays small snippet sizes, displays no more than 3 snippets for any single search term (and only one snippet per page), always uses just the first “hit” on each page, excludes books whose value could be supplanted by the displayed snippets (e.g., cookbooks and dictionaries), and intentionally “blacklists” one snippet per page (and one page per ten pages of the book) such that the blacklisted snippets never show up in anyone’s search.Id., p. 31-32.

FACTOR FOUR – EFFECT ON MARKET

As for the fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” 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. Id., pp. 36-37.

DERIVATIVE WORKS

After addressing these fair use factors, the court turned to the plaintiffs’ remaining arguments. Regarding the argument that Google Books infringed the plaintiffs’ right to create a similar derivative work (e.g., a similar search tool), the court was again swayed by the transformative nature of Google Books. The court noted that derivative works largely were works that sought to re-present the protected aspects of the original work (e.g., a translation of a book from one language to another, or a film adaptation of a book), and that the Google Books “program does not allow access in any substantial way to a book’s expressive content.” Id., p. 38.

HACKING

As for the risk of hacking, the court agreed that a secondary user who unreasonably exposes the rights holder to destruction of value may lose the fair use argument. Id., p. 41. However, in this case, the court found that Google had sufficiently proved that it had taken reasonable precautions against hacking. Google stores the scanned book data on computers that are walled off from public Internet access, and protected by the same “impressive security measures used by Google to guard its own confidential information.” Id., p. 42.

LIBRARY COPIES

And as a final point in the analysis, the court addressed the Library Project's sharing of digital copies with the libraries. Since this merely allowed the libraries to each have digital copies of books that they already owned (the project did not allow libraries to get copies of other libraries' books; only their own), the court found that this was already a fair use under prior precedent, and that the only distinction here is that the libraries contracted out to another entity to do the actual scanning. Id., p. 44.

CONCLUSION

So in conclusion, the Second Circuit was largely swayed by what it deemed the highly transformative nature of the Google Books project, and that transformative nature found its way into the court's analysis of several of the relevant fair use factors. Google's case was bolstered by the steps it took to secure the digital copies, limit the search result contents viewable by users, and to provide additional statistical data about the books.

Please click here to view the decision.

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