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Bill Hannay

Schiff Hardin, LLP; Chicago-Kent College of Law at the Illinois Institute of Technology,
whannay@schiffhardin.com

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Google Books: It Ain't Over 'Til the Librarian Sings

Bill Hannay, Partner, Schiff Hardin LLP (Chicago); Adjunct Professor, Chicago-Kent College of Law at the Illinois Institute of Technology¹

Abstract

On October 16, 2015, the US Court of Appeals for the Second Circuit handed down its opinion dismissing the Authors Guild's copyright case against Google Inc.² What does it all mean for librarians?

History of the Google Books Case

Let's make a quick trip through the history of this long-running litigation. It all began in 2004 when Google announced the initiation of its Google Print project and its Library Project (now generally called Google Books). A few months later in 2005, the Authors Guild, several individual authors, and various publishers filed a lawsuit in New York City against Google, seeking to enjoin the project from going forward.

As litigation sometimes does, the proceedings began to drag out as the parties filed various motions with the court and engaged in preliminary investigations (known as "discovery"). The parties also began negotiations over a possible settlement in 2006. After extended discussions, the parties filed a proposed settlement agreement on October 28, 2008. Notice of the proposed settlement was widely circulated and produced hundreds of objections. The parties then modified the proposal and, on November 13, 2009, filed a proposed amended settlement agreement with the trial court.

After notice of the amended settlement was circulated in early 2010, another flood of objections was filed, including one from the US Department of Justice which alleged that, if the proposed settlement was adopted, substantial anticompetitive effects would result. On March

22, 2011, US District Judge Chin rejected the amended settlement as not "fair, adequate, and reasonable."

The parties went back to the drawing board but were unable to reach a settlement that was likely to pass muster with the court. So the case resumed its litigation posture, and on May 31, 2012, Judge Chin certified a class of plaintiff-authors and allowed them to proceed to trial.³ But a little over a year later, the US Court of Appeals for the Second Circuit vacated the class certification and ordered Judge Chin to consider whether or not Google had a legitimate "fair use" defense. He did so, and on November 14, 2013, Judge Chin granted summary judgment to Google on its fair use defense.

The Authors Guild filed an appeal which, almost two years later in October 2015, resulted in affirmance of the District Court's judgment.

Where Are We Now That the Case Is Over?

Is it actually over? Plaintiffs could possibly file a petition for a writ of certiorari with the US Supreme Court, but the likelihood of the Court accepting the case for review—and actually reversing it—seems low.

But the truth of the matter is that, assuming the case is over, the legal result of the case is both extremely sweeping and at the same time

¹ Mr. Hannay is a regular speaker at the Charleston Conference and a contributor to *Against the Grain*.

² The Authors Guild et al. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

³ On October 4, 2012, the Association of American Publishers (AAP) and Google announced that they had settled the publishers' part of the Google Books litigation. See <http://www.publishers.org/press85/>. The settlement provides access to publishers' in-copyright books and journals digitized by Google for its Google Library Project. Other terms—including monetary payments, if any—were not disclosed.

extremely narrow. While millions of individual books have been copied and made part of the Google Books project, all that the Second Circuit has approved are the narrow word search and “snippet” features of the project. The court’s opinion is limited to this specific conduct, and there is no court authorization for Google to do anything more than that.

On a book-by-book basis, therefore, very little of the works are actually made available to users of the system.

A Reminder of What Google *Is* doing

Google has made digital copies of millions of books that were submitted to it for that purpose by major libraries. Over 20 million have been scanned since 2004 (at an average cost of \$10 per book). In turn, Google has established a publicly available search function for the digital copies.

Specifically, an internet user can use this function to search—without charge or advertising—to determine whether the book contains a specified word or term. The result of the search is that the user can see “snippets” of text containing the searched-for terms.

In addition, participating libraries (i.e., those that have made their books available to Google for scanning) are given a limited right to download and retain digital copies of the books that they submitted.

Google’s Search Function Is Quite Limited

The search function in Google Books is quite limited. Only the first usage of the searched-for term on a given page is displayed, for example. Overall, for each book containing the search term, a maximum of three “snippets” containing the term are displayed. (A snippet is a horizontal segment comprising ordinarily an eighth of a page highlighting the term.)

It appears that the Google Books system cannot be fooled into providing more quotations. In particular, a researcher cannot increase the number of snippets revealed on the system simply by repeating the entry of the same search term or

by entering searches from different computers. Moreover, one snippet per page and one page out of ten containing the term are randomly “blacklisted” by Google and cannot be displayed. Furthermore, no snippet views of certain books such as dictionaries, cookbooks, and short poems are permitted.

The Second Circuit’s Ruling

In analyzing fair use, the Court of Appeals applied the four-part statutory test contained in Section 107 of the Copyright Act of 1976. That Act provides that in determining whether a use is “fair,” the factors to be considered must 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.

Focusing heavily on the first factor (i.e., the purpose and character of the use), the Court of Appeals upheld Google’s making of a digital copy to provide a search function as fair use because it is “transformative.” It augments public knowledge by making available information *about* authors’ books. By contrast, Google does not provide the public with a substantial “substitute” for the substance of the matter protected by the authors’ copyrights in the original works. The same is true, at least under present conditions, of Google’s provision of the “snippet” function. The search tool permits a researcher to identify those books, out of millions, that do—as well as those that do not—use the terms selected by the researcher.

While Google is a for-profit entity, the court held that profit motivation does not in these circumstances justify denial of fair use. In any event, Google does not charge for the search and snippet functions. (Whether a court might view matters differently if Google were to attempt to

monetize these services by charging for them is a question for another day.)

Legal Precedent: Campbell v. Acuff-Rose Music

The Second Circuit devoted considerable attention to interpreting the Supreme Court's 1994 decision on fair use in *Campbell v. Acuff-Rose Music*.⁴ There, a music group called "2 Live Crew" recorded a parody of Roy Orbison's 1964 hit "Pretty Woman" without obtaining a license. The rights holder had sued and lost before the District Court, but won a reversal before the Court of Appeals for the Second Circuit. The appellate court held that the commercial nature of the parody rendered it presumptively unfair under Section 107. The Supreme Court disagreed, however, and reinstated the trial court's dismissal of the claim. The Court held that a commercial parody may be fair use if it is "transformative."

A Caveat Re: "Transformative"

Following the Supreme Court's reasoning in *Campbell v. Acuff-Rose Music*, the Second Circuit held that Google's use of the copied books was transformative. However, the court issued a strong caveat narrowing the reach of that defense. Speaking for the court, Judge Pierre Leval (who is considered something of an expert on copyright law) stated:

The word "transformative" cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author's original text will necessarily support a finding of fair use.

Derivative Works and "Transformations"

Last year, the Second Circuit had given narrow approval to libraries' pooling of the digital copies of their books provided to them by Google after scanning. Some 80 universities and libraries had submitted over ten million digitized books into the

HathiTrust repository, which permits patrons to search for files for particular terms (but does not provide snippets). Patrons with print disabilities (such as blindness) are provided full-text access to the books.

In its 2014 HathiTrust decision,⁵ the Second Circuit distinguished between "derivative works" (which are not entitled to a fair use defense) and "transformative works" (which may be). The court said that "[p]aradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or play, or the recasting of a novel as an e-book or an audiobook." In *Google Books*, the court explained that, "[w]hile such changes can be described as transformations, they do not involve the kind of transformative purpose that favors a fair use finding."

The Key to Google Books Is the Limited Nature of Google's Use

The court perceived that the specialized use by Google of the copyrighted work distinguished it from unfair and improper uses. By asking solely whether the work contains a word of interest, Google's search function in effect treats the book as a mere compilation of data rather than exploiting its expressive content. The following quotes from HathiTrust and Google Books illustrate this perspective:

[T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. —HathiTrust

[T]he purpose of Google's copying of the original copyrighted books is to make available significant information about those books. —Google Books

This transformation is made greater by the "snippet" function, in the court's view. "Snippet view adds important value to the basic transformative search function."

⁴ 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

⁵ *Authors Guild v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014).

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.

For Transformation, Google Needed to Copy the Whole Book

In order to achieve these transformative search functions, Google needed to copy the whole book. But importantly, though Google in effect makes an unauthorized digital copy of the entire book, it does not reveal that digital copy to the public. The amount and substantiality of what is made accessible to a public is very limited.

Google has constructed the snippet feature in a manner that substantially protects against its serving as a substitute for authors' books. In the court's words:

Google safeguards from public view the digitized copies it makes and allows access only to the extent of permitting the public to search for the very limited information accessible through the search function and snippet view. The program does not allow access in any substantial way to a book's expressive content.

Recall That Google Tried to Get a Lot More Than This

The actual use made of the copyrighted works is far narrower than Google envisioned a decade ago. Consider the failed 2009 amended settlement: it would have allowed Google to make substantially more extensive use of its scans of copyrighted books than the current arrangement. There, Google sought the right to

- (1) sell subscriptions to an electronic books database;
- (2) sell online access to individual books; and
- (3) sell advertising on pages from books.

The amended settlement (if it had been approved) would have effectively granted Google a monopoly over digital books, and, in particular, orphan books.

But none of these uses exist in the current arrangement.

Libraries' Use of Their Digitized Books Is as Restricted as Google

Reading HathiTrust and Google Books together, it is clear that the participating libraries must use their digital copies to enable only the kinds of searches that the Second Circuit has held to be fair use in connection with Google's offer of such searches to the internet public: i.e., word searches and snippets.

Libraries may not freely disseminate or allow patrons to access the full text of digital copies, and defend by claiming fair use. (Only the narrow category of print-disabled patrons may have access to the full text of the digitized books.)

Can Libraries Be Liable for Copyright Infringement?

With respect to the digital copies that Google has created (and returned to them), if libraries were to misuse them in an infringing manner, those libraries may be liable to authors for copyright infringement.

Also, libraries might incur liability by negligent mishandling of, and failure to protect, their digital copies, leaving them unreasonably vulnerable to hacking.

A Musical Aside

All this suggests to me a Rodgers and Hart song from their 1940 musical *Pal Joey* (which I have "transformed" for fair use purposes):

If they asked me, I could scan a book,
That you could read upon a Kindle or Nook.
You could search the preface inside and out
So you'd know what data's about.

And the simple secret of the plot
Is just to limit what we disclose a lot.
Then the world discovers as our case ends
On what our fair use law depends.

Now It's Your Turn to Talk . . .

It is important to hear from librarians about Google Books, because in the end, the essential question to be answered is whether the Google Books project has been worth all the effort to create it (and to fight about it). So, I would like to

know what you have to say concerning the following questions:

- Is Google Books being used by libraries and library patrons in a productive (and proper) way?
- Is the world (at least the library world) a better place for its creation?

Share your answers with the author at whannay@schiffhardin.com.