

## Copyright Alert: Google Wins Summary Judgment in Books Case

*Full Copying to Make Search Snippets Available to End-Users Held Fair Use*

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Round one of the long-fought Google Books case has ended in a summary judgment victory for defendant Google. The Federal District Court for the Southern District of New York held yesterday that Google's copying, use, distribution and display of "snippets" from millions of books copied in their entirety constituted fair use and therefore did not infringe the authors' copyrights. The court further held that the use of digitized copies by the libraries that had provided Google with access to the works also constituted fair use. *Author's Guild, Inc. v. Google Inc.*, Opinion (S.D.N.Y. , No. 05 Civ. 8136 (DC), November 14, 2013).

### Key holdings on fair use:

- Google's scanning and digitizing of entire books is transformative, weighing heavily in favor of fair use, because it facilitates searching, opens up new fields of research and analysis through data mining and text mining, and facilitates access to new audiences.
- That Google's use was commercial is of little significance since Google is not directly commercializing the works.
- Copying the entirety of books does not weigh heavily against fair use where the copying was necessary for the transformative search function and where end-users are not given access to the full text.
- The "effect on the market for the work" factor weighs heavily in favor of fair use where (1) plaintiffs do not show that the use is a substitution for the original work and (2) facilitating searches can increase sales by making more readers aware of the work, and links to booksellers make it easier for readers to purchase the work.
- Libraries' use of digitized copies is similarly fair use when they already own lawful hard copies of the works at issue.

### Procedural background

The war over Google's unauthorized copying of more than 20 million complete books began in 2005, and the relatively narrow purpose of that copying – to provide small excerpts and information about the books in response to searches – has often been overshadowed by the controversies concerning an attempted settlement of the case.

After the Google Books Settlement was rejected by the district court in 2011, and other settlement efforts failed, the case moved forward on the merits. In 2012, the Second Circuit stayed proceedings for an interlocutory appeal of the class certification, and then, in July 2013, vacated the class certification and remanded for the District Court to consider the fair use issues.

### Factual Background

Beginning in 2004, Google began its "Library Project," which involved scanning and digitizing books in the collections of the New York Public Library, the Library of Congress, and various university libraries, with the authorization of those libraries. Although all kinds of books were involved, 93% were non-fiction; and the digitized books included works that were both in-print and out-of-print, and works still under copyright as well as others in the public domain.

Google used optical character recognition technology to general machine-readable text for each scanned book, and it allows users to search the full text of all the books in the Google Books corpus. However, Google does not display or offer the full texts for viewing or download. A list of books responsive to the search is made available, and the end-user can go to a page that provides information "About the Book," including links to websites offering the book for sale.

The user can also look at an excerpt in "snippet view," which provides a verbatim extract of an eighth of a page around the search term. Because of various security measures, there is no practical way for an end

user to view all or even most of a book. And snippet view is not available for books typically used in short “chunks,” such as dictionaries or cookbooks.

The libraries that provided access to the books received digitized copies of the books scanned from their own collections, but not from other libraries.

### **The Court’s Fair Use Analysis**

Circuit Judge Denny Chin, sitting by designation, assumed for purposes of summary judgment that the plaintiffs had established a prima facie case of infringement of the exclusive reproduction right under §106(1) of the Copyright Act, the public distribution right under §106(3), and the public display right under §106(5). The court proceeded to analyze Google’s defense under 17 U.S.C. §107, considering the four statutory fair use factors.

#### ***Factor One: Purpose and Character of the Use***

Judge Chin held Google’s use to be “highly transformative,” meaning that it “adds something new, with a further purpose or different character, altering the [original works] with new ... meaning.” (Quoting from *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).) The court pointed to several aspects of Google’s use of the works in concluding Google’s use is transformative.

First, the digitizing “transform[ed] expressive text into a comprehensive word index” to allow readers and scholars to find books; similarly, the availability of snippets facilitated searching for works. The court likened such searches to the use of thumbnail images approved as fair use in *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003). Second, the digitizing “transformed book text into data for purposes of substantive research, including data mining and text mining . . . opening up new fields of research.” (The court discussed these and other positive aspects of Google’s activity with more specificity in an earlier section of its opinion titled “The Benefits of the Library Project and Google Books.” As far as we are aware, this is the first case to address data and text mining in a fair use context, and to hold it transformative.)

While Google is a commercial entity and the use was commercial, the court gave this little weight, *inter alia* because Google “does not engage in the direct

commercialization of copyrighted works”—it does not sell the scans or snippets, and does not run ads on the About the Book page. The court “conclude[d] that the first factor strongly favors a finding of fair use.”

#### ***Factor Two: Nature of Copyrighted Works***

Since the vast majority of the books at issue are non-fiction, and since they are published and available to the public, the court also held this factor favors fair use.

#### ***Factor Three: Amount and Substantiality of Portion Used***

While Google copied the full text of the books, “courts have held that copying the entirety of a work may still be fair use.” In this case, “full-work reproduction is critical to the functioning of Google Books,” and “Google limits the amount of text it displays in response to a search.” This factor was therefore held to weigh only slightly against a fair use finding.

#### ***Factor Four: Effect of Use Upon Potential Market or Value***

Judge Chin dismissed plaintiffs’ contention that Google’s scans would serve as a market replacement for books, or that multiple searches could be used to access an entire book. “Neither suggestion makes sense” because Google does not sell its scans and the scans do not replace the books. As for the partner libraries who provided access to the books that Google scanned, the court observed that “they owned the books already.” “Nor is it likely that someone would take the time and energy to input countless searches to try and get enough snippets to comprise an entire book.”

Not only does the book search function not harm the authors’ markets, the court held; “a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders.” It does so by allowing books to be discovered and noticed, increasing the audience for books, and by providing convenient links to booksellers, making it easy for readers to order a book. The fourth factor therefore also “weighs strongly” in favor of a fair use finding.

### *Overall Fair Use Assessment*

After concluding that the balance of the fair use factors weighed in Google's favor, the court went on to hold that Google Books was a fair use because it provided significant public benefits. In addition to providing text and data mining for research and scholarship, Google Books facilitates broader access to works to print-disabled and remote or underserved populations, generating new audiences.

### *Claims Against Google Relating to the Libraries' Use of Digitized Copies*

Finally, the court disposed of claims based on Google having made digitized works available to the libraries that had given Google access to their books. Providing the libraries "with the technological means to make digital copies of books that they already own" is also fair use, the court held, the purpose being "to advance the libraries' lawful uses of the digitized books consistent with the copyright law. The libraries then use these digital copies in transformative ways." And since the libraries' use of the copies was fair use, claims of secondary liability against Google failed for want of any underlying primary infringement.

The court summed it up this way: "Google books... advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.... Indeed, all society benefits."

Presumably, the case will be appealed to the Second Circuit Court of Appeals, but for now, Google's victory appears to be complete.

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