THE NATIONAL LAW JOURNAL
NOVEMBER 16, 2015
An ALM Publication
THE PRACTICE | Commentary and advice on developments in the law

Google Pushes the Bounds of Fair Use—and Wins

Second Circuit is persuaded by new forms of research created through the company's book database.

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As hard as it may be to believe, there was a time when "Google" was not a verb, Wikipedia wasn't a source of knowledge and no one expected instant access to digital versions of newspapers, books and movies.

All of that most certainly was the case when the Copyright Act was passed in 1976. Among the most significant features of the 1976 act was enactment of a statutory test that codified what had been the common law of "fair use." The doctrine of fair use is a kind of safety valve that authorizes courts to permit socially beneficial uses of a work (for example, in scholarship or research) that would otherwise be considered infringement.

The U.S. Court of Appeals for the Second Circuit's decision last month in *The Authors Guild v. Google*—a case that, the court said, "tests the boundaries of fair use"—held that a Google database including millions of books was protected by fair use.

EMBRACING NEW TECHNOLOGY

The case illustrates how far some courts are willing to go to construe fair use to embrace new technology. *Authors Guild* concerns the Google Books project, which began in 2004 when Google signed agreements with a number of leading research universities, including Harvard, Stanford, Oxford and the New York Public Library among them, under which the libraries select books from their collections for digital scanning by Google.

The database that Google produced now contains more than 20 million books, the vast majority of them nonfiction and most out of print. Although some of these books are in the public domain, many are copyrighted.

All of Google's copying was done without permission of the authors or copyright owners. Members of the public can perform word searches on the database, receiving a list of all books in which the selected search terms appear and the number of times those terms appear in each work. Users also receive a brief description of each book and, in some cases, links to buy the book online and information about libraries that own copies.

Although Google undoubtedly has determined that creation of the database is good for its business, it does not display advertising to users and receives no payment when searchers use the displayed links to buy a book.

LIMITED ACCESS

The act of reproducing the copyrighted materials in the Google Books database is itself infringement. To pave the way for a fair-use defense, Google Books is designed to severely limit access to the content of works in the database.

Users may see only a maximum of three "snippets" of a book—a horizontal segment of about one-eighth of a page—containing terms designated in a search, and significant portions of each book are made permanently unavailable for snippet viewing. In addition, snippet viewing is totally disabled for works such as dictionaries, cookbooks and collections of short poems, where a short excerpt might be all that a reader would want to see.

A group of authors, joined by the Authors Guild, sued Google for infringement in 2005. Google, they complained, "enhanced its search engine, drove potential book purchasers away from online book retailers, increased its advertising revenue and stifled its competition by digitizing, distributing and monetizing millions of copyright-protected books without permission or payment."

After years of procedural battles, the trial court dismissed the case, sustaining Google's fair-use defense on summary judgment.

FOUR-FACTORS TEST

Fair use is judged under a test stated in Section 107 of the Copyright Act, which is itself based on remarks made by Justice Joseph Story in a famous 1841 copyright case.

The statute directs courts to consider four factors: first, "the purpose and character of the use," including whether the use is for "commercial" purposes; second, the "nature of the copyrighted work"; third, the "amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and fourth, the "effect of the use upon the potential market for or value of the copyrighted work." Google Books does poorly on many of these factors. It is a commercial use, the works copied undoubtedly include expressive content protected by copyright, and all of the works at issue, not just portions, are scanned into the database.

TRANSFORMATIVE NATURE

But the Second Circuit affirmed the fair-use finding, largely because it was so impressed by the "transformative" nature of Google Books. Google's search engine, the court found, makes possible "new forms of research" such as "text mining," showing how "nomenclature, linguistic usage, and literary style have changed over time."

Nor was the court persuaded that Google Books would have a meaningful effect on the potential market for copyrighted works—viewing snippets of text, it found, would not provide a "significant substitute" for purchasing the whole work.

Critics of the decision argue that the court's rationale denies authors the right to capitalize on new markets made available by digital technology. Why, they say, shouldn't the creators of the work share in the commercial advantage Google hopes to obtain?

At least for now, however, the decision is narrowly limited to the constrained uses and access built into Google Books. Whether *The Authors Guild v. Google* is indeed a test of the "boundaries of fair use," or instead the opening wedge of new limitations on the rights of copyright owners, remains to be seen.

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