



THINK FORWARD

Authors Guild, Inc. v. Google, Inc.

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On October 16, 2015, the Court of Appeals for the Second Circuit, in *Authors Guild, Inc. v. Google, Inc.*, No. 13-4829-cv, affirmed the district court's grant of summary judgment dismissing the Authors Guild's copyright infringement claim against Google's Digital Library on the basis of the fair use doctrine under 17 U.S.C. § 107.

In 2004, Google began a project with several research libraries to make digital copies of tens of millions of books. Google scanned the books and created a publicly available search function that allows Internet users to determine whether a book contains specified search terms and read "snippets" of text containing the terms to provide the reader context. Google also allows participating libraries to download and retain digital copies of any books they submit, provided that the libraries agree to use the digital copies in accordance with Copyright law. Since 2004, Google has created digital copies of over 20 million books.

The Authors Guild and three authors sued Google for copyright infringement as a putative class action suit. In November 2013, the U.S. District Court for the Southern District of New York granted Google's motion for summary judgment, finding that Google's use of the copyrighted books constitutes fair use under the Copyright Act.

The Authors Guild appealed the district court decision to the Second Circuit, arguing that:

- Google's digital copying of entire books, allowing users access to "snippets", is not a "transformative use" and provides a substitute for Plaintiffs' works;
- Google's ultimate commercial profit motivation precludes a finding of fair use;
- to the extent that Google's copying does not infringe Plaintiffs' books, they infringe Plaintiff's derivative rights in search functions;
- Google's storage of digital copies is vulnerable to hackers, who can destroy the value of the copyrights; and
- Google's distribution of digital copies to participant libraries is not a transformative use.

The Second Circuit analyzed the following four fair use factors enumerated in §107 of the Copyright Act to determine that Google's actions did not constitute copyright infringement:

- the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

The Second Circuit specifically found that Google's making of a digital copy to provide a search function is a "transformative use," which actually enhances public knowledge about Plaintiffs' books, rather than serving as a replacement. Moreover, Google Books' "Snippet View", allowing users to read snippets, "show[s] the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of interest (without revealing so much as to threaten the author's copyright)."

The Court also found that there was little threat to the potential market for or value of the copyrighted work because at best the snippet view shows "discontinuous, tiny fragments, amounting to no more than 16% of a book."

Since all four fair use favors weighed in favor of finding fair use, the Second Circuit affirmed the district Court's holding.

The Second Circuit also rejected the Authors Guild's argument that Plaintiffs had derivative rights in the search and snippet view and that the books were vulnerable to hackers who would diminish the value of their works.

As it becomes easier to digitize and manipulate copyrighted content, it will only become more difficult to distinguish unauthorized copying from allowable "transformative" use. For the present, scanning of books to make them available in searchable snippets constitutes the latter. Similarly, in the high art world, appropriation art that borrows from other sources is being found to be transformative fair use. Content providers need to remain vigilant lest over-reliance on a simple transformative trend swallows up fundamental prohibitions against copying protected works. The Authors Guild has indicated that it plans to appeal to the Supreme Court.

Contact Us

If you have any questions about the case or how it may impact your business, please contact one of our [Copyright Attorneys](#).