



Second Circuit *Authors Guild v. Google, Inc.* – Google Books Does Not Infringe Authors’ Copyright

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In the latest development in the 10-year legal battle between the Authors Guild and Google, the Second Circuit affirmed the district court’s grant of summary judgment in Google’s favor and held that Google Book’s search and snippet functions were "transformative" under the test of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) and thus constituted fair use of the published books under copyright that the plaintiffs had authored.

The court, in a unanimous decision written by Judge Pierre Leval, provides a lucid summary of the relevant facts:

Through its Library Project and its Google Books project, acting without permission of rights holders, Google has made digital copies of tens of millions of books, including Plaintiffs’, that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see “snippets” of text containing the searched-for terms. In addition, Google has allowed the participating libraries to download and retain digital copies of the books they submit, under agreements which commit the libraries not to use their digital copies in violation of the copyright laws. These activities of Google are alleged to constitute infringement of Plaintiffs’ copyrights.

Slip op., pp. 2–3.

The plaintiffs made five distinct arguments, each of which the Court rejected:

(1) Plaintiffs argued that Google’s **copying of entire books**, together with letting readers search them and view "snippets" of them, is not "transformative" under *Campbell*. Slip op., p. 3.



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The court found that making searchable copies and providing snippets to the public was "a highly transformative purpose" because it "augmented public knowledge" and revealed only as much as was essential to "permit searchers to identify and locate the books in which words or phrases of interest to them appeared." *Id.*, pp. 4, 21. While the snippet view allows users to read portions of the copyrighted book, it "communicates little of the sense of the original" and provides only "enough context surrounding the searched term to help [the searcher] evaluate whether the book falls within her scope of interest" the use was still "highly transformative [for the] purpose of identifying books of interest to the searcher." *Id.*, p. 23, 33.

(2) Plaintiffs argued that Google's overall **profit motive** and its goal of "use its dominance of book search to fortify its overall dominance of the Internet search market" preclude a finding of fair use, even though Google does not charge for access to the books and provides the functionality in question without advertising. *Id.*, pp. 3, 24.

The court saw "no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use." *Id.*, p. 26. The court also noted that "[m]any of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit." *Id.*

(3) Plaintiffs argued that Google infringes their **derivative rights** by cutting into potential licensing revenues. *Id.*, pp. 3-4.

The court found that "the copyright resulting from the Plaintiffs' authorship of their works does not include an exclusive right to furnish the kind of information about the works that Google's programs provide to the public. For substantially the same reasons, the copyright that protects Plaintiffs' works does not include an exclusive derivative right to supply such information through query of a digitized copy." *Id.*, p. 37.

(4) Plaintiffs argued that Google's digital copies of plaintiffs' books are **vulnerable to hackers** who might distribute the books for free on the Internet. *Id.*, p. 4

The court conceded that "this claim has a reasonable theoretical basis, [since] unreasonably expos[ing] the rights holder to destruction of the value of the copyright resulting from the public's opportunity to employ the secondary use as a substitute for purchase of the original" may rebut a fair use claim. *Id.*, p. 41. However, the court found that plaintiffs' claim is "not supported by the evidence" because Google Books' digital scans are protected by "impressive security measures" that were praised by "plaintiffs' own security expert." *Id.*, p. 42.

(5) Finally, Plaintiffs argued that "Google's distribution of digital copies to participant libraries is not a transformative use." *Id.*, p. 4.

The court found that "the possibility that libraries may misuse their digital copies is sheer speculation. Nor is there any basis on the present record to hold Google liable as a contributory infringer based on the mere speculative possibility that libraries, in addition to, or instead of, using their digital copies of Plaintiffs' books in a non-infringing, manner, may use them in an infringing manner." *Id.*, p. 45.

Throughout the decision, the court acknowledged that at risk is an important tool for public knowledge. As the court noted, "giving authors *absolute* control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge. Google Books, however, "augments public knowledge by making available information *about* Plaintiff's books." *Id.*, p. 13. Many of these books, as the court observed, are out of print, so Google Books "provide[s] otherwise unavailable information" about these works. *Id.*, p. 18.

This decision may prove a landmark case for copyright litigants and scholars alike, as it presents useful guidance on how courts should define what is "transformative use." The battle may not be over yet, however: the next step may be a petition for certiorari.

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