

Library Ruling A Good Sign For Google In Next Book Case

By **Bill Donahue**

Law360, New York (June 12, 2014, 8:48 PM EDT) -- The ruling this week that HathiTrust's Google Inc.-backed project to digitize university library collections counted as legal fair use was the first of two big rulings on mass digitization — and the analysis bodes very well for Google's chances in Round 2.

The Second Circuit's decision — that scanning the libraries of HathiTrust's seven universities and making them searchable was a protected use of copyrighted material under the doctrine — came as a similar case over Google's even larger, consumer-facing book project sits pending before the appeals court.

Though they deal with roughly the same concept, the two cases have differences. The HathiTrust digital library, or HDL, was created by collegiate libraries for research, and, except for a function that displays modified versions of full books for the blind, it only provides searchability and presents no actual content to end users.

Google's millions of scanned books, on the other hand, are available to all consumers through the company's ubiquitous search engine, which provides users with a short “snippet” of the protected material when it locates a match.

In the Google case, a district court found that the company's searchable database of books was a hugely helpful tool for research and, because the snippets didn't really substitute for the author's original use of the material, a transformative use worthy of the doctrine.

On Tuesday, the Second Circuit gave that finding, as it related to HathiTrust's version, an appellate-level seal of approval, calling the search function “a quintessentially transformative use.” And despite the differences between the two book projects, Google has to be liking its chances of winning its Second Circuit case, too.

“Courts are now explicitly focusing on the broader societal goals in determining fair use, as long as copyright owners are not directly harmed by creating a free substitute for their works,” said Bennett A. Bigman, a partner at Liner LLP who specializes in copyright law.

“Recent decisions such as the HathiTrust case make it clear that widespread digital copying for the societal good will not only be permitted but may actually be encouraged, as long as the defendants are not simply making full and unaltered versions of the copyrighted works available to the public,” Bigman added.

Notably, the ruling Tuesday shot down a few of the arguments the author-plaintiffs in the parallel Google case have used in their appeal.

For example, the authors in both cases pushed the idea that storing digital copies opens up the risk of a security breach in which malevolent actors could gain access to the copyrighted works. On Tuesday, the Second Circuit said it had “no basis ... to conclude that a security breach is likely to occur” in HathiTrust’s library because of reasonable security measures put in place.

“The idea that you’re going to get an injunction and a finding of infringement based on speculation of security harms without any actual facts to support that concern, the court showed it has no reason to accept it,” said Julie Ahrens, director of copyright and fair use at Stanford Law School’s Center for the Internet and Society.

Another tidbit that might help Google in the upcoming case: the Second Circuit said the authors couldn’t argue that HathiTrust’s unauthorized program hurt the market for their copyrights by depriving them of licensing opportunities in a market for search services that “could possibly develop in the future.”

“It is irrelevant that the libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair),” the court wrote. “Lost licensing revenue counts under [the fair use test’s market harm prong] only when the use serves as a substitute for the original and the full-text search use does not.”

That language, said Ahrens, might have some impact on the same analysis in the upcoming Google ruling, too.

“The authors don’t have any type of market for their own similar kind of use,” the Stanford professor said. “It’s not like the HathiTrust’s use or Google book program’s use is competing with or substituting for anything the authors are currently doing.”

All that said, Google will likely still deal with one big hurdle in comparing its program with the one run by HathiTrust: The world’s biggest search and online ad company is undoubtedly a commercial enterprise, and it didn’t add books to its search results out of altruism.

“To me, the principal difference is that Google is using it for commercial purposes in a way that the libraries really aren’t,” said Columbia University copyright professor June Besek. “The fact that Google’s use is blatantly commercial ought to be a factor the court takes into account.”

Still, considering HathiTrust and other recent fair use cases, Besek doesn’t see the Second Circuit ruling against Google’s program when it eventually hands down an opinion. She hopes, however, that an eventual ruling would be narrow enough — defining exactly what length of snippet is acceptable, for example, or exactly how tight security has to be on the stored copies — to prevent it from being used as a carte blanche invitation for mass, unauthorized digitization.

“I would hope that they are sufficiently narrow in how they describe their holding that it doesn’t open the doors for all kinds of other databases that argue that they’re similar.”

--Editing by Kat Laskowski and Christine Chun.