

Daily Journal

www.dailyjournal.com

MONDAY, NOVEMBER 2, 2015

PERSPECTIVE

Google Books decision is logical evolution of law

By Bennett A. Bigman
and Ashley R. Yeargan

On Oct. 16, the 2nd U.S. Circuit Court of Appeals ruled that the Google Books project, which involves cover-to-cover scanning of millions of copyrighted books, is a permissible “fair use” under U.S. copyright law. Authors *Guild v. Google Inc.*, 13-4829. The societal benefits of the project, and the careful steps Google took to craft a program that added something to the works rather than acting as a substitute for them, drove the court’s analysis.

Google Books is an Internet search function that allows users to search the text of digitized books for particular terms. It displays a “snippet” of text from all books containing the searched term “to give some minimal contextual information to help the searcher learn whether the book’s use of that term will be of interest.” Although Google copies an entire book to index the text and supply snippets, the general public does not have access to the entire copied book. “Snippets” are typically limited to about three sentences (usually scattered throughout the book), and Google disables the snippet view where a snippet might substitute for the work itself, such as cookbooks, short poems and dictionaries.

Google reached agreements with several major libraries, including libraries at Harvard, Stanford and Oxford, which allowed Google to scan their collection of books for use in the Google Books project. In exchange, Google provided the libraries participating in the “Library Project” with a digital copy of the books that the libraries had supplied to Google.

The plaintiffs, representing various authors and publishers, brought suit in federal district court in New

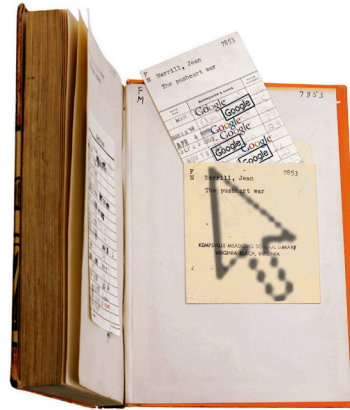
York alleging that Google Books and the Library Project infringed the copyrights in their works. The district court said Google’s project was protected as a fair use.

On appeal, Google admitted that it copied the authors’ works, but argued that it was protected by the fair use doctrine, which requires a case-by-case analysis of: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The 2nd Circuit held that all four factors cut in Google’s favor.

Addressing the “purpose and character of the use,” the court said Google’s search and snippet features were “transformative” uses of the authors’ original books designed to identify “books of interest to the searcher” and “to make available significant information about those books.” Because Google was “communicat[ing] something new and different from the original or expand[ing] its utility,” the court said, it was “serving copyright’s overall objective of contributing to public knowledge.” The court found this “highly convincing transformative purpose” outweighed the potential commercial benefit to Google from the project.

The “nature of the copyrighted work” factor also weighed in favor of fair use. The court focused less on the type of books copied (e.g., fiction or nonfiction), and instead on the fact that Google displayed valuable information about the original books rather than providing a meaningful substitute for them.

The “amount and substantiality” of the use favored Google as well.



Again, although Google had indexed all of the words of a book, the index and resulting snippets would not function as a substitute for the original work.

Finally, the court said Google’s service would not deprive authors of revenue by diverting readers to Google’s project in lieu of purchasing their works, particularly given the disjointed and the incomplete nature of the snippets made available to users.

The court rejected the authors’ argument that Google interfered with their right to create derivative works, noting that the authors did not have “an exclusive right to furnish the kind of information about the works that Google’s programs provide to the public.” It also found that Google had employed reasonable security measures to prevent users from hacking the system and making complete copies of the works available to the public.

The Google decision is a logical evolution of the law applied in multiple circuits that the copying of an entire copyrighted work can be a fair use under appropriate circumstances. *See, e.g., Perfect 10 Inc. v. Amazon.com Inc.*, 508 F.3d 1146 (9th Cir. 2007), and *Authors Guild v. HathiTrust Inc.*, 755 F.3d 87 (2d Cir. 2014). Notable in the decision

is the increasing emphasis on usefulness and societal good as transformative factors which, over time, could lead to expanded fair use findings at the expense of authors and creators in today’s digital age.

An interesting question is whether the decision would have come out differently if the works copied had been television shows or movies. A search tool for particular movie scenes, and snippets of those scenes, would be a closer call given the greater commercial potential for such derivative works. Such excerpts seem closer to the use of ringtones in *U.S. v. ASCAP*, 599 F. Supp. 2d 415 (S.D.N.Y. 2009), which the Google court described as a “mini-performance of the most appealing segment of the author’s expressive content,” as distinguished from a few random sentences of text from a book. Likewise, security concerns would have more weight if the library of films stored by Google included titles such as the highly anticipated new “Star Wars” film.

Google and other content aggregators will need to carefully navigate the new boundaries of transformative fair use. Artists and innovators, on the other hand, will need to fight hard to make sure that fair use remains the exception, not the rule.

Bennett A. Bigman is a partner and **Ashley R. Yeargan** is an associate with *Liner LLP*.



BENNETT BIGMAN
Liner LLP

ASHLEY YEARGAN
Liner LLP