

## Supreme Court Refuses to Hear Appeal In Google Books Copyright Case

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To almost no one's surprise, on April 18, 2016, the Supreme Court refused to hear the Authors Guild's appeal in *Authors Guild v. Google*. This ruling left intact the decision of the Court of Appeals for the Second Circuit which had upheld the lower court's finding that Google Books' use of its digital library did not infringe the copyrights in the books scanned, but rather was a fair use of those books. The decision, which explores and clarifies the outer edges of copyright's fair use doctrine, is now binding, ending an epic legal tale ten years in the making.

The background of this lawsuit began in 2004, when Google commenced the process of creating a massive digital library, ultimately scanning and digitizing, to date, more than 20 million books provided to it by major research libraries. Some of those books are fact-based or out of print, while others are in print and protected by copyright. Through the program, the providing libraries receive e-copies of the books. Users can search the resulting database, Google Books, for keywords or phrases and even read short snippets of text (up to 3 each of 1/8 of a page in length) if the rights holder has not opted out of the option, all without cost or advertising.

The Authors Guild and a group of writers sued Google in 2005, arguing that the digital library breached the copyrights in the books scanned. A twisted saga followed in which the Authors Guild was held to be without standing to bring the lawsuit (the action continued because the named authors did have standing); a settlement reached by the parties was rejected by the district court as giving monopolistic rights to Google; and the same judge later found fair use on the part of Google. That ruling was affirmed by the Second Circuit in an opinion written by Judge Leval, the same jurist who had, 25 years earlier, written the influential article *Towards a Fair Use Standard* for the Harvard Law Review.

The decision held:

The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption... Thus, while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.

This ruling relied upon the principle that in analyzing whether a secondary use is an infringement or a fair use, courts must be mindful of the public policies which underlie the fair use defense.

Fair use (codified at 17 USC 107) is an intentionally vague concept which renders any otherwise infringing use of a copyright not an infringement. Lawyers have wrestled with its scope and meaning for many years. The statute lists four factors to be considered: (1) the purpose and character of the use; (2) the nature of the original work; (3) the amount and substantiality of the original work used; and (4) the effect upon the market for the original work. However, the law makes it clear that these factors need not be given the same weight (the 1<sup>st</sup> and 4<sup>th</sup> have been held to be the most important) and are not exclusive ("[t]he factors to be considered include shall include...").

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The lesson of *Google* is that the degree to which a junior user **transforms** the original work is the guiding consideration in analyzing fair-use. A fair use junior user must employ the original material in a different manner or for a different purpose from the original, in order to maintain the original author's financial incentive in creating and still serving the public interest. Transformative uses potentially include uses for criticizing the senior work, proving a fact, or summarizing an idea argued in the original work in order to defend or controvert that idea, parodying the original work and symbolism, among others. Specifically, the Second Circuit noted "Google's commercial nature and profit motivation do not justify denial of fair use" and its "provision of digitized copies to the libraries that supplied the books, on the understanding that the libraries will use the copies in a manner consistent with the copyright law, also does not constitute infringement."

Thus, the Supreme Court's refusal to grant review let stand the Second Circuit's approach that the ultimate question is whether the senior material is transformed by the junior use in the creation of new information, new aesthetics, new insights or new understandings, thereby serving the public's interest.

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