AN INTERNATIONAL LEGAL SYMPOSIUM ON THE WORLD OF MUSIC, FILM, TELEVISION AND SPORTS

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FAIR USE UPDATE:

*The Authors Guild v. Google, Inc.*, 804 F. 3d 202 (2\textsuperscript{nd} Cir 2015)

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In October 2015, the United States Court of Appeals for the Second Circuit granted summary judgment in favor of Google, finding that Google’s copying of published books and establishing a search function that displays snippets of those books is a fair use under the Copyright Act. The Second Circuit’s decision is noteworthy for two reasons. First, the court found a fair use in a case in which entire works were copied. Second, the decision applies principles of statutory construction in a way that supplies an object lesson in their proper application of those principles.

Google, acting through its Library Project and Google Books Project, made digital copies of “tens of millions of books” and established a publicly available search function. “An internet user can use this function to search without charge to determine whether [a] book contains a specified word or term and also see ‘snippets’ of text containing the searched-for terms.”

Authors of published books sued for copyright infringement. The district court found that Google’s use was a “fair use” and therefore not an infringement under the Copyright Act, and the Court of Appeals agreed.

“Since 2004, Google has scanned, rendered machine-readable, and indexed more than 20 million books.” A member of the public who searches these books can identify those books that do, and those books that do not, contain the search terms. In addition, the search engine performs “text mining” and “data mining,” “to furnish statistical information to Internet users about the frequency of word and phrase usage over centuries.”
A user can only view limited “snippets” of text. Each page of a book is divided into eight horizontal segments, and the search function permits a user to view a maximum of three “snippets”; Google makes permanently unavailable one “snippet” from each page, and a user may not increase “the number of snippets revealed by repeated entry of the same search term or by entering searches from different computers.” Also, Google disables “snippets” that are likely “to satisfy the searcher’s present need for the book, such as dictionaries, cookbooks and books of short poems.”

As in the case of any analysis that requires construction of a statute, the court began its analysis by reciting the statute. The Copyright Act provides:

[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The court further noted that “the party asserting fair use bears the burden of proof.”

The court also examined the legislative history. The Second Circuit Court of Appeals observed that “[t]he statute’s wording...does not furnish standards for
recognition of fair use.”

Rather, “the House Report makes clear that, in passing the statute, Congress had no intention of normatively dictating fair use policy.”

The United States Court of Appeals for the Second Circuit then examined the Supreme Court’s prior analysis of the statute, observing that the Supreme Court did not undertake an analysis of the standards for finding fair use until that court’s decision in *Campbell v. Acuff-Rose Music, Inc.* The Second Circuit noted that the Supreme Court in *Campbell* “made clear that [the purposes set forth in the statute] are ‘illustrative and not limitative.’” The Second Circuit further observed that the Supreme Court had previously recognized that certain of the statute’s four factors are more significant than others, particularly noting “that the fourth factor, which assesses the harm the secondary use can cause to the market for, or the value of, the copyright for the original, ‘is undoubtedly the single most important element of fair use.’”

Finally, the Second Circuit noted that the court in *Campbell* had stressed the importance of the “purpose and character of the use,” noting that copyright’s goal of “enriching public knowledge” was best served by increasingly transformative purposes. In other words, a more transformative use will justify a larger taking of the underlying copyrighted material.

After examining the plain language of the statute, the legislative history of the statute and the existing interpretation of that language by a higher court, the Second Circuit then turned its attention to applying those principles to the facts presented by the lower court’s opinion in *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp.2d 282
The Second Circuit analyzed each of the four factors enumerated in the statute.

*Purpose and Character of the Use*

Regarding the first factor, “the purpose and character of the use,” the Second Circuit returned to *Campbell*, focusing on whether the secondary use “adds something new, with a further purpose...whether and to what extent the new work is ‘transformative.’”\(^\text{17}\) The Second Circuit observed that “transformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.”\(^\text{18}\)

The court then examined both the search function and snippet-view functions of Google’s application. The Second Circuit had “no difficulty” concluding that Google’s making a copy of the books “involves a highly transformative purpose.”\(^\text{19}\) Drawing on the court’s own earlier analysis in *Authors Guild v. HathiTrust*, the court concluded that creating a full-text searchable database is “‘different in purpose, character, expression, meaning, and message’” from the book from which the expression is copied.\(^\text{20}\) The Second Circuit continued, “the purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books.*”\(^\text{21}\)

Regarding the snippet view, “[m]erely knowing that a term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book.”\(^\text{22}\) The Second Circuit noted that Google’s dividing each page into eight snippets gave a
researcher just enough context “to help her evaluate whether the book falls within the scope of her interest.”

Nature of the Copyrighted Work

Courts rarely find that the second factor, the nature of the copyrighted work, plays a significant role in a fair-use analysis, and the Second Circuit’s opinion in Authors Guild v. Google, Inc., is no exception. Although the Second Circuit noted that “[o]ne cannot assess whether the copying work has an objective that differs from the original without considering both works, and their respective objectives,” the court found nothing remarkable about the second factor, “considered in isolation.”

Amount and Substantiality

The court then turned its attention to “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The Second Circuit noted “[t]he larger the amount, or the more important the part, of the original work that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original.”

The application at issue clearly copied the entirety of the underlying copyrighted works. Courts have already rejected a per se rule that copying an entire work cannot be a fair use; rather, as the Supreme Court found in Campbell, “the extent of permissible copying varies with the purpose and character of the use.” Here, although Google made a copy of each entire book, Google does not reveal the entire book to the searcher. The Second Circuit found that “the snippet view does not reveal matter that offers the
marketplace a significantly competing substitute for the copyrighted work,” thus, the third factor fell in favor of a finding of fair use.28

Effect on the Potential Market

The fourth statutory factor, the effect of the use upon the potential market for or value of the copyrighted work, “focuses on whether the copy brings to the marketplace a competing substitute for the original.”29 The Second Circuit recognized that the snippet function would result in some loss of sales, but that fact alone “does not suffice to make a copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original.”30

Thus, the Second Circuit concluded that Google’s making a complete copy and offering both search and snippet functions did not, “at least as snippet view is presently designed,” does not infringe plaintiffs’ copyrights in their books.31

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2 Id. at 207.
3 Id., at 207.
4 Id. at 208.
5 Id. at 209.
6 Id.
7 Id. at 209 – 210.
8 Id. at 210.
9 Id. at 212 – 213 (quoting 17 U.S.C. §107).
10 Id. at 213.
11 Id.
12 Id.
14 Authors Guild, 804 F. 3d at 213.
16 Id. at 214.
17 Id. at 214 (quoting Campbell, 510 U.S. at 578 – 579).
18 Id. at 214.
19 Id. at 216.
20 Id. at 217 (quoting Authors Guild v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014)).
21 Id.
22 Id.
23 Id. at 218.
24 Id. at 220.
26 The Authors Guild, 804 F.3d at 221.
27 Id. at 221 (quoting Campbell, 510 U.S. at 586 – 587).
28 Id. at 222.
29 Id. at 223.
30 Id. at 224.
31 Id. at 225.
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The Second Circuit’s decision is noteworthy for two reasons.

First, the court found a fair use in a case in which entire works were copied but nothing was added that “transformed” the copied work.

Second, the decision applies principles of statutory construction in a way that supplies an object lesson in their proper application of those principles.
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[i] Id. at 214 (quoting *Campbell*, 510 U.S. at 578-579).
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Conclusion

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