

Chicago Daily Law Bulletin®

Volume 159, No. 241

Google prevails in fair use case on book digitization project

Google's unofficial slogan "Don't be evil" sets a pretty low bar as a standard of corporate conduct.

Maybe that's why the company is so often the subject of criticism.

The Google-haters are numerous and the complaints are strident: Google invades our privacy, it reads our e-mail, it allows censorship in China, it is unfair in its page rankings and it has inundated us with advertisements.

One group of researchers reporting on the dangers of large search engines said "Google has become the main interface for our whole reality." That is perhaps a bit of hyperbole, but there is no doubt that Google plays a crucial and pervasive role in our lives. Sometimes we hate the ones we depend on most.

Another criticism of Google is that it is a copyright infringer on a massive scale. The flash point for this charge was its announcement of the Google Book Project in 2004.

Google, in partnership with several major university libraries, began scanning the entire collections of the books in these libraries.

At present, Google has digitized more than 20 million books cover to cover. The purpose for this prodigious project is to enable computerized searching of the entire text of the books.

As lawyers, we are accustomed to doing full-text word searches of court decisions on Westlaw or Lexis, but the Google Book Project for the first time enables a user to search the entire contents of the libraries at Harvard, Stanford, Oxford, University of Michigan and many others. The massive project is a large stride toward Google's ambitious corporate mission: "to organize the world's information and make it universally accessible and useful."

The obvious problem is copyright. While millions of the volumes in the project are in the public domain, millions more are still protected by copyright.

To seek permission to digitize every copyrighted book in the li-

braries would be a logistic impossibility.

So Google addressed the problem in a bold and controversial way. Rather than seeking permission from publishers and authors to scan copyrighted books, Google scanned all the books and announced that if any copyright owner did not want its book included in the project, Google would gladly remove it. In other words, authors and publishers could "opt-out" of the project rather than "opting-in."

The broad protectionists of copyright were appalled, arguing that this turned copyright on its head.

Copyright is an opt-in system, they said. By 2005, both the authors' and publishers' associations brought class-action lawsuits for copyright infringement. The risk to Google of pursuing the project was huge, but it persisted, relying on the fair-use doctrine to justify its novel approach.

The basis for Google's fair-use defense is that it tailors the technology of the book project to accommodate, to a degree, the interests of copyright owners.

Public domain books can be searched and viewed in their entirety. For copyrighted books, however, while the entire text is searched, only "snippets" of a few lines containing the search terms can be viewed.

Some publishers allow Google to display more extended portions than snippets while not allowing the entire book to be viewed. Using Google Books to search for terms in a copyrighted book is like using an electronic index or electronic browsing.

For now, at least, Google can relax. In *Authors Guild, Inc. v. Google, Inc.*, (S.D.N.Y., Nov. 14, 2013), U.S. District Judge Denny Chin ruled that the Google Book Project is a fair use and granted Google's motion for summary judgment.

The court pointed to several benefits of the project.

Most importantly, Google Books has become an essential tool for research, allowing scholars and other readers an efficient way to



William T. McGrath is a member of Davis, McGrath LLC, where he handles copyright, trademark and Internet-related litigation and counseling. He is also associate director of the Center for Intellectual Property Law at The John Marshall Law School. In 2013, he was honored with a Lisagor Award from the Chicago Headline Club. He can be contacted at wmcgrath@davismcgrath.com.

find books and information.

For example, say an art historian wanted to know whether there was any connection between Marsilio Ficino, a Renaissance philosopher, and Agostino Chigi, a wealthy Renaissance patron of the arts. By plugging those names into Google Books' search engine, the researcher immediately discovers at the top of the search results a book entitled "Influences: Art, Optics and Astrology in the Italian Renaissance," published by the University of Chicago Press this year.

The reader is able to browse the portions of the book where the search terms are found to see if the book is relevant. Because only excerpts are displayed, the researcher can't read the entire book and can't download any material from the book.

To facilitate the immediate purchase of the displayed work, Google provides links to online book vendors.

This is how copyright law should work.

The reader has access to books that may only be available at distant libraries and can easily find new information that would otherwise have been inaccessible to the reader.

The publisher has already made a sale of the book to the library and might get another sale to the

reader, as well. The author gets her royalty on the sales. And Google has taken a small step toward its mission of making information universally accessible and useful.

Chin's decision is an excellent example of a ruling that achieves the ultimate goal of copyright law — to promote the dissemination of knowledge and the advancement of learning, while also providing an economic benefit to the author.

A key consideration in a fair-use assessment is whether the new work is transformative, that is, whether it merely supplants the original work or whether instead it "adds something new with a further purpose or different character, altering the first with new expression, meaning or message."

Even though the copies Google made were verbatim, Chin found that the use of the copyrighted works was "highly transformative."

The transformation comes through the digitization, which transforms the text into a comprehensive word index that enables searching. Using the digital text for searching and display of snippets is analogous to a search engine displaying copyrighted thumbnail images when providing results for a search of websites, a practice that has previously been held to be fair use in *Perfect 10 v. Amazon.com* (9th Cir. 2007).

The court also ruled that Google Books does not usurp the market for the original book. Google does not sell the digital scans.

And, given the technological restrictions built into Google Books, it is unreasonable to think that readers would try to read an entire book via snippets. "To the contrary," said the court, "a reasonable fact-finder could only find that Google Books enhances the sales of books ... Google provides convenient links to booksellers to make it easy for a reader to order a book."

Chin is no doubt right about this. In fact, I hear that copies of "Influences: Art, Optics and Astrology in the Italian Renaissance" are flying off the shelves.