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One last swing at Google Books project

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On Dec. 31, 2015, the Authors Guild commenced what will likely be the final chapter in a decade-long legal battle with Google over its Google Books project. The guild filed a petition for a writ of certiorari to the U.S. Supreme Court,

asking the court to overturn the 2nd U.S. Circuit Court of Appeals' determination that Google's digital scanning of millions of books for a searchable database was a "fair use" protected under the Copyright Act. Although the petition gives the Supreme Court a chance to address the contours of "fair use" in the digital age — and clarify existing case law regarding the verbatim copying of creative works — it is unlikely that the Supreme Court will seize the opportunity. *Authors Guild Inc. v. Google Inc*., 804 F.3d 202 (2d Cir. 2015).

Starting in 2004, Google initiated its Google Books project, which involves the copying of entire books from the collections of major university libraries and creation of a digital database that allows users to conduct text searches that display results as short "snippets." Subject to the libraries' agreement not to use the digital copy in violation of U.S. copyright law, Google also provided each participating library with a digital copy of the works it supplied Google. In 2005, the Authors Guild sued for copyright infringement. Years later, the parties reached a settlement that was rejected by the district court as being unfair to the guild. The district court subsequently ruled for Google on its "fair use" defense and dismissed the action. In October 2015, the 2nd Circuit affirmed the trial court's finding that the Google Books project was a socially beneficial "transformative" fair use.

In a skillfully crafted petition to the Supreme Court, the Authors Guild argues that the 2nd Circuit misapplied the fair use test, and that Google's "mass copying and digitation of millions of books," without authors' permission, constituted copyright infringement on an "epic scale." They attempt to identify multiple circuit splits and rely on the argument that there has not been a single fair use ruling from the Supreme Court in the digital age to give the Supreme Court four separate reasons to consider review.

First, pointing to 3rd, 6th and 11th Circuit cases which require that the use of a copyrighted work add "something new," and produce a "new expression, meaning or message," the Authors Guild asserts that the verbatim copying of works with a useful purpose but without the creation of new expression or meaning is not a *transformative* fair use. Although they try to rely on a circuit split between the 3rd, 6th and 11th Circuits (which require "something new") and the 2nd, 4th and 9nth Circuits (which solely require a new purpose), the argument is not likely to persuade the Supreme Court on the applicable facts. As the 2nd Circuit held, Google arguably provided not only a new, useful purpose (searchable books), but it also arguably transformed the original works' character and expression by providing only snippets in response to user text searches and then providing information *about* the original books. Had Google made an entire (or substantial portions of a) book "viewable" in response to a searched term, the result would be different.

New York Times
18th century books scanned by Google in their Cambridge, Mass., offices Nov. 30, 2010.

Second, the Authors Guild argues that the 2nd Circuit improperly allowed the "transformative test" to act as a substitute for the Copyright Act's four-factor "fair use" test. This argument is unfair to the 2nd Circuit's opinion, which did, in fact, analyze all four factors and held that the small snippet views, and transformative character of the works, was a factor affecting the nature and character of the use, did not impact the market for the original books, and outweighed any possible commercial gain to Google.

Third and fourth, and of much less significance, the Authors Guild also alleges that Google cannot avoid liability by claiming that recipients will use the works for lawful purposes, and that the Supreme Court should take the case to decide whether a membership association of authors has standing to pursue infringement claims of its member authors. Neither of these arguments is likely to motivate the Supreme Court to overturn the 2nd Circuit's decision.

Supreme Court review is extremely rare. The Supreme Court grants and hears oral argument in about 0.8 percent of the cases submitted to it per year (approximately 75-80 cases out of 10,000). This case does not involve a basic right to free expression (such as the rap parody of Roy Orbison's "Pretty Woman" song, which was held to be a fair use in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), the Supreme Court's most recent fair use opinion). Moreover, despite the Authors Guild's characterization, the 2nd Circuit's ruling appears to be merely a logical expansion of, rather than a departure from, existing precedent in fair use cases, with the deciding factor of societal benefit tipping the balance. An application of the statutory fair use factors to this particular project cuts in favor of a finding of fair use, especially considering the fair use examples of "scholarship" and "research" that are specifically mentioned in Section 107 of the Copyright Act.

Google will have a chance to reply to the Authors Guild's petition, which may provide the Supreme Court with all the reasons it needs to deny the petition. On the other hand, it is possible that the Supreme Court might accept review to give its own view of "fair use" in the digital age, even if it does so just to stamp its approval on the 2nd Circuit's approach. As with any good book, the audience will need to keep reading until the very end.

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