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Google Books: Finally, an Actual Fair Use Ruling!

Prof. James Gibson, University of Richmond School of Law

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One of our favorite topics in this Intellectual Property Issues series – perhaps *the* favorite – is [Google Books](#), the massive project through which Google hopes to bring its search capability to the text of all books in the English language. To make a book's text searchable, however, Google must scan the book. And scanning is copying. And copying usually means copyright infringement. Certainly the many authors and publishers who have sued Google take this view.

There are two ways to avoid infringement when copying a copyrighted book: get a license or prove that the copying constitutes fair use. Many publishers have in fact granted Google Books the necessary licenses, and for many others the licensing option was in play in a proposed settlement of the Google Books lawsuits. But objections to the far-reaching terms of that settlement (including, as noted by Randy Picker, objections based on [antitrust](#) and [class action law](#)) led the judge to scuttle the deal. Peter Menell proposed that the controversy might be best resolved legislatively by [Congress](#) or [a public commission](#) (and he has more recently called for [a fee shifting approach](#) to fair use claims), but so far his calls have not been heeded – and in any event Randy Picker cast doubt on [the direction that some of the contemplated legislation was headed](#).

Like many of my fellow Intellectual Property Issues authors, I am happy that the settlement fell through, because it brings us to the second way for Google to avoid infringement: show that its Google Books project qualifies as fair use. My view, as articulated years ago in an [online Yale Law Journal essay](#) and a [Washington Post op-ed](#), is that a ruling on the fair use issue is preferable to a settlement, both because licensing tends to degrade fair use rights and because a settlement might mean that Google Books could stifle competition from other book-search services.

But will Google win its fair use argument? A few years ago, Doug Lichtman suggested that [the fair use claim was weak](#). Now, for the first time, a court has actually weighed in. Earlier this month, in [Authors Guild v. Hathitrust](#), a U.S. district court ruled in favor of fair use – but Google itself was not among the defendants, so it takes some parsing of the opinion to figure out the big-picture significance.¹

Here's what happened. When Google started the Google Books project, it partnered with several university libraries so that it could obtain books for scanning. These universities not only provided the books, but also created their own search engine from the resulting digital library. Not surprisingly, then, authors and publishers sued not just Google, but also the universities. The *Hathitrust* ruling disposes of the claims against the latter, and it did so by relying on fair use.

This is certainly encouraging news for Google. But how much does the ruling really further its cause? Google is very different from the nonprofit educational institutions that were the defendants in *Hathitrust*. It is a for-profit company, and a particularly large and well-heeled company at that. Google's use of the books is arguably different too, as is its user base. The universities relied on the fact that their use of the scanned books was largely for scholarship and research purposes – purposes that the fair use doctrine favors. Google Books, in contrast, is

aimed at a broader audience, one that includes casual Internet surfers as well as serious scholars and researchers. It is far from clear, therefore, that a court would readily extend the *Hathitrust* ruling to excuse Google's use of scanned books.

That said, the *Hathitrust* court did rely extensively on one finding that dovetails quite nicely with Google's defense of its own conduct – namely, that copying the books for the purpose of making them text-searchable was “transformative.” Transformative use plays an important role in fair use analysis generally, and it was absolutely pivotal in this case. The court relied on its transformativeness finding on several occasions: (1) when it ruled favorably on the purpose and character of defendants' use of the books, (2) when it discounted two fair use factors that would otherwise have hurt Google (the nature of the copyrighted works and the amount that Google copied), and (3) when it dismissed the plaintiffs' argument that they suffered economic harm from the loss of licensing revenue. In short, once the universities' use was found to be transformative, they essentially ran the table on all the fair use factors. Rest assured that when the time comes, Google will cite this portion of the *Hathitrust* opinion ad infinitum.

So the future is brighter for Google, but it is hardly free of clouds. The suit against Google (currently mired in procedural details at the appellate level) is before a different judge, who may simply not agree with his *Hathitrust* colleague. And the *Hathitrust* opinion is short – indeed almost cursory, given the significance of the issue decided. Google may ultimately decide to use it not as precedent in its briefing of the fair use issue, but as leverage in a new round of settlement negotiations. Yes, after all this, we may be back in settlement-land again.

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[1.](#) The court also vindicated fair use claims on behalf of blind and disabled readers – a welcome development, but not one with broader implications for the viability of Google Books.