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### Authors Guild v. Google, Inc., 804 F.3d 202 (S.D.N.Y. Oct. 16, 2015)

Victoria Campbell

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**AUTHORS GUILD V. GOOGLE, INC.,  
804 F.3d 202 (S.D.N.Y. OCT. 16, 2015).**

I. INTRODUCTION

In *Authors Guild v. Google, Inc.*, Plaintiffs-Appellants Jim Bouton, Betty Miles, Joseph Goulden, and The Authors Guild (“Authors Guild”) filed suit against Google, Inc. (“Google”) for copyright infringement.<sup>1</sup> Plaintiffs alleged that Google infringed its copyrights by creating and storing digitized copies of Plaintiffs’ published books in its Library Project within the larger Google Books Project.<sup>2</sup> In response, Google claimed that its digitized copying project constituted fair use of the copyrighted materials under § 107 of the Copyright Act.<sup>3</sup> Although the parties attempted to settle the matter, the United States District Court for the Southern District of New York denied both the proposed settlement agreement and the amended settlement agreement due

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<sup>1</sup> Jim Bouton is the author of *Ball Four*, Betty Miles the author of *The Trouble with Thirteen*, and Joseph Goulden the author of *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms*. The Authors Guild is the nation’s largest organization of published authors that advocates for and supports the copyright and contractual interests of published writers. *Authors Guild v. Google Inc.*, 804 F.3d 202, 208 (2d Cir. 2015).

<sup>2</sup> *Id.* at 207; Plaintiffs allege copyright infringement pursuant to the Copyright Act of 1976, 17 U.S.C. § 106 (1976). Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

To reproduce the copyrighted work in copies or phonorecords;

- (1) to prepare derivative works based upon the copyrighted work;
- (2) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (3) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and  
in the case of sound recordings, to perform the copyrighted work publicly by means of digital audio transmission.

<sup>3</sup> *Authors Guild*, 804 F.3d at 207; 17 U.S.C. § 107.

to issue of fairness.<sup>4</sup> Defendant filed a motion for summary judgment, which the district court granted, and the Second Circuit affirmed.<sup>5</sup> The Second Circuit's decision in this case is significant because it pushed the boundaries of the fair use analysis by upholding Google's blanket copying of millions of copyrighted materials.<sup>6</sup>

## II. BACKGROUND

In 2004, Google announced that numerous research libraries were granting it access to their collections so that Google could create digital copies of each library's books and other writings.<sup>7</sup> Between 2004 and 2011, Google scanned more than twelve million books.<sup>8</sup> The books provided by the participating libraries included both copyrighted works as well as books in the public domain.<sup>9</sup> In this case, the Plaintiffs and copyright holders did not grant permission to the libraries to provide their books to Google to be copied, nor did they grant Google permission to make digital copies of their works.<sup>10</sup> Additionally, Google did not attempt to compensate the copyright holders for its use of their copyrighted materials in the Google Books Project.<sup>11</sup>

To create digital copies of the books, Google used optical character recognition technology to transform the hard copy works into digitized versions.<sup>12</sup> Once the books were digitized, Google compiled the works into a mass index that served as the framework

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<sup>4</sup> *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011). The main fairness issue raised by the district court was that the members of the class had varied interests from the named plaintiffs. The Amended Settlement Agreement ("ASA") required members to opt-out of the class. This effectively meant that rights holders who were unaware of the ASA or the opt-out provision surrendered their copyrights to Google. Unlike traditional class action settlement agreements, rights holders in this case were surrendering property rights by remaining silent, instead of surrendering claims for damages.

<sup>5</sup> *Authors Guild*, 804 F.3d at 207.

<sup>6</sup> *Id.* at 207–08.

<sup>7</sup> *Authors Guild*, 770 F. Supp. 2d at 670.

<sup>8</sup> *Id.*

<sup>9</sup> *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 286 (S.D.N.Y. 2013).

<sup>10</sup> *Id.* at 289.

<sup>11</sup> *Id.* at 286.

<sup>12</sup> *Id.*

for the Google Library Project, a component of the Google Books Project.<sup>13</sup> Once the books had been scanned, Google retained a copy of each scanned book on their servers and also distributed a copy of the scanned book back to the original library.<sup>14</sup>

By 2014, Google had digitally scanned and indexed over twenty million books for use in the Google Books Project.<sup>15</sup> Google Books is part of the Google search engine and it allows users to type a keyword or phrase into Google Books, which then searches for the keyword or phrase in its index of scanned books.<sup>16</sup> The search returns a compiled list of books and other works that includes the searched term.<sup>17</sup> By clicking on a particular title, the user is able to see three “snippets” from the book that show the keyword and the context in which it is used.<sup>18</sup> The “snippets” consist of lines of the text that comprise approximately an eighth of the page’s content.<sup>19</sup> The same three “snippet” views will be presented regardless of how many times a user searches the same keyword or phrase.<sup>20</sup> In addition, when a user views a page of text through Google Books, a link is provided to various sites where users can go to purchase the full text online.<sup>21</sup>

### III. AUTHORS GUILD V. GOOGLE, INC.

On September 20, 2005, approximately a year after Google first announced the Google Books Project, various authors and publishers filed a putative class action suit against Google for copyright infringement in the United States District Court for the

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<sup>13</sup> *Id.* at 285–86. The Google Books program consists of two digital books programs. The “Partner Program” is a program used to display material that has been provided by the Copyright holder. The “Library Project,” is the project at issue in this case, and it involves the scanning of copyrighted materials provided by various libraries without the copyright holder’s permission. Google then provides a digitized copy of the works back to the library and uses their digitized copy of the work to create their index.

<sup>14</sup> *Id.* at 286.

<sup>15</sup> *Authors Guild v. Google Inc.*, 804 F.3d 202, 208 (2d Cir. 2015).

<sup>16</sup> *Id.* at 209.

<sup>17</sup> *Id.* at 208–09.

<sup>18</sup> *Id.* at 209.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 210.

<sup>21</sup> *Authors Guild*, 804 F.3d at 209.

Southern District of New York.<sup>22</sup> The Authors Guild alleged that Google had infringed its copyrights by scanning its copyrighted works and making them available to the public without their permission.<sup>23</sup> As an affirmative defense, Google claimed that the digitized copying program was fair use of the copyrighted materials under § 107 of the Copyright Act.<sup>24</sup> For several months, the parties attempted to settle the matter.<sup>25</sup> On October 28, 2008, the parties reached a settlement and filed a proposed settlement agreement with the district court.<sup>26</sup> However, the parties reentered discussions to modify the agreement after receiving a high number of complaints and objections from class members.<sup>27</sup> On November 13, 2009, the parties executed their amended settlement agreement, which was followed by more objections.<sup>28</sup> Due to the number of objections over the amended settlement agreement, the district court held a fairness hearing and determined that the amended settlement agreement was not fair, adequate, or reasonable.<sup>29</sup> The district court subsequently denied the party's motion for final approval of the amended settlement agreement on March 22, 2011.<sup>30</sup>

On October 14, 2011, the Plaintiffs filed their fourth amended class action complaint.<sup>31</sup> Before the matter went to trial, the Authors Guild filed a motion for class certification which the district court granted on May 31, 2012.<sup>32</sup> Google appealed the Plaintiffs' class certification, and on July 1, 2013, the Second Circuit vacated the Authors Guild's class certification and remanded the issue for further consideration on Google's fair use defense.<sup>33</sup> The Authors Guild and Google filed cross motions for

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<sup>22</sup> *Id.* at 211.

<sup>23</sup> *Authors Guild*, 954 F. Supp. at 288.

<sup>24</sup> *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670–71 (S.D.N.Y. 2011); see 17 U.S.C. § 107.

<sup>25</sup> *Authors Guild*, 770 F. Supp. 2d at 671.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 671.

<sup>30</sup> *Id.* at 686.

<sup>31</sup> *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 289 (S.D.N.Y. 2013).

<sup>32</sup> *Id.*

<sup>33</sup> *Authors Guild v. Google, Inc.*, 721 F.3d 132, 134–35 (2d Cir. 2013).

summary judgment with the district court.<sup>34</sup> On November 14, 2013, the district court denied the Authors Guild's partial motion for summary judgment and granted Google's motion for summary judgment, finding that Google's use constituted fair use.<sup>35</sup> Additionally, the district court found Google Books provided significant public benefit and that the Authors Guild's claim of secondary liability failed because the libraries, which contributed to the Google Books project, were also protected by the fair use doctrine.<sup>36</sup> On appeal, the Second Circuit affirmed the district court's finding of fair use for Google.<sup>37</sup> The Authors Guild petitioned the Supreme Court for certiorari, but the petition was denied on April 18, 2016.<sup>38</sup>

#### IV. LEGAL ANALYSIS

On appeal to the Second Circuit, the Authors Guild challenged the district court's grant of summary judgment in favor of Google.<sup>39</sup> The Authors Guild specifically contested the district court's finding of fair use.<sup>40</sup> This required the Second Circuit to analyze the four factors of fair use. However, the Second Circuit did not limit their analysis to fair use; they also considered Authors Guild's claims regarding derivative rights, risk of exposure to hacking, and Google's distribution of digital copies to participant libraries.<sup>41</sup>

##### A. Fair Use Claim

As the Second Circuit points observed in *Authors Guild*, copyright law rewards authorship and benefits the public by providing access to knowledge.<sup>42</sup> Courts have developed the doctrine of fair use to allow unauthorized copying of information

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<sup>34</sup> *Authors Guild*, 954 F. Supp. 2d at 284.

<sup>35</sup> *Id.* at 294.

<sup>36</sup> *Id.* at 293, 294.

<sup>37</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 208 (2d Cir. 2015).

<sup>38</sup> *Authors Guild v. Google, Inc.*, 136 S. Ct. 1658 (2016).

<sup>39</sup> *Authors Guild*, 804 F.3d at 207.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 225–29.

<sup>42</sup> *Id.* at 212.

or work that “promote the Progress of Science and useful Arts.”<sup>43</sup> In *Authors Guild*, Google did not contest its unauthorized use of copyrighted materials, but instead claimed that it constituted fair use.<sup>44</sup> In determining whether Google’s search and “snippet” view functions are fair use, the Second Circuit looked at the four factors set forth in § 107 of the Copyright Act.<sup>45</sup> These factors include: (1) the purpose and character of the use; (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.<sup>46</sup>

### *1. Purpose and Character of the Use*

Generally, secondary uses that are transformative and add a new purpose to the original copyrighted work favor a finding of fair use.<sup>47</sup> This is because transformative uses expand the utility of the original material by broadening the use of the original work’s contribution to public knowledge.<sup>48</sup> Here, the Second Circuit found that both Google’s search and the “snippet” view functions were transformative.<sup>49</sup> Google’s search function allows users to narrow sources to those containing their searched term and to see how often the searched term appears within a particular source.<sup>50</sup> The Second Circuit reasoned that the search function was exactly the type of transformative purpose that expands public knowledge, and therefore satisfies the first factor of the fair use doctrine.<sup>51</sup>

The Second Circuit held that the “snippet” view function satisfied the first factor.<sup>52</sup> The Court reasoned that Google’s “snippet” view function was transformative because it allowed users to view how the searched term was used within the context

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<sup>43</sup> *Id.*

<sup>44</sup> *Authors Guild*, 804 F.3d at 207.

<sup>45</sup> See The Copyright Act of 1976, 17 U.S.C. § 107 (1978).

<sup>46</sup> *Authors Guild*, 804 F.3d at 212–13.

<sup>47</sup> *Id.* at 214.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 216, 218.

<sup>50</sup> *Id.* at 217.

<sup>51</sup> *Id.*

<sup>52</sup> *Authors Guild*, 804 F.3d at 218.

of a source and further allowed users to refine their research to determine whether the source was relevant to their limited purpose.<sup>53</sup> The Second Circuit also noted that any commercial motivation Google might have had while commissioning this project should not outweigh the transformative purpose when it lacks a showing of true competition with the original work.<sup>54</sup>

## 2. *Nature of the Copyrighted Work*

Traditionally, the second factor considering the nature of the copyrighted work is not dispositive in a fair use analysis.<sup>55</sup> The nature of the copyrighted work pertains to the respective objective of the copyrighted material.<sup>56</sup> The Second Circuit held that the second factor should be considered in conjunction with the transformative use factor.<sup>57</sup> As a result, the Second Circuit found that the second factor favors fair use because Google's secondary use did not replicate the Plaintiffs' protected expression but instead provided a transformative purpose to the original work.<sup>58</sup> The Second Circuit also reasoned that whether a copyrighted work is factual versus fiction should not be more persuasive in a finding of fair use.<sup>59</sup>

## 3. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Works as a Whole*

Courts have traditionally made findings of fair use when the copying involves small portions or passages of less importance versus copying of an entire work or copyrighted material.<sup>60</sup> Despite this trend, no bright line rule rejecting fair use for copies of an entire copyright protected work exists.<sup>61</sup> Complete copies of a copyrighted work can still be considered fair use under the third

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 219.

<sup>55</sup> *Id.* at 220.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Authors Guild*, 804 F.3d at 220.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 221.

<sup>61</sup> *Id.*



factor of the § 107 of the Copyright Act as long as the copy does not serve as a substitute competing with the original work.<sup>62</sup> The Second Circuit held that the third factor of the fair use analysis was satisfied even though Google copied Plaintiffs' protected works in its entirety.<sup>63</sup> The court reasoned that the copying was reasonably necessary for Google's transformative purpose, and it did not serve as a competitive substitute to the original work.<sup>64</sup> The search function serves two main purposes; the first is to provide the user with results about which sources contain the searched term, and the second is to inform the user as to the amount of times the searched term appears within the source.<sup>65</sup> If Google did not copy these works in its entirety, the search function would not be able to serve its intended purposes.<sup>66</sup>

Similarly, Google had to copy the entire work in order for the "snippet" view function to show the searched keyword or phrase within the context of the material.<sup>67</sup> The Second Circuit found that the "snippet" view function did not serve as a competitive substitute for the original material because although the work was copied in its entirety, the function only enabled the user to view "snippets" of the source.<sup>68</sup> It would be impossible for the user to view the text in its entirety, even if the user searched a variety of keywords and phrases in an attempt to reveal different "snippets."<sup>69</sup> On average, through searches of various keywords and phrases, a user is able to view less than sixteen percent of the original copyrighted work.<sup>70</sup>

#### *4. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

Under the fourth factor, a secondary use cannot be determined to be fair use if it harms the value of the original

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Authors Guild*, 804 F.3d at 221.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 222.

<sup>69</sup> *Id.*

<sup>70</sup> *Authors Guild*, 804 F.3d at 222.

work.<sup>71</sup> The Second Circuit held that the “snippet” view function had the most potential for negatively impacting the original work’s market value but that ultimately, the function did not serve as a significant competing substitute.<sup>72</sup> The Second Circuit agreed with the Authors Guild that there was a potential for loss of sales through the “snippet” view function.<sup>73</sup> The “snippet” function can potentially provide a user with the information they need, eliminating the need for the user to purchase the full text.<sup>74</sup> The Second Circuit reasoned that this type of sale loss generally occurs when obtaining information about a non-copyright protected fact.<sup>75</sup> Given that the court found it unlikely that the “snippet” view function would completely satisfy a user’s interest in the given source, the “snippet” view does not serve as a substitute for the copyrighted material, which would result in the loss of sales.<sup>76</sup> After analyzing Google’s search and “snippet” view functions under the factors set out in § 107 of the Copyright Act, the Second Circuit determined that both functions satisfied the factors of fair use.<sup>77</sup>

### *B. Derivative Rights Claim*

Plaintiffs argued that they had derivative rights in the information Google provided to users through their search and “snippet” view functions, and that Google commandeered their right to exclusively profit from such derivative works.<sup>78</sup> The

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<sup>71</sup> *Id.* at 223.

<sup>72</sup> *Id.* at 224.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Authors Guild*, 804 F.3d at 224.

<sup>77</sup> *Id.* at 225.

<sup>78</sup> *Id.*; Plaintiffs alleged infringement of their derivative rights pursuant to the Copyright Act of 1976, 17 U.S.C. § 106(2) (1976). Subject to §§ 107–122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (2) to prepare derivative works based upon the copyrighted work; Appellants argue that the snippet view function is taking the original copyrighted work and creating a new product in order to further exploit the market. This derivative use is granted to the copyright holder explicitly in the Copyright Act.

Second Circuit held that Plaintiffs' claim was meritless.<sup>79</sup> The court reasoned that authors of an original work do not get to enjoy exclusive derivative rights with regards to information supplied through search functions such as Google.<sup>80</sup>

### C. Risk of Exposure Claim

A copyright holder can rebut a claim of fair use when a secondary user destroys the value of the original copyrighted work by providing the public with a substitute.<sup>81</sup> Authors Guild argued that Google's storage of the digitized copies unreasonably exposed them to hackers who might gain access to Google's system and make the digitized books available to the public.<sup>82</sup> The Second Circuit found this to be a valid argument but lacking in evidentiary proof.<sup>83</sup> Google provided well-documented evidence that the digital scans were protected by the same security system used to guard Google's own confidential information, and the Authors Guild was unable to provide sufficient evidence to the contrary.<sup>84</sup>

### D. Distribution of Digital Copies to Participant Libraries

Authors Guild argued that Google's distribution of digital copies of the copyrighted materials back to the participating libraries was not fair use and could expose Plaintiffs to potential infringement and hackers.<sup>85</sup> The Second Circuit denied this claim holding that it is fair use for the libraries to create a digital search database, thus it was not infringement to contract with Google to create the digital copies.<sup>86</sup> Additionally, the Second Circuit held that Google provided digital copies of the copyrighted materials to participating libraries with the understanding that the digital copies would not be used for infringing purposes and that the mere

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<sup>79</sup> *Id.* at 225.

<sup>80</sup> *Id.* at 226.

<sup>81</sup> *Id.* at 227.

<sup>82</sup> *Id.*

<sup>83</sup> *Authors Guild*, 804 F.3d at 227.

<sup>84</sup> *Id.* at 228.

<sup>85</sup> *Id.* at 228.

<sup>86</sup> *Id.* at 229.

speculation that the libraries will not sufficiently protect the digital copies does not warrant liability for Google.<sup>87</sup>

## V. FUTURE IMPLICATIONS

The Second Circuit properly applied the fair use doctrine when assessing the first three factors of the fair use analysis. However, the Second Circuit's consideration of the fourth factor reduces the incentive to create new works.<sup>88</sup> With the rise of modern technology, a potential market exists for the digitization of entire collections of research and literary materials.<sup>89</sup> The rise of this potential market has led to the loss of future licensing fees. This loss results in a decrease in the future market value of copyrighted materials digitized by Google.<sup>90</sup> The Second Circuit's reasoning was based on the idea that Google did not benefit financially from copying an estimated twenty million copyrighted materials without the copyright holders' permission.<sup>91</sup> This was because Google does not place advertisements on their Google Books search pages or the "snippet" view pages.<sup>92</sup> However, the Second Circuit failed to address that Google is a fully commercialized business that indirectly profits from having scanned copies of entire copyrighted works within their system.<sup>93</sup> Google has used the digitized copyrighted materials for their own benefit – without compensating copyright holders – in ways such as “deep enrichment of its own language database, for translation, search, reference, data mining, the development of algorithms, and other unidentified uses.”<sup>94</sup> By accepting Google's argument that the search function greatly benefits the public, the Second Circuit

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<sup>87</sup> *Id.*

<sup>88</sup> Brief of Amicus Curiae the Copyright Alliance in Support of Petitioners at \*15, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d. Cir. 2015) (No. 15-849).

<sup>89</sup> Brief of Amicus Curiae, *supra* note 89, at \*16.

<sup>90</sup> *Id.* at \*17.

<sup>91</sup> *Authors Guild v. Google Inc.* 804 F.3d 202, 208–09 (2d Cir. 2015).

<sup>92</sup> *Id.* at 209.

<sup>93</sup> Roxana Robinson, *How Google Stole the Work of Millions of Authors*, WALL STREET JOURNAL, Feb. 7, 2016, <http://www.wsj.com/articles/how-google-stole-the-work-of-millions-of-authors-1454880410> (hereinafter “*How Google Stole*”).

<sup>94</sup> *Id.*

allowed Google to indirectly use copyrighted materials for commercial gain.<sup>95</sup>

The Authors Guild's argument that the Google Book's project, specifically its search function and "snippet" view functions, is a commercial venture that will destroy the sales of copyrighted materials. Since 2009, the annual income of a writer has decreased sixty-seven percent for authors with at least fifteen or more years of experience.<sup>96</sup> Meanwhile, in 2015, Google reported revenue of nearly seventy-five billion.<sup>97</sup> The reality is that print sales for "intellectually challenging literary works" are struggling.<sup>98</sup> The Supreme Court's denial for *certiorari* leaves the Second Circuit's decision as precedent. Thus, the Second Circuit's decision has the effect of "redistribute[ing] wealth from the creative sector to the tech sector, not only with books, but across the spectrum of the arts."<sup>99</sup>

## VI. CONCLUSION

In 2005, the Authors Guild and individual writers filed a suit against Google claiming copyright infringement after Google made digital copies of more than twelve million copyrighted materials without permission from the various copyright holders. More than ten years after the district court issued its opinion, the Second Circuit decided in favor of Google and against the Plaintiffs, finding Google's copying to be fair use. On April 18, 2016, the Supreme Court denied certiorari, leaving the Second Circuit's decision as binding precedent. The Second Circuit's decision is flawed as it adopted a narrow analysis of the fair use doctrine and ignored the financial implications of the Google Books Project.

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<sup>95</sup> *Id.*

<sup>96</sup> See Robinson, *How Google Stole*, *supra* note 93.

<sup>97</sup> *Id.*

<sup>98</sup> Mathew Ingram, *Print Book Sales Are Up, But Don't Start Celebrating Just Yet*, Dec. 22, 2015, <http://fortune.com/2015/12/22/print-book-sales>.

<sup>99</sup> See Alter, *Challenge to Google Books Is Declined by Supreme Court*, Apr. 18, 2016, <http://www.nytimes.com/2016/04/19/technology/google-books-case.html>; see Robinson, *How Google Stole*, *supra* note 93.

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Plaintiffs' suit against Google was an attempt to protect millions of copyright holders from infringement and to prevent the exploitation of their copyrighted works for the economic benefit of the infringers. However, the Second Circuit's holding of fair use illustrates the court's tendency to favor to tech companies' "transformative uses" over the rights of the copyright holder.

*Victoria Campbell\**

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\* J.D. Candidate, 2018, DePaul University College of Law; B.A. 2015, Auburn University.

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