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**The Intellectual Property
Issues That Arise by Mass Digitization – A
Google Books Case Analysis**

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Abstract

This dissertation was written as part of the MA in Art Law and Arts Management at the International Hellenic University.

This dissertation aims to introduce the readers to the legal background of copyright and the way that it has evolved until today and in particular the differences that digital copyright presents. It elaborates on the evolution of the legal background of copyright internationally and in the European Union. Further, a distinction is made with regards to the works in printed form and the digital works and how this distinction is important to copyright protection. A very important – a landmark case is analyzed, the Authors Guild v. Google, that has set a precedent to the digital copyright and how the rights of the authors are protected or not by digitization. Both the plaintiffs' claim and the judgment are thoroughly analyzed and case law is used to underline the importance of this judgment to the entire copyright protection. Finally, conclusions are drawn with regards to the consequences of this case to the future and how new creators should and can protect their interest on their original and copyright protected works.

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I. Introduction

The rapid development of technology has constituted the Internet as the main marketplace in the online environment and has raised a controversial discussion on the protection of privacy, intellectual property, e-criminality, and other similar ethical issues. The introduction and the availability of e-books have significantly reduced the readership and need for hard copy books. Even libraries and archives nowadays use mostly technological means to meet the demands of the readers. Oftentimes, digitization is regarded as a step even more daring than the Internet. On the other hand, authors consider digitization as an imminent threat of “commoditization” of goods and services, since even the viewing or the uploading of a digital image online could potentially constitute copyright infringement.

Initially, in this essay the legal background around copyright and digital copyright in the European Union and internationally will be examined. Following, the differences between digital and printed forms will be presented, along with the ways that digital copyright may be infringed.

Authors Guild Inc. vs. Google Inc. known as the “Google Books Case” is the case that will be thoroughly analyzed in this essay. This case has set a landmark precedent for the Digital Copyright in the United States and worldwide, as well, since it has contributed significantly to the development of international copyright law. Critical questions have arisen by this judgment with regards to the application of the fair use doctrine, since the technological improvement introduces new forms of works that were only published, until now, in traditional formats. The facts of the case, the settlement that the parties agreed to sign, the judgment, and how and to what extent this case affected mass digitization and the free use of digital works over the Internet will be presented. Even though the fair use doctrine was not originally known in civil law countries, after the “Google Books Case,” courts in civil law countries and internationally now assess similar ways of reasoning and apply legislative provisions that limit copyright. Subsequently, a few notable cases in the field of digital copyright and the way these cases influenced digital copyright worldwide will be analyzed. Last, this essay analyzes the challenges this judgment

created and resolved and looks at whether the way this case was dealt with will affect and lead towards a more accepted way to deal with complex copyright infringement cases worldwide.

II. Copyright in a Nutshell

Copyright is the property right that grants the authors, including those who take ownership from them, the right to monitor the copying and the exploitation of the creations and works by third persons. However, *only the original creations of the mind expressed in some kind of form are protected by copyright*. An idea cannot be copyright protected, unless it is specified and has taken a form of an original creation. Copyright policy tries to establish a balance between the rights of the rightholders and the users, the rightholders themselves and the rightholders and the collective societies. In particular, the absolute and exclusive rights of the creators to their works are guaranteed so they are incentivized into creating and investing more of their effort, time and financial resources.

In the United Kingdom (UK) and British colonies the so-called common law countries, copyright law rests on a principle, *“That anyone who by his or her own skill and labor creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown”*¹.

Contrary to this, the statutory provisions in the so-called civil law countries protect the works that are the *“author’s own intellectual creation”*, where the author makes free and creative choices, stamping the work with his or her personal touch. The sole criterion for copyright protection is the originality of the work. In other words, a work is considered original *“if another author, under similar circumstances and with the same aim in mind, would not reasonably reach the same creative outcome or if the work at issue presents an individual particularity or a modicum of creativity such that the work can be distinguished from everyday productions or from other similar and known works”*^{2, 3}.

¹ Per Lord Bingham of Cornhill at 2418A.

² Court of First Instance (Multimember Panel), Athens, Decision No. 2028/2003, Nomos (online).

On the other hand, copyright legalizes a reasonable use of a copyright-protected work by a person who does not have the authorization by the copyright holder, as long as it does not conflict with the normal exploitation of the work and does not prejudice the legitimate interests of the author.

In the USA, the U.S. Copyright Act of 1976 for the first time introduces the fair use defense. Fair use grants an exception to specific uses of copyright protected work that otherwise would constitute copyright infringement. Fair use can only be affirmed on a case-by-case determination and aims to establish the balance between the interests of the copyright holders and the society's interest in the free dissemination of ideas and information only where the unauthorized use of a copyrighted work is reasonable and customary.

The future promises to be different regarding copyright and particularly, digital copyright. The evolution of technology gives us the freedom to read, learn and access information, widely and without limits. Furthermore, the new technologies and the excessive use of the internet have both posed enormous challenges to copyright and new rights and conditions have arisen by the globalization and the evolution of technology.

III. Legal Background of Digital Copyright

The first Copyright Statute worldwide was introduced in the UK in 1709; initially copyright law granted specific privileges to printers of books. The statute's case was for authors and legitimate creators to protect their creations from piracy, and in response, the potential pirates created more evolved and sophisticated ways to achieve their goals.

However, the current uncontrollable change of technology, the way information is disseminated and the habits that people have nowadays, have created a complex legal background regarding copyright. These issues are obvious internationally and, in particular, in the European Union (EU).

³ Koumantos G., Stamatoudi I., Greek Copyright Law, 2014, Sakkoulas Publications, p. 23.

The legal background of digital copyright was introduced internationally by the Berne Convention and the WIPO Copyright Treaty and in the EU by the Information Society Directive, the Directive on Orphan Works, the Directive regarding Audiovisual Performances and the Collective Rights Management Directive which was adopted in February 2014. In 2011 the Memorandum of Understanding on out of commerce works was signed and in September 2017 the World Intellectual Property Organization (WIPO) Marrakesh Treaty created the copyright exceptions to the benefit of blind and visually impaired people⁴. Lastly, the Directive on Copyright in the Digital Single Market, also known as the EU Copyright Directive, which was first introduced by the European Parliament Committee on Legal Affairs on June 2018, was approved by the European Parliament on September 2018.

A. INTERNATIONAL

i. The Berne Convention 1886

The Berne Convention is the oldest and perhaps the most significant convention regarding international copyright. So far, 168 countries have signed and ratified the convention and are obliged to conform to the Convention's conditions to guarantee legal protection for their members.

"The Berne Convention for the Protection of Literary and Artistic Works" has set a number of aspects to modern copyright law. First, it introduced the theory that in order for a work to be protected by copyright, no registration is needed but the fixation of the work. It also demands that all member states to the convention treat copyrighted works from authors from other parties the same way as those that were created by their nationals. It also requires parties to provide some minimum standards for copyright law in their domestic legislation.

More specifically, article 3 provides that copyright protection of the convention applies to nationals and residents of the countries who have signed and ratified the convention. It also applies to all the works published in a country – party

⁴ Stamatoudi I., *New developments in EU and International Copyright Law*, 2016, Wolters Kluwer, pg. 184-185.

to the convention. The Berne Convention requires the copyright to apply for 50 years after the author's death for photographic and cinematographic works. Parties have the option to provide even longer terms.

The Berne Convention provides a number of exceptions to copyright in several provisions. In Article 10 it introduces a "teaching exception" where the parties can include in their copyright statutes and in article 9 paragraph 2 of the convention there is a general rule, the "*three step test*", which will be known and used in the subsequent conventions and treaties. This test establishes a framework for parties to develop their own national exceptions and limitations. The three prerequisites a copyright-protected work should meet to be considered non-infringing are: to concern special cases, not to conflict with the normal exploitation of the work and not to unreasonably prejudice the legitimate interests of the author to the work. These conditions could also apply to the digitization of the artworks in specific cases.

However, the Berne Convention does not provide or refer to doctrines such as fair use and fair dealing in any of its articles, something that has raised arguments that the fair use doctrine violates the Berne Convention⁵⁶.

ii. WIPO Copyright Treaty

In 1996 the member states who have already signed the Berne Convention adopted a copyright treaty issued by the World Intellectual Property Organization. The most significant contribution of this treaty was technological measures and ways to prevent their circumvention. The digital form of the works undoubtedly introduced new ways of access, reproduction, dissemination, and exploitation of digital works. This created new ways of copyright infringement.

Technological measures are designed to protect works of art against acts of copying that are not authorized by the authors and are related to copyright, related rights or even the sui generis right that is granted in databases.

⁵ Okediji R. "Toward an International Fair Use Doctrine", 39 Colum. J. Transnat'l L. 75 (2000-2001).

⁶ Travis, H. "Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law", (2008), Notre Dame Law Review, vol. 84, p. 383. President and Trustees of Notre Dame University in South Bend, Indiana.

The WIPO Copyright Treaty attempts to manage access to digital works. It provides and clarifies acts that are not allowed by the legal provisions as legitimate and at the same time, tries to establish a balance between the rights holders and the users. The ultimate aim of this Treaty was to monitor the “access” of the users to any copyright protected work, since through digitization more and different ways of access to information have been introduced. The 1996 WIPO Copyright Treaty requires adequate legal protection and legal measures against any circumvention of the technological measures that are used to protect copyrighted works and against users that try to remove or change the electronic rights management information (ERMI) or distribute, broadcast and disseminate works for which the ERMI have been removed or changed.

In an Agreed Statement with regards to Article 1(4), Member States agreed that the reproduction right and the exceptions that are related to it, as these are provided in Article 9 of the Berne Convention, have full application to the digital environment and to the digital form of these works⁷.

B. EUROPEAN UNION

i. Information Society Directive (D. 2001/29/EC)

The Information Society Directive (InfoSoc Directive) has set and clarified many copyright issues in the European Union. New technologies and new ways to access information and works of art have introduced the necessity for a new type of protection measures. The key issues that this directive addresses to are:

a. The Directive helps clarify the application of the reproduction and distribution right of digital works. It sets an exception to the copyright, with regards to the use of a work for research and private study.

b. As Article 2 of the Directive provides with regards to the reproduction right, authors have the absolute and exclusive right to permit or prohibit any “*direct*

⁷Stamatoudi I., New developments in EU and International Copyright Law, 2016, Wolters Kluwer, pg. 10-11.

*or indirect, temporary or permanent reproduction by any means and in any form in whole or in part (...) of their works*⁸.

c. In Article 3 the Directive introduces a new right of communication to the public, which is a necessity due to the on-demand service the Internet has established: *“Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access from a place and at a time individually chosen by them*⁹.

d. Lastly, the Directive sets some provisions on the legal protection against copying and rights management systems. In Article 6, the Directive sets the conditions on the technological measures that can help prevent the unlawful exploitation of digital works, and it sets conditions to prevent the circumvention of these measures. However, it seems that the most significant factor to determine the infringement of copyright is the absence of the rightsholders’ authorization for a specific use.

With regards to exceptions and limitations, very few are provided as mandatory in the Directive and in particular, exceptions may apply to the reproduction right in specified and certain cases.

ii. Memorandum of Understanding (MoU) on Key Principles On The Digitization and Making Available Of Out-of-Commerce Works (2011)

Out-of-commerce works are described as *“...when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce...”*¹⁰. Worldwide and particularly for Europe, it has been considered a great challenge to manage the access to this category of works, which constitutes the cultural heritage of Europe and faces the threat to be lost forever.

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 2.

⁹ Id. Art. 3.

¹⁰ See under the sub-heading “Definition” and Principle 1(2) of the Memorandum of Understanding on Key Principles on the Digitization and Making Available of Out-Of-Commerce Works (20 September 2011).

Usually, many orphan works are also considered out-of-commerce works, but unfortunately, not many out-of-commerce works fall under the category of orphan works, as well. The Memorandum of Understanding (MOU) on Key Principles on the Digitization and Making Available of Out-Of-Commerce Works¹¹ was Europe's response to the dialogue around the threat that out-of-commerce works could be lost forever.

The main purpose of the MOU was to encourage non-commercial public institutions to use the out-of-commerce works (books and journals only) in their collections, voluntarily, through licensing agreements. Three basic principles are set by the MOU with regards to the licensing agreements that will allow public institutions to use out-of-commerce works. First, the agreement shall be signed voluntarily by the contracting parties, and a decision has to be made on how the work will be used and under which specific conditions. Second, the licenses that can only be granted by collective management organizations have to be clearly publicized in advance. The last prerequisite refers to the use of the out-of-commerce works and in particular whether the use will be commercial or even cross-border.

The MOU could be considered more as wishful thinking, since it is not obligatory or binding for the Member States, nor does it introduce mandatory provisions. The Digital Single Market Directive and the special provision concluded with regards to the legitimate uses of out of commerce works is EU's response to the lack of binding effect of the MOU.

iii. Orphan Works Directive (D. 2012/28/EU)

The EU Orphan Work Directive¹² implies some exceptions and limitations with regards to the use of orphan works by libraries, archives, and other institutions. Actually, the implementation of the Directive enables digitization. An orphan work is a work whose author is not identified and cannot be traced after a diligent search. Every institution needs to clear rights from the author in order to publish and digitize a copyright protected work. This doesn't apply to orphan works, where it is

¹¹ 20th September of 2011.

¹² Directive 2012/28/EU of the European Parliament and of the Council of 25 Oct. 2012 on certain permitted uses of orphan works.

impossible to acquire the authorization, since the author cannot be either identified or located.

The fact that an institution cannot acquire permission and publish an orphan work, limits the amount of works that can be published and so the preservation of cultural heritage may be harmed. This, along with the so-called “*black hole*” of the twentieth century where “*cultural material from before 1900 is accessible on the web, but very little material from the more recent past*”¹³ poses enormous threats and challenges that the Orphan Works Directive answers.

The Directive 2012/28/EU has provided specific uses for the orphan works. Libraries and other public institutions may use orphan works only in one of the ways that are described in Article 6 of the Directive: by making the work available to the public, or by reproducing it for the purposes of digitization, preservation, cataloguing, indexing and restoration. Moreover, according to the provisions of the Orphan Works Directive, only certain institutions have permission to use the orphan works: public libraries, museums, archives, film or audio heritage institutions, and public-service broadcasting organizations. Also, the Directive sets the exact prerequisites that a work has to meet in order to be considered orphan. First, only a copyright protected work belonging in the collection of a beneficiary institution can be considered an orphan work. Second, the work should have been already published in a Member State or if the work hasn't been published, it should have been publicly accessible with the permission of the right holder. Last, the work has to belong in one of the following categories: writings, audiovisual works, phonograms, or embedded works. Therefore, in order for a work to be considered an orphan, apart from the above prerequisites, none of the right holders should have been identified or located, a diligent search on the identity of the author should have been conducted, and the results of the diligent search should have been recorded in accordance with Article 3 of the Directive¹⁴.

¹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions on Europe's cultural heritage at the click of a mouse: Progress on the digitization and online accessibility of cultural material and digital preservation across the EU (COM(2008) 513, final, 2008), 3.

¹⁴ Article 2(1) of the Orphan Works Directive.

Also, the Orphan Works Directive sets specific prerequisites so that a search will be considered diligent. It should be conducted in good faith, for each specific work, and in a diligent way. For works that have already been published or broadcasted, the search should be conducted in the Member State of the first publication, while for works that have not been published yet, Article 3 of the Directive requires that the diligent search should be conducted in the state where the beneficiary institution is located. It is very important that the results of the search be recorded so that there will be proof in the future that the search has been carried out in a diligent way. The EU maintains a database of orphan works¹⁵.

iv. Directive on Copyright in the Digital Single Market (D. 2016/0280 (COD))

On the 6 May 2015, Member States of the EU decided to initiate a “*Digital Single Market*” strategy, with the aim to “modernize” copyright¹⁶. The aim was to improve the bargaining position of the copyright holders that would create a significant positive effect on copyright as a property right. Another objective was to guarantee the legitimate use of copyrighted works for specific cases in the fields of education, scientific research and cultural heritage. By modernizing exceptions and limitations researchers will be allowed to use innovative text and data mining research tools, digital technologies will be used at all levels of education, and cultural institutions will by all means be supported for the preservation of cultural heritage.

The aim of the Digital Single Market Directive was to eliminate the “*value gap*” between the revenues the Internet platform holders earned and the content creators, by encouraging the cooperation of these two parts and creating exceptions and limitations for text and data mining. The breakthrough though, was the attempt to give to press publishers the authorization and the direct copyright to use the online publications made by news aggregators¹⁷, so that they would be able to facilitate the online licensing of their publications and the application of their rights.

¹⁵ http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm.

¹⁶ “A Digital Single Market Strategy for Europe” COM(2015) 192 final, available at <https://ec.europa.eu/digital-agenda/en/news/digital-single-market-strategy-europe-com2015-192-final>.

¹⁷ Art. 11, the Directive on Copyright in the Digital Single Market (D. 2016/0280 (COD)).

Articles 11 and 13 are considered quite controversial. Article 11 is claimed to be a “link tax” that will urge websites “to obtain a license before linking to news stories¹⁸”. In Article 7 the Directive specifies the legitimate use of out-of-commerce works by cultural heritage institutions and in paragraph 2 there is the definition of out of commerce works: “A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so¹⁹”. In paragraph 3 the Directive sets the obligations that Member States have with regards to the deeming of works as out of commerce, the licenses and the possibility of rightholders to object to the deeming of a work as an out of commerce. In Chapter IV of the Directive measures are provided aiming at achieving a balance and improving the bargaining position and the remuneration of the authors and performers, with regards to the licensing of their rights.

IV. Digitization vs Printed Forms

The debate around the digital copyright nowadays is relentless because of the differences between digital and printed forms. First, one topic under discussion is the digitization of works that are copyright protected – for example the digitization of a photograph or a printed script that can be available as an image – and the increasing use of the Internet in almost every aspect of our everyday life that has constituted the digitization of copyright works a necessity.

The most important advantages the digital works present over the printed-form works are “*the ease of replication*,” the fact that a digital work can be reproduced in the same shape multiple times, “*the ease of transmission and multiple use*,” the easiness in reproducing and disseminating a work in seconds, “*the plasticity of digital media*,” the fact that the users can easily change and adapt a digital work, “*the equivalence of works in digital form*,” the fact that a digital work can easily be

¹⁸ O’ Brien D., The Crucial Next Few Days In the EU’s Copyright Filter and Link Tax Battle, Electronic Frontier Foundation, 29 June 2018, <https://www.eff.org/deeplinks/2018/06/crucial-next-few-days-eus-copyright-filter-and-link-tax-battle>.

¹⁹Art. 7 par. 2, DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market, Brussels, 14.9.2016 COM(2016) 593 final 2016/0280 (COD).

combined and transformed in another digital form, “*the compactness of works in digital form,*” the fact that a significant amount of digital forms can be stored in a simple USB, and “*the new search and link capabilities,*” the fact that software can be created by a computer system and without the need of an author²⁰.

To illustrate the differences between the printed works and digital ones, we have to clarify the way the Internet works. We should, at first, consider the actions that take place when a work is uploaded on the Internet and beyond that, the consequences that such an action triggers. If a photograph is scanned and stored in a digital form on computer memory, this photograph or image can be copied several times in the exact same quality, size, and form and if this work is copyright protected, this – even the scanning of a photo – may amount to a copyright infringement²¹. Also, the original work may be copied into transitory copies; for example, if the photograph is viewed on-screen, a copy will be made in RAM memory²². In the case that the work is stored on a computer server and accessible through the Internet worldwide, any person browsing the relevant site can possibly download several copies from the original work and store them into his or her computer. This could also constitute an infringement of the copyright of the author’s original work.

*“The Internet is best viewed as a global network which allows computers to talk to each other”*²³. If a person browses the Internet with the aim to download a copy of a text or an image, he or she sends a request to the server computer in order to forward a particular copy that he or she is trying to store. The copy in the digital form is not sent to the browser. On the contrary, it is forwarded in many pieces, and each one has a specific address and form and is sent through the Internet. The copy is passed from one computer to the other until the browser receives the copy of the

²⁰ Stokes S., *Digital Copyright Law and Practice*, 2014, Oxford and Portland Oregon, Hart Publishing, pg. 11-12.

²¹ S. 16 Copyright, Designs and Patents Act 1988.

²² Stokes S., *Digital Copyright Law and Practice*, 2014, Oxford and Portland Oregon, Hart Publishing, pg. 12-13.

²³ Stokes S., *Digital Copyright Law and Practice*, 2014, Oxford and Portland Oregon, Hart Publishing, pg. 12.

work. Every computer that follows this procedure has a copy from the original work. In conclusion, the Internet transmits works by the procedure of copying.

As we can assume, the copying of works in digital form can undoubtedly produce several infringing copies. Furthermore, since the Internet is so prevalent in every aspect of our everyday life and an uploaded work can be available to every browser worldwide, copying and downloading a copyright protected work can take place in several countries.

Through the use of the Internet, several copyright related issues have arisen. First of all, a computer by caching holds copies of information of the most important or the most visited websites by a browser so that the person will not have to return to the original server. By this way, a person can use and browse in the Internet easier and have quicker access to the websites he or she tends to visit. When a computer uses a cache the user literally holds a copy of the work, and if we assume that the work is copyright protected, caching may lead to copyright infringement.

"Hyper-linking" is another issue that the use of the Internet has created. A website browser has the ability to move from one website to another by the use of hypertext links. A *"hyper-link"* is the connection between two hypertext links and it appears in a website as an underlined keyword that will lead the browser to another website if it is clicked on. Users often cannot recognize that the hyperlink they have just clicked has led them to another website. This is the main reason why the use of hypertext links can possibly infringe the copyright of the owner.

The *"on-demand"* interactive access to copyright has challenged the existing copyright legislation. The transmissions through the Internet are not protected by copyright. The interactive access functions as follows: the transmission of a particular text or image in a specific digital form will be sent from the server to the computer of the user that has demanded such information. These packets that, until now, are not protected by copyright are sent to the user's computer and transformed into digital images on his or her screen. The concerns on the protection of copyright on these *"on-demand"* access to copyright has been an issue on many law texts. The US Digital Millennium Copyright Act in 1998 and the Information Society Directive have added provisions on the protection of online transmissions

and the 1996 WIPO Copyright Treaty has provided a new right of communication to the public. More specific, the Treaty provides that the authors of literary and artistic works shall: “*enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them*”²⁴.

V. How Digital Copyright Can Be Infringed

In order for a work to be copyright protected, it has to satisfy the criterion of originality, which provides, for the civil law countries, that *it has to be the author’s own intellectual creation reflecting his personality*²⁵. The author of a work is the person who created the work in first place. In certain countries, such as the USA, where the copyright grants certain benefits to the author, a copyright notice along with an indication [© the name of the copyright owner and the year of first publication] may prove useful.

Copyright grants specific moral and economic rights to the author. Among the so-called “economic rights” of the author are fixation and reproduction, translation, adaptation, distribution, rental and public lending, public performance, broadcasting, communication to the public, and importing copies that were produced abroad, without the consent of the author. Among the moral rights of the author to his or her work, which reflect the bond between the author and his or her work are the right of publication; the right of the author to decide when, where and how the work will be published; the paternity right; the right of the author to be acknowledged as the author or retain his anonymity; the integrity right; the right to authorize or prohibit any modification to the work; the right to have access to his work and last; the right of repudiation; to renounce contracts of transfer or exploitation of the work in order to protect his or her personality. The use of a work by a person who will perform one of those actions without the author’s permission might constitute copyright infringement. The same applies to digital copyright, as well.

²⁴ Art. 8 Right of Communication to the Public, WIPO Copyright Treaty 1996.

²⁵ Art. 6 and Recital 17 of the Term Directive.

The infringement of copyright may relate to the whole of a work or part of it. With regards to digital aspects of copyright, “*communication to the public*” means communication through electronic transmission, which can take place by the broadcasting of the work and the making of the work available to the public by electronic transmission, in such a way that the users may access it at a time and a place individually chosen by them²⁶. It is obvious that this on-demand transmission right could be violated by making copyright works available over the Internet. It is very critical whether giving access to copying by others is lawful or not.

VI. The Case

Google along with the “*Library Project*”, introduced the “*Publisher Program*” in 2004. According to the “*Publisher Program*”, a creator of a work could permit and authorize Google to scan his or her work, display some parts of his or her work related to a specific text, and post the links on the Internet so that a user could purchase the book. Also, if the copyright holder gave his permission, Google could place advertisements alongside the parts of the book. Google and the author agreed that the author would receive the royalties and would be allowed to leave the program whenever he or she wishes to. Since 2004, Google has scanned and made available more than 20 million books, which include books in the public domain and copyright protected books.

Further, Google combined the “*Library Project*” and the “*Publisher Program*” and introduced the “*Google Book Search*”. During August 2005, Google gave a three month deadline so that all the copyright holders that wanted to ‘opt-out’ of the search database had to give notice to Google in writing. After that, during the same year, the Authors Guild, as plaintiffs, filed a suit in the United States District Court against Google for copyright infringement. The plaintiffs are one of the biggest and oldest organizations of authors in the USA with more than eight thousand members.

The plaintiffs first brought this case before the United States District Court for the Southern District of New York, claiming that Google infringed their copyright on

²⁶ Stokes S., *Digital Copyright Law and Practice*, 2014, Oxford and Portland Oregon, Hart Publishing, pg. 41.

their works by developing the Google Book Database and by digitizing their books without being authorized to do so. On 14 December 2004, by the Google Book Database, Google started making digital copies of books allowing libraries and individuals to download and retain in the hard drive of their computer downloaded copies of those books. Moreover, Google Books Database allows individuals to search texts of digitally copied books and see displays of snippets of the works²⁷. In case the copyright has expired, the user is available to view the full text of the book that he or she is searching for.

The District Court decided that what Google did to the copyright protected works does not infringe the copyright of the authors but can be considered fair use, under Art. 17 U.S.C. § 107. Plaintiffs appealed the first judgment and brought the case before the United States Court of Appeals, which also concluded that the defendant's copying is transformative and does not offer the public a significant substitute of the work protected and satisfied the prerequisites for fair use.

A. How the Google Books Database Functions

Five of the libraries that Google collaborated with were Harvard University, the New York Public Library, the University of Michigan, Stanford University, and Oxford University. The participating libraries who agreed to submit books they had in their collection to the Google Books Database were bound by an agreement among them and Google, by which they could select which and how many of the books that they had in their collection they wanted to be digitized and made available online. The participating libraries could download copies of the digital image in which each book was available and machine-readable versions – but only of the books the library agreed to submit to Google and not from every book or from books that have been submitted by other libraries. The agreement that all the participants to the Google Books Database signed required them to conform to copyright law with regards to the use of the copies that they download from the Google Books Database and take all necessary measures to prevent the dissemination of copies of their books to the public.

²⁷ Authors Guild, Inc. v. Google, Inc., 721 F.3d 132 (2d Cir. 2013).

More specific, the so-called “*Cooperative Agreement*” that was signed between Google and the University of Michigan provides the following: “*..If at any time, either party becomes aware of copyright infringement under this agreement, that party shall inform the other as quickly as reasonably possible... U of M shall implement technological measures [...] to restrict automated access to any portion of the U of M Digital Copy or the portions of the U of M website on which any portion of the U o M Digital Copy is available. U of M shall also make reasonable efforts [...] to prevent third parties from (a) downloading or otherwise obtaining any portion of the U of M Digital Copy for commercial purposes, (b) redistribution any portions of the U of M Digital Copy, or (c) automated and systematic downloading from its website image files from the U of M Digital Copy*²⁸”.

The project also allows a user to see if a particular book he or she is searching for exists and how to purchase it or borrow it from a library. Google described this initiative as its “*man on the moon*” endeavor²⁹. The aim of Google was to make out of print and unpopular books available to the public, and they stated that the particular search engine may satisfy even the most obscure requests. Google allowed the users to view only particular pages and the functions to copy, save, download and print were disabled. Lastly, the authors are allowed to ask for the removal of their creations from the Google Book Project at any time.

The user’s search is not interrupted by advertisements nor does Google receive any payment if the searcher decides to buy any book. The Google Books Database allows the user to view a particular part of the work he or she is interested in. Moreover, the user can view how many times the word he or she is searching for appears in the whole book. However, the user cannot view a significant part of the book, since Google makes one snippet in every page available and one whole page out of every ten – something that Google calls “*blacklisting*”. Also, for books such as dictionaries, cookbooks or even books of short poems, Google does not allow even

²⁸ “*Cooperative Agreement*” between Google and the University of Michigan (U of M), Authors Guild, Inc. v. Google, Inc., 721 F.3d 132 (2d Cir. 2013), p. 9-10.

²⁹ See Google Book Search: All the World’s Books at Your Fingertips, <http://books.google.com/googlebooks/vision.html> (describing the Google Books Search project as Google’s “*man on the moon initiative*”).

the snippet view, since the view of a small part of a book may even satisfy the need of the user on the particular book.

There are three ways that a user is able to use and read books from the database: full view, limited view, and snippet view. If the copyright has expired, the user is able to view and download the entire book. If the author wanted to make only particular pages of his or her book available, he or she gave permission only for the limited view. Lastly, by snippet view, the user is able to view some basic information about the book and some randomly selected snippets of the context of the book.

Google alleged that the Book Database favors the doctrine of fair use and balances “*the rights of copyright-holder with the public benefits of free expression and innovation*”³⁰. Furthermore, according to Google new markets were to be created, since the Google Book Database would help users find and purchase books that otherwise would not be easily found.

Google claimed that the digitization of millions of books and the creation of a public universal library would offer great benefits worldwide and would promote cultural education and, at the same time, the rights of the creators would be protected. However, plaintiffs claimed that the creation of a digital library by Google would unavoidably lead to the creation of a “*de facto monopoly*” with devastating consequences for the creators, the collecting societies, the libraries and all the organizations or companies profit motivated or not that deal with publishing.

B. The Settlement Agreement

The class action was submitted to court in 2005, after many years of negotiation among the parties, which at last reached an agreement in October 2008 that would resolve the opposite claims on a class-wide basis. In order to be effective, the agreement had to be approved by the competent courts. According to the settlement agreement, Google would pay \$125 million to the owners of the books and authors, while Google was allowed to display books to the users and charge fees

³⁰ Schmidt E., *Books of Revelation*, Wall St. J., Oct. 18, 2005, at A18; Band J., *The Google Print Library Project: A Copyright Analysis*, <http://www.policybandwidth.com/doc/googleprint.pdf>; Google Book Search, <http://books.google.com/intl/en/googelbooks/about/html>.

for works that were digitized and available online on the Google Books Database. In a few words, Google would be allowed to use the copyrighted works that were digitized more extensively and would pay royalties to the creators in return. In March 2011, the court rejected the settlement, on the grounds that the creation of a digital library that anyone worldwide could acquire access would benefit many but the ability that Google would have to charge for the use of books and the viewing of digitized books, as was provided in the agreement, would create a monopoly worldwide. Also, the court found that the agreement was not fair to the parties that relied on the plaintiffs to represent their claim.

Another issue the court believed would arise by the settlement agreement was that Google would acquire a de facto monopoly with regards to the digitization and the digital versions of the out-of-print books, out-of-commerce books, and the orphan works. Since these works are estimated to be a significant number in the millions of books that are published and distributed worldwide, this could constitute Google and the Google Books Database a universal regulator that determines what books are to be read and at what cost.

C. The Plaintiff's Claim

According to Authors Guild, through the Library Project Database and the Google Books Database, Google, without clearing rights from the rights holders, made digital copies of millions of books that were submitted to Google by major libraries. The Google Books project gives to an individual the right to search for a specified word or term in a book and see snippets of the digitized book online. Google has made agreements with libraries and has given to them the right to download digital copies of the books that are available on the database.

The plaintiffs appealed the District Courts' ruling because of many flaws in several respects, according to their view. They claim,

A. The fact that by digitization, the Google Books Database allows servers to view snippets of copyright protected works is not a transformative use and provides a significant substitute of the works. Moreover, the fact that an individual may,

through the Google Books Database, view even small parts of a whole work might play a vital role for the individual not to buy that book.

B. Google is profit motivated, and, by the Google Books Database, may monopolize and strengthen its position even more, worldwide.

C. Even if the digitization of the books does not constitute an infringement of the rightholders' rights, it definitely infringes their derivative rights, since the authors would gain profit by licensing agreements.

D. There is an imminent danger that hackers may access the digitized works and make them available for downloading to every individual, something that will prove to be devastating for the rights of the authors, and

E. The license between Google and libraries that allows libraries to download digital copies of books is definitely a loss of copyright revenues of the authors.

According to the Authors Guild, *“Google’s goal was to amass an unrivaled digital library, using these books to draw users to its website, strengthen its dominance of the search-engine market and increase its advertising. The libraries, in turn, wanted to digitize their collections, which they legally would not have been able to do themselves³¹, other than in certain circumscribed circumstances. Libraries buy books, preserve them, and lend them to readers, but when the books are in copyright, they may not make copies unless an exception to copyright applies. Nor may a private company, like Google. As the nation’s largest society of published authors and the leading writer’s advocate for fair compensation and effective copyright protection, the Authors Guild felt compelled to act”*.

Among the other arguments, plaintiffs claimed that according to the Section 106(2), they had a derivative right on their works, which was infringed by the digitization and dissemination of their works. However, the court found that this argument had no merit. First of all, the court took under consideration that copyright does not include the information and the way it will be disseminated to the public, with regards to the copyrighted work. In other words, the creator of a work could

³¹ Authors Guild v. Google, The Authors Guild, <https://www.authorsguild.org/where-we-stand/authors-guild-v-google>.

authorize or prohibit and under any circumstances, monitor the translation of the work into other languages or the adaptation of the work into other forms. This argument is provided in 17 U.S.C. art. 101, which provides that “*a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, [or] condensation [...] or any other form in which a work may be recast, transformed, or adapted*³²”. Under this definition, it is provided undoubtedly that if the derivative works introduce aspects of the original work that are under protection, the author of the copyright protected work enjoys exclusive rights over the derivative works as well.

If the Plaintiff’s claim was referring to the unauthorized conversion of the books of the creators into a digitized form and the infringement of the making available to the public right, the claim could have been stronger. But even so, Google argued that the user is allowed to view only particular snippets of the whole text and is provided with particular and limited access to the copyrighted works.

Another argument that plaintiffs contended was that the digitization and digital storage of the copyrighted works could constitute a significant threat, considering that possible hackers could illegally acquire access to those works and make the works available widely. Although the court found that this argument had a theoretical basis, it was not sufficiently proved by the evidence the plaintiffs submitted and proposed.

Google argued that all the digitized copies were stored on computers that were not accessible through the Internet and were efficiently protected by specific and specialized technological security measures. However, Google’s considerate acknowledgment that “*security breaches could expose [it] to a risk of loss [...] due to the actions or outside parties, employee error, malfeasance, or otherwise*³³” could not suffice in proving plaintiff’s argument that hackers could access the works and possibly make them available to the public.

The court, in other words, found that the protection that Google used on the digitized copies was enough to guarantee the rights of the rightholders and that for

³² 17 U.S.C. §101.

³³ Google’s July 2012 SEC filing.

that reason the plaintiffs had the burden to prove that this protection was not enough or that the hackers could possibly acquire access to their works.

Finally, plaintiffs argued that the digitized copies that Google distributed to the participating libraries was not a fair use and the creators could lose royalties if the libraries used the digitized copies in an unlawful way or if the copies were not sufficiently protected from potential Internet threats and hackers. Their claim was dismissed.

Google signed an arrangement with each of the participating libraries, under which Google undertook the obligation to create a digital copy of each book the library submitted to Google and distribute the digital copy to the library, while the library agreed to use it in a lawful manner. Libraries submitted to Google books they already owned in their collection. The agreement between Google and libraries provided that the libraries would make use of the copies in a lawful manner and would not infringe, under any circumstances, the rights of the creators while, at the same time, provided that libraries would take all the necessary technological measures to guarantee the protection of the digital copies from possible hackers or threats through the Internet. The court rejected the aforementioned claim on the grounds that the creation of a digital copy by Google of books that the libraries already owned in their collection could not constitute an infringement of copyright. Even if libraries, contrary to their binding agreement, would use the copies in an infringing manner, this could not render Google a contributory infringer. If libraries would use the copies unlawfully, then they may be liable to plaintiffs for the infringement of their copyright. However, the court found that this argument was based just and merely on a speculation.

Moreover, the court rejected the proposed agreement for the settlement of the case, which provided that Google would pay to authors royalties for the digitization and use of their original works, on the grounds that the access that Google would provide to the users of the original works would be more extensive with the threat to supersede the original work and possibly infringe the rights of the rights holders.

D. The Judgment

The court found that Google was making a transformative use of the works that had been digitized in the books database, which raised the public awareness and disseminated more information about plaintiffs' books while, at the same time it was found that information that was available did not constitute a significant substitute of the work of the plaintiffs. Therefore, the copyright and derivative rights of the authors remained protected.

With regards to the claim about the revenue the authors lost, the court found that the licensing markets provide very different functions compared to the ones that the Google Books Database provides. Complementary, the derivative rights of the authors do not include an exclusive right to supply information about their works. According to the court's ruling, this database did not, with the given circumstances, expose the works in an imminent threat by the hackers, and finally, the licensing agreements between Google and libraries do not infringe the rights of the authors. Also, the court found that even if libraries use the works in an infringing way, this does not render Google a contributory infringer.

To sum up, the court ruled that,

A. The unauthorized digitization of copyright protected works by Google, the creation of a database that allowed the search of specific terms and texts, and the display of snippets of the digitized copies are lawful under the fair use doctrine. The fact that the secondary use of the original work has a highly transformative purpose in addition to the small and specific views of snippets of the original text guarantee that the copy cannot under any circumstances constitute a substitute of the original work.

B. The distribution of digitized copies to libraries that already have the original works in their collection and the use of the digitized copies in a lawful manner, consistent with copyright law, cannot be considered as an infringement of copyright.

C. The commercial and profit motivated nature of Google cannot verify the denial of fair use.

VII. The Doctrine of Fair Use around Copyright

The aim of copyright is to give authors incentives to create works for the enrichment of libraries and for public consumption by granting authors exclusive rights on their creations over copying of their works, while at the same time, aims to expand public knowledge and cultural diversity. It has been proven that, if authors have absolute and exclusive control over their works, this will rapidly limit, rather than expand, public knowledge. This is why the “*Fair Use Doctrine*”, which allows specific uses of works in special cases and under certain circumstances, has been introduced into copyright law.

The Fair Use doctrine was adopted and recognized in the art. 107 of the Copyright Act of 1976 of the United States. Article 107 provides: “*The 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 of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and the 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*³⁴”.

Some factors from the aforementioned are more significant than the others, as the Supreme Court ruled in our case. We could reasonably assume that, since copyright is in fact a commercial right, it means that its aim and purpose is to protect the rights of the authors to profit and benefit from the exclusive rights that they have on their own works. As in *Campbell case*³⁵, the court found that the company that takes advantage of the works and uses them for new and transformative purposes helps for the enrichment of public knowledge rather than poses a threat

³⁴ Art. 107 of the Copyright Act of 1976.

³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-585 (1994).

that this appropriation and the new works that have been created will replace the original work at some point.

Further on, we will see separately each one of the factors that Art. 107 sets as conditions for an unauthorized use to be considered fair, and how these factors were applied by the Supreme Court in our case. The courts, in general, provide that all the four factors that are outlined in the Copyright Act, must be in equitable balance, so that any act could qualify as fair use.

A. First Factor

1. Transformative Purpose / Purpose and Character

The transformative purpose of a work can be determined on the basis of whether the work substitutes the original creation or adds something different and new and gives to the secondary work a different character from the original with a new meaning, message, or expression. Under any circumstances though, the appropriator must show a justification for the taking and the copying of the original work. This argument is very significant for our case as well, since Google argued that the ultimate purpose for the transformative use of the copyright protected works was to provide information to the public that otherwise would be forgotten.

The definition of transformative works is vital in defining the “*derivative works*” as well. Art. 101 of the Law 17 U.S.C. states: “A ‘*derivative work*’ is a work based upon one or more preexisting works, [...] or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘*derivative work*’³⁶”.

Transformations in *Authors Guild Inc. v. HathiTrust*³⁷ are considered the examples of derivative works that may include the translation of a novel into another language or the adaptation of a novel into a play. The court found that since the use is transformative, the nature of the original works is not necessary to be

³⁶ Art. 101 17 U.S.C.

³⁷ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

considered. The Circuit Court for the Southern District of New York however, disagreed and argued that making a work available to a broader audience is not a transformative use of a work and went further on, comparing the action of making a work available to the public to translating a work into another language, finding that the latter cannot be considered a transformative use. Finally, the court ruled that transformative uses cannot be considered fair use, since as the law demands the derivative works should include transformations in the nature of changes of form.

Under the aforementioned considerations, Google's use of the copyright works favor a fair use finding with regards to the author's rights on their creations.

Even if Google Books Database does not add anything new or original to the original work, it helps to transform the entertainment purpose of the book into archive and access to it. Further, in the case that courts find that the Google Books Database qualifies as fair use it is likely that other programs will proceed and try to digitize or transform other forms of works and creations, like songs, music, and images. As Google digitizes the whole of a book and makes available online only specific parts of it, with the same aim in mind, another corporation may try to reproduce only specific lyrics or parts of songs.

2. Search Function

The digitization of books by Google with the intent to make them available to the public and allow the users to take a snippet view of particular parts of the copyright protected works is undoubtedly a transformative use. The ultimate purpose was that the Google Books Database would provide significant information *about the books that were included in the database*, by allowing the user to identify all the books that included a particular word or phrase in which he or she is interested in. The Supreme Court found also that *"the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn"*.

However, we should bear in mind that Google permits the user to view some parts of the digitized book and that Google is a profit motivated commercial

company. These two factors were adequately examined by the Supreme Court, in order to reach a decision on the satisfaction of the fair use factor.

3. Snippet View

Google Books is the first public database that permits the user to view parts of the book that he or she is searching, in order to determine whether this book falls within his or her scope of interest or not and consequently, whether there is any need in buying that book or not.

This ability that the Google Books Database provides is very important and was taken under serious consideration by the Supreme Court, since this “*snippet view*” could prove harmful for the creator’s rights. Google’s argument was that the snippets that the user is allowed to view can show only a very restricted context of the book, which surrounds the term that the user is searching, so that he can determine whether the book refers to the terms he is interested in or not. Furthermore, Google argued that this “*snippet view*” proves the transformative purpose of the database and that it satisfies the fair use doctrine. And so found the Supreme Court as well.

4. Google’s Commercial Motivation

The Authors Guild argued that the commercial motivation of Google weighs against a finding of fair use, since Google is a profit-motivated organization with the ultimate purpose to use the dominance of Google Books Database to establish its dominance over the internet search market in general. They rely their argument on art. 107 and the condition that “*the purpose and character of the [secondary] use*” should “*include whether such use is of a commercial nature or is for nonprofit educational purposes*”. Also, alternatively in the Supreme Court’s judgment in *Sony Corporation of America v. Universal City Studios, Inc.* we find that “*every commercial use of copyrighted material is presumptively ... unfair*³⁸”.

Taking under consideration that almost every use listed in Art. 107 is conducted for commercial and profitable use, the Supreme Court found that a broad

³⁸ *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451, (1984).

presumption as the aforementioned would consequently restrict all of the commercial fair uses. Also, the profitable or nonprofit character of a work is not the only factor that should be taken under consideration, but it is a fact, that along with other facts, should be evaluated to determine the finding of fair use or not.

Moreover, the Court clarified that *“the more transformative the [secondary] work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use³⁹”*.

Furthermore, what is examined under the fair use defense is the profit that Google gains by creating the database and digitizing and distributing the digitized copies online. Something that we should take for granted is that even if Google does not gain a direct profit from the Google Books Database, an ultimate profit motivation is undoubtedly in mind. Even if there are not any advertisements directly in the platform, Google might receive revenues from ads that are displayed on other websites, related to the database.

In conclusion, what mostly matters under the first factor is if the new work is transformative, which can be determined by whether and to what extent the new work replaces the original one, or on the contrary, adds something different and new and transforms the original work with a new message or a new meaning.

B. Second Factor

The second factor that the court took under consideration is the *“nature of the copyrighted work”*. Actually, Google tried to transform books from their physical form into a digital one. Courts consider that since copyright does not protect ideas or facts but the way the creator expresses these facts or ideas, the copying of a factual work is more likely to satisfy fair use rather than the copying of a work of fiction.

In our case, the Supreme Court found that with regards to the nature of the copyrighted work and its purpose and character, the second factor satisfies fair use, not on the ground that the works are factual but because the secondary work provides important information about the original work and proves its transformative purpose rather than supersedes the original work.

³⁹ *Acuff-Rose Music, Inc. v. Campbell*, 972 F. 2d 1429, 1435-1437 (6th Circ. 1992) 579.

C. Third Factor

The third factor refers to the *“amount and substantiality of the portion used in relation to the copyrighted work as a whole⁴⁰”*. Therefore, fair use is more likely to be found when the copying of the original work is not extensive or the parts that have been copied are not the most important ones, so that it cannot be implied that the secondary work replaces the original one.

The ultimate aim of Google is to create a fully functional digital library. Therefore, Google will copy the number of books that are necessary to achieve that purpose.

1. Search Function

In general, courts have found that even the excessive copying of the whole of a book cannot justify unlawful use of a copyrighted work. Even the copying of a whole of a work can favor a fair use finding if the transformative purpose of the secondary use of the work required so or if the secondary work does not supersede the original one. In *Campbell v. Acuff-Rose Music, Inc.* case, the dictum provided that *“the extent of permissible copying varies with the purpose and character of the use and characterized the relevant questions as whether the “amount and substantiality of the portion used [...] are reasonable in relation to the purpose of the copying⁴¹”*.

Furthermore, the Supreme Court found that the copying of the entirety of the plaintiffs’ original works satisfied fair use since it was necessary for the transformative purpose that Google tried to achieve through the secondary use of the works. Moreover, in the case that Google did not copy the whole of the copyrighted works, the users could not be provided with reliable information on the searched terms. Lastly, even if Google makes copies of the entire book, the digital copies are not available to be viewed by the users.

⁴⁰ *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir. 2013), p. 29.

⁴¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 586-587 (1994).

2. Snippet View

The important inquiry that the “*snippet view*” of the Google Books Database should answer is not “*the amount and substantiality of the part of the work that is used in making a copy*” but rather the importance and quantity of information that is made available to the public and to what extent it can supersede the original work.

The court took under consideration that the amount of the copyrighted work the user can view in addition to the extent he or she can monitor the information he or she receives on the particular text, increase the likelihood that the copy will serve as a substitute for the original, and therefore, prevent the user from buying the original book. Google insisted that the “*snippet view*” does not allow the user to extract either substantial or excessive information of the copyrighted work, therefore, it could not be considered as a substitute for the original work.

The parts of the copyrighted work that can be shown are specific and no matter how many times the same term is being searched, each time the same snippets will be shown to the users. Furthermore, even if the user is trying to extract more information than what is revealed to him or her through the snippet view, he or she can only view specific, small, and randomly scattered snippets of the copyrighted work.

D. Fourth Factor

The fourth factor refers to whether and to what extent the secondary work supersedes the original, notwithstanding its transformative purpose and whether it constitutes a threat to the revenues of the creator of the original work if the purchasers choose to acquire the copy. Since copyright is actually a commercial doctrine with the aim to incentivize creators and fortify their exclusive rights and revenues to their creations, the fourth factor is very important to determine the satisfaction of fair use or not.

In *Campbell v. Acuff-Rose Music, Inc.*, the court found that “*the more the copying is done to achieve a purpose that differs from the purpose of the original, the*

*less likely it is that the copy will serve as a satisfactory substitute for the original*⁴²” while in the HathiTrust, the court took under consideration that the ability that a database may give to a user to search for a specific text of a book in order to determine whether it includes specific works “*does not serve as a substitute for the books that are being searched*”⁴³.

The question that the court had to answer, in order to make a fair use assessment for our case, was if the digitized parts of the books and the ability that a user had to view particular parts of the copyrighted works could constitute a substitute and could harm the creator’s exclusive rights on their creations. Google argued that the “snippet view” can only give access to particular parts of the works and even more, parts that are not consistent and randomly selected that cannot under any circumstances supersede the original work or harm the rights of the creators.

The court acknowledged that even under certain conditions, some sales of the books of the plaintiffs could be lost, since the users’ need could be served even by the small and randomly selected parts that the Google Books Database could provide. However, even the probability of some loss of sales cannot under any circumstances suffice and the “snippet view” or the copy cannot be considered a substitute of the original work.

Maybe the last factor is the most important in order for the court to determine the satisfaction of the fair use doctrine or not. Google had to prove that not only does the database not cause any harm to the market or the potential market, but on the contrary, flourishes a potential market by increasing demand for books and titles that the audience either did not know about or were not discovered or available. Furthermore, the database links users directly to the publishers’ websites allowing and encouraging a potential purchase of the work. Google argues that with regards to the digitization of books that are available and free of charge in a library, the copyright holder cannot allege that the digitization of the specific book by Google could under any circumstances cause harm to his or her rights.

⁴² Campbell v. Acuff-Rose Music, Inc., 510 U.S. (1994), p. 591.

⁴³ Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), p. 100.

Taking all the aforementioned arguments under consideration, the Supreme Court found that the digitization of the plaintiff's books and the making available of specific parts of the works to the public satisfied the fair use doctrine and did not harm the rights of the creators on their books.

VIII. The Challenges the Judgment Created and Resolved

One of the main speculations around the judgment was whether allowing Google to digitize copyrighted works without the authorization and permission of the authors would create and allow "*a de facto monopoly*" with immediate consequences over the "out-of-commerce" and "orphan works" whose copyright holder has not been found. The Google Books Database, by controlling and monitoring the digitization of the aforementioned works, which represent a significant amount of the internationally published works, could become the most powerful information provider and even determine the specific works that the audience would be impelled to buy, read and borrow and at what cost.

We will further see some landmark cases that influenced and were influenced by the Authors Guild v. Google case and the way this case affected the background of the digital copyright over the last decade.

*In Sony Corp. of America v. Universal City Studios, Inc.*⁴⁴ the United States Supreme Court ruled that the videotape recorders (VCRs) that are used in order to record programs displayed in the television, do not constitute copyright infringement of the copyright of the production company's rights. Despite the allegations of the plaintiffs, the court found that the VCRs favor the doctrine of fair use for the following reasons: first of all, the VCRs are not used for commercial uses but mostly for private use. Secondly, it was found that the copyright holders who agreed that their program would be broadcasted in the television, would not oppose to the recording of their program by the audience for later playback privately. Lastly, there was not found any potential or imminent threat to the copyright holders of the market by the recording of television programs for private purposes. In conclusion, what this case lead to was that copyright infringement can be found if a certain and

⁴⁴ Sony Corporation of America v. Universal City Studios, Inc, 464 U.S. 417, 451, (1984).

reasonable possibility of harm of the copyright holders' rights could be proven by the unlawful use of a work.

In the *Campbell v. Acuff – Rose Music Inc.* case, the plaintiffs filed a suit for copyright infringement with regards to a parody of a classic song. In that case, the court found unanimously that the secondary work – the parodied song satisfied the doctrine of fair use, since the transformative purpose of the work was obvious in many aspects of it. Furthermore, the court found that a use can be “transformative” when the secondary work contains “something new with a further purpose or different character, altering the [original] with new expression, meaning or message⁴⁵”. The court, with regards to this case, found that the parodied song copied only what was necessary, adding a creative and unique interpretation⁴⁶, and it could not supersede the original classic song under any circumstances. While the transformative use of the work is not the only factor to determine the satisfaction of fair use or not, a significant qualitative and quantitative input reduces the importance of other factors, one of which might be the commercialism. However, the commercial use of a work cannot as such constitute the only factor under consideration against the finding of fair use.

*A & M Records, Inc. v. Napster Inc.*⁴⁷ was the case that was brought to the United States Court of Appeals related to whether Napster, a free computer program that allowed users to copy; share; and download music files, could constitute copyright infringement⁴⁸. The court, before reaching a judgment, examined the fair use doctrine and the conditions when a commercial use may constitute copyright infringement. Copying is not necessarily tied to economic benefits to prove a commercial use. It was found that the “repeated and exploitative unauthorized copies of” the copyrighted songs, made to “save the expense of purchasing authorized copies”, constituted a commercial use⁴⁹, ⁵⁰. Even if the copying of a work

⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. (1994), 579.

⁴⁶ *Id.* At 589.

⁴⁷ *A & M Records, Inc. v. Napster Inc.*, 114 F.Supp.2d 896 (2000).

⁴⁸ *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1011-1013 (9th Cir. 2001).

⁴⁹ *A & M Records, Inc. v. Napster Inc.*, 239 F.3d 1004, 1015(9th Cir. 2001).

⁵⁰ Gamble A., *Google’s Book Search Project: Searching for Fair Use or Infringement*, 9 Tul. J. Tech. & Intell. Prop. 365 (2007), p. 373.

does not always constitute a copyright infringement, the court, in this case, found that the copying of entire songs over the Internet, did not favor over a finding of fair use. Napster could significantly decrease the sales of audio CDs. However, the court agreed that the possible harm to an established market was low and could not prevent a company from creating more alternative markets for the distribution of music. Napster prevented the record company from creating similar programs for downloading music songs over the Internet. Moreover, the use of Napster indicated a significant potential harm to primary and derivative markets, since the sales of CDs would be reduced, and at the same time, the royalties that were charged for music sales over the internet were decreased as well. Last, the court agreed that Napster did not satisfy the fair use defense.

In the case of *Field v. Google, Inc.*, the court found that the “cached” copies of the websites that are accessible and can be downloaded by users weighed in favor of fair use. The plaintiffs argued that the distribution by Google of the “cached” copies of copyrighted works that were uploaded on a website and were available online, constituted copyright infringement. However, the court found that the “cached” copies that Google created and distributed qualified as fair use, since the copyright holders first had “*create[d] and download[ed] a copy of the cached Web page*”⁵¹. Since there was not direct harm and copyright infringement found, the court analyzed the four factors under the fair use doctrine as follows: “*while no one factor is dispositive, courts traditionally have given the most weight to the first and fourth factors*”⁵². With regards to the first factor, the court found that the cached copies could not supersede the original works and constitute a substitute, but on the contrary, they gave access to information and works that were not available by other means. Last, the court took under consideration that the copyright holder uploaded his creations over the Internet at first place and did not prevent Google from creating “cached” copies of them. Based on that ground, the court found that the use of the works by Google qualified as fair use despite the profit motivated character of Google. There was not any proof that Google gained profit by the use of the “cached” copies, nor did it display any advertisements on the cached pages.

⁵¹ *Field v. Google, Inc.* 412 F. Supp. 2d 1106 (D. Nev. 2006), 1115.

⁵² *Id.* At 1118.

Another condition that the court took under consideration was the fact that the copyrighted works were already available online, free of charge over the Internet through Field's website. Also, the court reasoned that since the works were already available online free of charge, there would not be potential harm by the use of the "cached" copies by Google. Last, a fifth factor was introduced: "*Google's Good Faith in Operating its System Cache*⁵³"; that Google acted in good faith by preventing and removing unwanted cached links.

On the contrary we see what the United States District Court found in *Perfect 10 v. Google, Inc.* Plaintiffs argued that Google violated the rights of the copyright holders with the dissemination and reproduction of thumbnail images of photos that were copyright protected without the authorization of the copyright holder. Google introduced a database, the "*Image Search*" where a user can search a photo from one of the photos that Google had scanned and digitized in this database. The user will either be transferred to the original website, where this image is posted in full-size and high resolution, or view in the database the low-resolution thumbnail copies of the original photos. The court found that this database contributed to Google's profits, since the thumbnails contained advertisements and increased significantly Google's revenues. Therefore, the court, in order to determine whether the use of the images was fair or not, took under consideration the fair use defense and the other factors. First, they reasoned that the transformative use "*depends in part on whether it serves the public interest*⁵⁴". Furthermore, the court found that the database helped users acquire an easier and faster way to access to information over the Internet, and at the same time, the use was consumptive, likely to substitute the small sized images that were already distributed in the market. Last, even if the thumbnails did not affect the market with regards to the full sized pictures, they caused harm in the market for the small-sized images for cell-phones. However, the court acknowledged the significant public benefit that Google provided by introducing the "Image Search" database, alleging at the same time that the current

⁵³ Id. At 1120-1121.

⁵⁴ *Perfect 10 v. Google, Inc.* 416 F. Supp. 2d (C.D. Cal. 2006) 845-847.

legislation, with regards to copyright and fair use could not support such considerations.

IX. The Future

Worldwide, there is a common belief that libraries and archives should be given the right to make limited copies of copyright protected works for preservation and replacement purposes, even without the permission of the author. The only prerequisite is that these copies won't be used for commercial purposes.

One of the critical questions that have arisen by the case we thoroughly examined is whether new models and new types of works will be introduced in the future, since the derivative and secondary works that are considered transformative satisfy the fair use doctrine without any prerequisites for the adaptation of the work and even without the authorization or consent of the creators. Will the new models lead to copyright where the copyright holders will not benefit by the derivative and secondary works at all?

The fair use doctrine would constitute a privilege for an unauthorized use of copyrighted work in a reasonable manner. On the other hand, the permission and authorization of the author for a lawful use of a copyrighted work would consist a way to promote science, arts, and culture since such an authorization would incentivize authors to improve and write upon pre-existing works, create further, and contribute to cultural development. The court, with regards to the aforementioned speculation provided: *"Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders⁵⁵".*

It is obvious that the digital revolution has changed the balance of copyright. Even so, writers and creators in general should be granted the right to earn a livelihood by their creations and create more. Google has transformed traditional

⁵⁵ Authors Guild Inc. v. Google, Inc. at.*10, No. 05 Civ. 8136, WL 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013).

means of reading into a modern and up-to-date way to read and access to information.

Copyright law and copyright protection is the main reason why cultural industries thrive and there are so many professions and so much interest around this area. We need to make sure that this protection and these principles will continue to be guaranteed in the future, for the next generations.

X. Conclusion

It is widely noticed that nowadays fewer people visit public libraries because of the use of the many and different technological means and the Internet and the variety of information that someone can assess on it. Therefore, the librarians struggle to attract more and more visitors to their libraries so that they can avoid the decay of libraries and maybe even their elimination. Undoubtedly, one of the most promising ways to prevent this is through technology and technological improvements, in addition to the abilities that the Internet offers. The ideal combination would be the information, wisdom, and expertise that a library offers, along with the current technological means that provide speed, images, sound, easiness, and variety. The important social objectives that this project will offer to the public will be acknowledged. Last, the encouragement of such a project that would offer the aforementioned and would provide the protection of the rights of the creators would discourage the development of other similar databases.

The Google Books Database is, on the one hand, an exceptional consideration and idea, determining the future of digital copyright, while on the other hand, the finding of fair use undoubtedly decreases significantly the exclusive rights of the copyright holders and their attachment to their creations. Under any circumstances, however, Google should not take advantage and exploit works and rights that it does not own rightfully or is not authorized to do so.

Google Books Project did not aim to help the audience read books, but rather to help the audience find books, and it has facilitated a way to help users discover and purchase books. Therefore, if a user wants to read a book, he or she either has to purchase it – and the project helps him or her find where to ask – or visit a local

library. Moreover, Google has codified the program so that it would be impossible to download or use illegally copyrighted books. Under this consideration, Google does not offer a project that can constitute a substitute over the original creations, but on the contrary, helps users find books that are unfamiliar. Google Books Database is a pioneer project following the trend of digitization to the benefit of the society and future generations for the dissemination of knowledge.

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