

# Fair Use or Foul Ball? Copying 20,000,000 Books Without Permission is not Copyright Infringement

## Client Advisories

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Jim Bouton's last pitch to Google wasn't Ball Four, at least according to the umps of the Second Circuit who decided, after replay, that the digital giant had smacked the pitcher-turned-author's hanging slider more than 330' directly over the foul pole boundary of the short porch in right. In [The Author's Guild v. Google Inc.](#), a three judge panel of the Second Circuit Court of Appeals affirmed a grant of summary judgment in favor of Google by the District Court of the Southern District of New York against the former Yankee pitcher, one of the named plaintiffs, and The Author's Guild, the nation's professional organization for writers, once headed up by such luminaries as Pearl Buck and Erica Jong (which organization had been found to lack standing to bring claims of copyright infringement on behalf of its members). The 2013 summary judgment decision held that Google, having made digital copies of the full text of tens of millions of books without the permission of the authors and having provided a publicly available search function with an electronic viewer that copies out "snippets" of works retrieved, had not infringed Bouton's, nor anybody's, copyright, because Google's digitization was "transformative" and therefore constituted "fair use" under the Copyright Act.

Stating off the bat that "[t]his copyright dispute tests the boundaries of fair use," the Second Circuit expanded the strike zone of the Fair Use exception in Section 107 of the Copyright Act, even in the face of the assertion of the plaintiff/copyright holders that Google's "ultimate profit motivation" in the creation of this new monolithic digital library<sup>1</sup> should obviate a finding of fair use under first prong of the Section 107 analysis, that is, "whether such use is of a commercial nature." The appellate court disagreed stating that "we see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose." As to the "snippets," while plaintiffs argued that making a "derivative work," such as a snippet, is within the bundle of exclusive rights of the copyright holder, and while the court recognized that "the snippet function can cause some loss of sales," the judges refused to accept the rather clear analogy advanced by plaintiffs of those "snippets" to digital ringtones, stating that "The value of the ringtone<sup>2</sup> to the purchaser is not

that it provides information but that it provides a mini-performance of the most appealing segment of the author's expressive content."

The Second Circuit ended by stating:

"In sum, we conclude that:

1. Google's unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses. The purpose of the copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals. Google's commercial nature and profit motivation do not justify denial of fair use.
2. Google's provision of digitized copies to the libraries that supplied the books, on the understanding that the libraries will use the copies in a manner consistent with the copyright law, also does not constitute infringement. Nor, on this record, is Google a contributory infringer."

Given the expanding boundaries of fair use, those companies and individuals wishing to copy works, whether for a corporate website or for a private book club, be they big business<sup>3</sup> or mom and pop shops, would be well served to analyze the Google decision before striking out to make copies of protected works.

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<sup>1</sup> It has been reported that one of the founders of Google justified the creation of the Google Library Project by citing the burnings of the Library of Alexandria in 48 B.C. and the Library of Congress in 1851, celebrating thereby the beneficent nature of the tech colossus.

<sup>2</sup> The court might have been advised to take judicial notice of the worldwide importance of such music segments as memorialized in song by The Arctic Monkeys: "There's only music, so that there's new ringtones." From "A Certain Romance" © 2006 Domino Recording Co., Ltd. London.

<sup>3</sup> Presumably searching in the Google library for "big business" one would find this ironically prescient snippet from Ball Four: "When I started out in 1959, I was ready to love the baseball establishment. In fact I thought *big business* had all the answers to any question I could ask." © 1970 Jim Bouton (Emphasis supplied.)

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