

2005

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Recommended Citation

Ryan Eddings *Publishers Fight to Stop Google's Library*, 18 Loy. Consumer L. Rev. 266 (2005).

Available at: <http://lawcommons.luc.edu/lclr/vol18/iss2/8>

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exclusively to the states.⁷⁸ In the decisions finding exclusive state jurisdictions over TCPA private claims, the courts have placed emphasis on the fact that Congress expressly granted exclusive federal jurisdiction to TCPA claims brought by states under §227(f)(2).⁷⁹ This is the same section that the Seventh Circuit used to justify its interpretation that federal courts retained jurisdiction over private TCPA claims.

How this split plays out in the federal courts is important for consumers bringing TCPA claims. As it is right now, which forum – state or federal – a plaintiff can properly bring such a claim depends in which appellate district the parties reside. Differing venues bring in the possibility of different procedural requirements which could increase disunity in standards and decisions in implementing a nationwide law.

Publishers Fight to Stop Google's Library

Google, the internet search engine giant praised for its innovation, recently unveiled a new concept that is exciting consumers and drawing the ire of international publishers. Google's next big idea is the Google Print Project,⁸⁰ an ambitious attempt to scan and digitize millions of books from the libraries at Harvard, Michigan, Stanford, and Oxford Universities and the New York Public Library.⁸¹ Under the plan, Google intends to scan over 15 million books and other documents at a cost of about \$10 per item.⁸² The scanned documents will then be made available for public searches. Fearing copyright violations, both the Association of American Publishers⁸³ (AAP) and the Authors Guild⁸⁴ have filed

⁷⁸ See *Chair King*, 131 F.3d at 512 (“Congress’s failure to address any of these matters with regard to private actions provides support for the our conclusion that Congress intended only state courts to handle these private actions”).

⁷⁹ See *Murphy*, 204 F. 3d at 913.

⁸⁰ The Google Print Project, <http://print.google.com> (last visited Nov. 26, 2005).

⁸¹ Chris Nuttall, *Publishers Try to Halt Google Library Plan*, FIN. TIMES, Oct. 20, 2005, at 20, available at 2005 WLNR 16948658.

⁸² John Markoff and Edward Wyatt, *Google is Adding Major Libraries to its Database*, NEW YORK TIMES, Dec. 14, 2004, at A1, available at 2004 WLNR 15523341.

⁸³ Press Release, Association of American Publishers, *Publishers Sue Google*

lawsuits against Google, seeking both damages and injunctive relief.

The Google Print Project is divided into two components. The first is the Google Print Publisher Project,⁸⁵ under which a publisher of a copyrighted book authorizes Google to scan the full text of a published work into the Google searchable database.⁸⁶ In response to a user search, Google returns results with information on specific publications and relevant text triggered by the search.⁸⁷ The user is also given a link, through which the user can purchase the publication.⁸⁸ There are no copyright issues implicated by the Google Print Publisher Project because it operates under an agreement between the publisher and Google.⁸⁹

It is the other component, the Google Print Library Project,⁹⁰ which has drawn the criticisms of the publication industry. What Google retrieves after running a user's search in the Print Library Project depends on whether the material retrieved is copyrighted. If the material is not protected by copyright, the full text will be available for the user to view.⁹¹ If the material is protected by copyright, the user will see what Google terms the "Snippet View" – a page containing basic card catalogue information, plus a few

over *Plans to Digitize Books*, (Oct. 18, 2005) available at <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=292> (last visited Nov. 26, 2005). The lawsuit brought by the AAP was filed in the United States District Court for the Southern District of New York, case number 05 CV 8881.

⁸⁴ Press Release, Authors Guild, *Authors Sue Google, Citing "Massive Copyright Infringement,"* (Sept. 20, 2005) available at http://www.authorsguild.org/news/sues_google_citing.htm (last visited Nov. 26, 2005). The lawsuit brought by the Authors Guild was filed in the United States District Court for the Southern District of New York, case number 05 CV 8136.

⁸⁵ The Google Print Publisher Project, available at <http://books.google.com/googlebooks/publisher.html> (last visited Nov. 26, 2005).

⁸⁶ Jonathan Band, *"The Google Print Library Project: A Copyright Analysis,"* at 1, available at <http://www.policybandwidth.com/doc/googleprint.pdf> (last visited Nov. 26, 2005).

⁸⁷ Band, *supra* note 86, p. 1.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Google Publisher Project, *supra* note 85.

⁹¹ Google Library Project, <http://books.google.com/googlebooks/library.html> (last visited Nov. 26, 2005).

sentences of the search terms in context.⁹² Google maintains that the full text of copyrighted material will not be available for public viewing,⁹³ although the full text of the copyrighted information will reside in Google's database.⁹⁴ As with the Print Publisher Project, Print Library Project users interested in a publication after reading the Snippet View will be directed to retailers' websites where the publication can be purchased.⁹⁵

The Google Print Project promises to give consumers unprecedented access via their own personal computers to information previously found only in the world's great libraries and accessible by only a privileged few. Librarians and educators see the Google Print Project as a way of promoting literacy.⁹⁶ Consumers see the project as a way of broadening and facilitating their information choices, while others predict the Print Project will turn into a windfall for publishers, providing consumers free referrals to a publisher's products and thereby actually increasing demand for the copyrighted material.⁹⁷ But publishers and authors fear what they call the "Napsterising" of books.⁹⁸

In response to Google's decision to press ahead with the Print Project, both the AAP and the Authors Guild have brought suit to stop the project, claiming copyright infringement. After filing suit against Google, Authors Guild President Nick Taylor labeled Google's plan a "brazen violation of copyright law."⁹⁹ Both the AAP and the Authors Guild claim that only the authors themselves can

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Needless Fight Threatens Google's Online Library*, USA TODAY, Nov. 8, 2005, at 12A, available at 2005 WLNR 18058884.

⁹⁵ Patti Waldmeir, *Google's Digital Page-Turner*, FIN. TIMES, Nov. 17, 2005, at 13, available at 2005 WLNR 18564938.

⁹⁶ USA TODAY, *supra* note 94.

⁹⁷ Google cites the example of the Penn State University Press who saw sales of Print On Demand titles jump from an average of nineteen sales per month to seventy-four after converting to the Google system. The Penn State case study is available at <https://print.google.com/publisher/pennstate> (last visited Nov. 26, 2005).

⁹⁸ Waldmeir, *supra* note 95. "Napsterising" is a reference to the now-legal music file sharing company, Napster, which in the late 1990s allowed consumers to share and download music files without forcing consumers to go through the trouble of purchasing the music.

⁹⁹ Authors Guild, *supra* note 84.

determine whether the copyrighted publications can be copied.¹⁰⁰ The groups insist that Google must first get the permission of each author before a copyrighted publication can be scanned into the Google database.¹⁰¹ Google has refused, noting that finding the author of every copyrighted publication would not only be prohibitively expensive, but impossible as well.¹⁰² Moreover, these groups insist that only the copyright holder can determine which information can be released in the “Snippet View.”¹⁰³

Rather than acquiesce to the publishers’ demands, Google has sought protection under the “fair use” exemption under American Copyright law, arguing that its use of the copyrighted material is limited and that the Print Project serves important public interests. The fair use exemption is an affirmative defense that can be raised after a *prima facie* case for copyright infringement has been established.¹⁰⁴ A *prima facie* case for copyright infringement consists of two elements. First, there must be ownership of a valid copyright.¹⁰⁵ Second, original elements of the copyrighted work must be copied.¹⁰⁶ Both elements are likely satisfied in the case of the Google Print Project. The fair use exemption is codified in the Copyright Act,¹⁰⁷ providing four factors for courts to consider in

¹⁰⁰ *Id.*

¹⁰¹ Waldmeir, *supra* note 95.

¹⁰² *Id.*

¹⁰³ USA TODAY, *supra* note 94.

¹⁰⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

¹⁰⁵ *Feist Publ’ns, Inc. v. Rural Telephone Servs., Inc.*, 499 U.S. 340, 361 (1991).

¹⁰⁶ *Id.*

¹⁰⁷ 17 U.S.C. § 107 (2004). Limitations on Exclusive Rights; fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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 made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and 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;

determining if unauthorized use of a copyrighted item is nevertheless fair.¹⁰⁸ The four factors are not exhaustive, and no single factor is determinative.¹⁰⁹ Rather, section 107 attempts to harmonize the two principles behind copyright law: providing incentives for creators without stifling other creators and the public good.¹¹⁰

The future of the Google Print Project will largely depend on how the courts presiding over the lawsuits interpret Google's actions. If the courts find that the Google Print Project use of copyrighted material is intended for commercial gain, then it is presumed that the infringement has, or will, harm the market for the copyrighted material.¹¹¹ On the other hand, if the courts find that Google's intent is not for commercial gain, then either AAP or the Authors Guild will have to show that Google's Print Project has, or will, harm the market for the copyrighted works in question to prevail.¹¹² If the Penn State University Press case study is to be believed, such a showing will be difficult to make.¹¹³

In the meantime, Google continues to digitize copyrighted works without permission. At the time of this publication, the first sources of the Google Print Library were accessible by users. The interests served by the Print Project are for the project to stall in litigation. The Print Project will likely benefit everyone involved – Google, consumers, authors, and publishers. The fact that Google is paying for the project should only sweeten the deal. However, unless a compromise is reached, it appears that Google will have to fight to make the world's great libraries available to the public, while at the

(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.

¹⁰⁸ See Elizabeth Hanratty, *Google Library: Beyond Fair Use*, 2005 DUKE L. & TECH. REV. 10, 14-16.

¹⁰⁹ *Sega Enters., Inc. v. Accolade, Inc.*, 977 F.2d 1510, 1521-22 (9th Cir. 1993).

¹¹⁰ Hanratty, *supra* note 108, at 16.

¹¹¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹¹² *Id.*

¹¹³ Google, *supra* note 97.

same time testing the outer boundaries of American copyright law.
