

Kluwer Copyright Blog

The Google Books Project is Lawful

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The saga over the legality of the Google Books project finally came to an end on April 18, 2016, when the Supreme Court of the US refused to intervene in the case over alleged copyright infringement for scanning millions of books and making them searchable online. This was a final blow to authors' representatives who in a [186 page petition](#) tried to argue that Google engaged in copyright infringement "on an epic scale."

This means that the [decision](#) of the Court of Appeals rendered in October 2015 remains in force and sets an important precedent concerning the application of the fair use standard. Back then, the Court of Appeals ruled that the Google Books project significantly contributes to the availability of information, facilitates the dissemination of knowledge, and promotes creativity and science. In the following paragraphs we will briefly (i) touch upon the main features of the Google Books project, the legality of which was contested in this litigation; (ii) introduce the main arguments that led the Court of Appeals to conclude that Google Books should be deemed as fair use under the US copyright law; and (iii) discuss whether copyright systems in civil law countries have any similar tenets to the fair use doctrine in dealing with intricate copyright infringement matters.

How Google Books Works

From the viewpoint of users, Google Books is an electronic library catalogue where users are able to conduct a search for particular keywords and get a list of books where those words could be found. Based on search results, users can choose a particular book and see up to three excerpts from the book (snippets). At the bottom of the page a list of other relevant books is provided, together with links to the sites where a particular book can be purchased.

Google Books originated in 2004 when Google initiated cooperation with the largest research libraries of the world ("Library Project"). According to the mutual agreements, libraries would provide hard copies of books which Google would scan and convert to digital copies. The library would then receive a digital copy of every book scanned. To date, more than 20 million non-fiction books (most of them out of stock) have been scanned and made available for online search. Google claims that all digital copies are stored on its servers using the strict protection standards and Google's own confidential information.

According to Google, the creation of such a digital library catalogue opens new unseen possibilities for readers and researchers to locate information which "would otherwise not be obtainable in lifetimes of searching". It should be noted that Google Books does not contain any

advertisements, nor does Google receive any remuneration for providing links to other websites where those books can be purchased.

Fair Use Analysis in the Google Books Case

In its decision of October 2015, the Court of Appeals held that Google can continue scanning books without prior copyright holders' permission. Justice Leval wrote the opinion of the court mainly focusing on four fair use criteria as set out in [Section 107](#) of the US Copyright Act.

First, the Court of Appeals held that Google's making of digital copies of the plaintiffs' books involves a highly transformative use of the original works because it enables a search. Besides, the possibility of viewing snippets of texts with specified keywords was considered to add important value to the basic search function. Also the fact that Google is a privately held corporation seeking profit did not outweigh the importance of the transformative nature of the use.

Second, the nature of the copyright works in this case did not play a major role: the Court noted that rather than the nature of the original works, it is more important to consider whether the original works are used in the transformative manner and that such transformative use provides valuable information about the original work.

Third, the Court found that even copying the whole work could be deemed as fair use. This is so because without having a digital copy of the whole work, the search function would not be possible. Moreover, it was emphasized that in any case the users of Google Books can only see up to three short snippets with each keyword searched. Finally, with regard to the question of whether the snippets could be deemed as affecting the market for the original works and income of the copyright holders, the Court of Appeals once again reiterated its arguments about the transformative use of the works and then came to the conclusion that even if in some rare instances the sales of original works might be affected, snippets can in no way be considered as substitutes for original copyrighted works in an economic sense.

Applying the Fair Use Standard in Civil Law Jurisdictions

The decision of the Court of Appeals might put an end to discussions about the legality of the Google Books project globally. As a result, Google can continue its digitization project without seeking prior permission from the authors. This Court of Appeals decision will set an important precedent in applying fair use standards in the future and will perhaps serve as an impetus for the proliferation of similar digitization projects and the establishment of more comprehensive types of databases.

Fair use doctrine is a peculiar feature of copyright systems in common law countries and is not known in civil law jurisdictions. In the following sections we will discuss how complex copyright infringement cases are handled in civil law jurisdictions, and whether any parallels between civil and common law countries could be drawn.

At the outset it should be noted that in both civil and common law countries it is generally acknowledged that the purpose of copyright law is to promote innovation, creativity and progress of science. Forward-thinking copyright law experts recognize that copyright law should also facilitate dissemination of information within society. This could be best achieved by creating an environment where intermediaries are able to enter the market and offer new services that would alleviate transaction costs. Copyright law, together with other regulatory measures (e.g., taxes, etc.)

should provide incentives for intermediaries to operate. Moreover, legal systems should be adjusted to changing social and technological conditions in order to curtail the uncertainties that intermediaries face due to competition in the market.

These two goals of copyright law – the promotion of creativity and facilitating the dissemination of information – could be considered as having slightly different philosophical justifications. A closer look at the European/civil law approach reveals that conventionally copyright law practice has placed greater emphasis on close personal ties between the creator and the work. E.g., fairness theory which has its roots in the writings of John Locke, posits that creators should be entitled to the fruits of their work (even if the work is not creative at all) while personality theory emphasizes close emotional ties between the creator and the work. Both fairness and personality theories would support granting broad IP rights to the creator of the work. The advocates of the currently prevailing welfare theory stress the need to create incentives that facilitate creativity and the importance of reducing various hurdles that might prevent society from enjoying the fruits of creative activities.

Decisions in complex cases such as the Google Books case usually depend on which copyright law theory the judge gives preference to, while the logic and reasoning to reach a specific result varies from country to country. In the US, fair use is considered as an affirmative defense, which aims to allocate the burden of proof in copyright infringement cases. While such issues as copyrightability, ownership and the act of copying have to be proven by the plaintiff, the defendant seeking to escape liability may choose to rely on the fair use doctrine and provide evidence showing that the secondary use of the original work is transformative and does not impact the market of the original work.

Although fair use doctrine has not been a part of copyright law systems in civil law countries, most copyright statutes in civil law countries currently contain a lengthy list of copyright limitations (e.g., Art. 5 of the [Information Society Directive](#), Arts. 44a-63a of the German [Act on Copyright](#), or Arts. 30-49 of the Japanese [Copyright Act](#)). Such a list of copyright limitations in civil law countries could be deemed as corresponding to various situations that could also possibly fall within the scope of fair use standard under the U.S. Copyright Law.

Courts in civil law countries have the authority to adjust and re-allocate the burden of proof in trying to find the fine line between competing interests of the parties. In Japan, for instance, courts may refer to the principle of the prohibition of abuse of rights (e.g., which is enshrined in Art. 3 of the Japanese [Civil Code](#)). The notion of abuse of rights may be applied in cases where the copyright holders seek to make extensive claims and enforce their copyright in relation to types of use which could be considered “fair”. Such abuse of rights would usually have to be shown by the defendant (i.e., alleged infringer of copyright). Civil law countries also do not have statutory requirements that mandate courts to take into account whether the secondary use of the work affects the market of the original work. As an alternative, courts may refuse to recognize the copyrightability of the specific part of the original work thus preventing the copyright holder from exercising its copyright (e.g., especially in disputes pertaining to copyrightability of computer programs).

The above comparative analysis shows that although a fair use doctrine was not originally known in civil law countries as such, similar ways of reasoning do exist in court practice as well as statutory provisions that are designed to limit the exercise of copyright. It goes without saying that fair use doctrine could be deemed as a more general and structured framework for the parties in

terms of factors which have to be proven in copyright infringement cases. Fair use doctrine is also attractive because those four criteria embodied in S 107 of the US Copyright Act are not exclusive, and courts are given freedom to take into consideration other factors that may be relevant in a specific case. In this regard (and given a judge's perspective of the purpose of copyright) both common law and civil law systems could be considered as providing some flexibility for the development of copyright systems. More generally, despite different political, cultural and socio-economic backgrounds in different countries, the proliferation of global business models is very likely to narrow the gap between different legal systems. This will gradually lead towards one more widely accepted way of dealing with complex copyright infringement cases.

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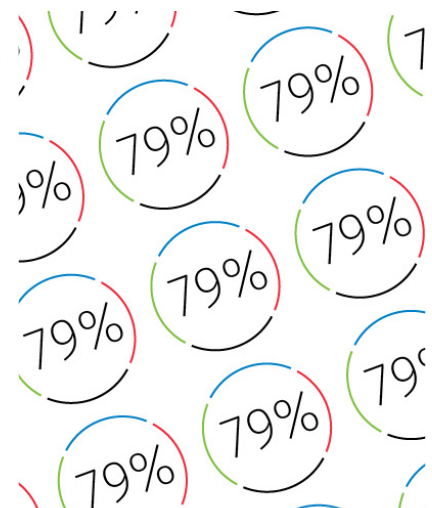
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