

Transformative Use: An Update on the Google Books Case

An Interview With Jonathan Band

by Cy Dillon

In spite of early concerns about the quality of its metadata, best summarized by Geoffrey Nunberg in the August 31, 2009 issue of *The Chronicle of Higher Education*, librarians have come to appreciate Google Books for its power to search millions of books and its potential as a “big data” source for the study of language and culture. Thus, the suits filed against Google by the Authors Guild and five publishers in 2005, which were soon consolidated, were viewed by many librarians as a threat to an irreplaceable resource. The suits asserted that Google’s scanning, maintaining a database for searching, and offering searchers short “snippets” of the text of books infringed on copyright. A proposed settlement failed in 2011, and the publishers dropped their litigation in 2012.

In November 2013 Judge Denny Chin issued a ruling in the case, by now with only the Authors Guild and a few individual authors as plaintiffs. Judge Chin found that Google’s use of the copyrighted material was covered by the doctrine of fair use because it is transformative as well as very beneficial to society. The Authors Guild has appealed the decision to the U.S. Court of Appeals for the Second Circuit.

Jonathan Band, an attorney who specializes in intellectual property law and who has often worked with the American Library

Association (ALA) in its efforts to support open access and fair use, has followed the Google Books case since the beginning. He, along with Cindy Cohn who represented the Electronic Frontier Foundation, filed an influential amicus brief in the case on behalf of ALA, the

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Association of Research Libraries, and the Association of College and Research Libraries. Mr. Band, who was earlier interviewed in *Virginia Libraries* in the spring of 2008, has been generous enough to respond to a number of questions about the Google Books case and about its implications for the future of copyright law.

CD *Back in 2005 in his Open Access News blog, Peter Suber quotes you as saying that Google’s book scanning, which you point out is analogous to a search engine scanning a website, is covered by fair use. How does it feel to have Judge Chin finally agree with you?*

JB Well, it would be a bit presumptuous for me to say that Judge Chin agreed with me personally. But in his decision, he did cite several times the amicus brief I filed for the Library Copyright Alliance. So it certainly is rewarding to feel that my efforts may have had some impact on the outcome.

CD *This decision has been called a big win for libraries. Would you explain why that is the case?*

JB I think this case needs to be viewed together with the HathiTrust decision. In HathiTrust, Judge Baer found that the fair use doctrine permitted the mass digitization of books for the purpose of creating a search index, preservation, and facilitating access for the print disabled. The Google Books decision went a bit further in that the index also enabled snippet display (the HathiTrust index just indicates which books include the search term) and the defendant was a commercial entity rather than a consortium of libraries.

CD *The purpose of the use is the first of the four factors to consider when evaluating whether an action is fair use. In your ALA Amicus Brief of August 1, 2012 you begin*

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by emphasizing the value of Google Books to society as an important factor in determining fair use. Do you think this is the strongest argument for fair use in this situation?

JB The social benefit was important, as was the fact that there was no harm to the market for books. To the contrary, Judge Chin found that Google Books helped the market for books by making them easier to find.

CD Will this decision influence the manner in which the social benefits of a use are weighed against individual intellectual property rights?

JB In the first instance, we need to see what the Second Circuit does in the appeal. Assuming that it affirms, as I think it will, the decision will be consistent with other decisions in several circuits. In other words, I think this decision will be in the mainstream of fair use decisions.

CD Would you describe how Google's use of the texts it has scanned is transformative in the legal sense?

JB The court found Google's use transformative in that Google used the books for a different purpose from the books' authors: to create a search index. Moreover, it transformed the books into data for the purpose of text mining.

CD Will this case be one of the foundations of the law around search engines?

JB The law relating to search engines has already been pretty well-established by fair use cases such as *Kelly v. ArribaSoft* and *Perfect 10 v. Amazon*. However, HathiTrust and Google Books are significant in that they establish that scanning for the purpose of indexing is a fair use not only with respect to web content, but also content off the web.

CD Is Judge Chin's decision likely to be confirmed by the Second Circuit and perhaps the Supreme Court?

JB I expect the Second Circuit to affirm both the HathiTrust and the Google decisions for several reasons. First, both decisions followed the transformative use reasoning of the Second Circuit in *Bill Graham Archives v. Dorling Kindersley*. Second, the Second Circuit panel that reversed Judge Chin's earlier decision certifying a class action hinted that the case could be resolved on fair use grounds. Third, fashioning an appropriate remedy would be very difficult, given that the Authors Guild never sought preliminary relief. Throughout the over eight years of litigation, Google has been scanning books. As a result, there are now two databases—Google's and HathiTrust's—with over 20 million books. It is hard to imagine that a federal judge would restrict access to these databases now that they exist.

CD Changing the format of the books from print to digital, in spite of being emphasized in the Authors' Guild's arguments, does not seem to have been a big factor in Judge Chin's decision. Why do you think that is the case, and does this bode well for other digitizing projects?

JB The key for Judge Chin, and Judge Baer before him, was the enormous social benefit of the use, without any offsetting harm to the authors. So these cases bode well for digitization projects that have those attributes.

CD One of the features of Google Books cited by Judge Chin as favoring fair use is the feature of linking users with booksellers, thus potentially adding value to the copyright holder's intellectual property. As library discovery software becomes

sophisticated enough to combine a search of the Google Books data with an interlibrary loan function (as opposed to a commercial site), do you think libraries will have a more difficult time asserting fair use? After all, we have the Georgia State [GSU] case as an example of how aggressive copyright owners can be.

JB I don't think there will be further cases involving Google Books. And frankly, I don't see another commercial firm undertaking a similar book scanning project. I believe that most mass digitization projects in the future will be more focused on ephemera and archival material, for which there is no market.

CD As more and more monographs are "born digital" will libraries that loan e-books have a more difficult time establishing fair use because of the DMCA [Digital Millennium Copyright Act]?

JB The primary issue with digital resources is that publishers tend to license them rather than sell them. And the licenses contain many restrictive terms.

CD Do you see licenses for digital books trumping copyright law in the years ahead?

JB Without question, this is a very significant issue. The courts and perhaps Congress will have to determine the extent to which the private law of contracts should be allowed to supersede the public law of copyright.

CD What other current or potential court cases should the library community be monitoring?

JB You mentioned the GSU electronic reserves case. The Eleventh Circuit should be ruling on that appeal in the near future. **VI**