



## ARE Copyright Litigation Alert: Google Book Scanning Found To Be Fair Use

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On November 14, 2013, Judge Denny Chin—now of the of the U.S Court of Appeals for the Second Circuit, but retaining jurisdiction in the U.S. District Court for the Southern District of New York—upheld the legality of Google Books in the class action copyright infringement suit commenced in 2005 by the Authors Guild, Inc., et al. against Google. Judge Chin found Google’s book scanning project to be allowable as fair use under Section 107 of the Copyright Act.

In *Authors Guild, Inc. v. Google Inc.*, the Authors Guild sued Google for copyright infringement on behalf of all holders of U.S. copyrights in books. No. 05-cv-8136, 2013 U.S. Dist. LEXIS 162198, at \*2 (S.D.N.Y. Nov. 14, 2013). Google Books searches the full text of books that Google has scanned and stored, and makes portions of that text available online. In March 2011, Judge Chin [rejected a proposed settlement agreement](#) on the basis that it was not fair, writing that Google would have the right to “exploit entire books, without permission of the copyright owners.” *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 669 (S.D.N.Y. 2011). Then, in May 2012, Judge Chin granted the plaintiffs motion for class certification. *Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012). On appeal, however, the Second Circuit vacated the class certification order and remanded the case “for consideration of the fair use issues.” *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132, 134-35 (2d Cir. 2013). In the most recent decision in this saga, Judge Chin concluded that Google’s scanning of copyrighted works falls under fair use and granted Google’s motion for summary judgment. *Authors Guild*, 2013 U.S. Dist. LEXIS 162198, at \*2, 17.

In determining fair use there are four factors that must be considered: (1) “the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes”—i.e., whether the work is *transformative*; (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.” 17 U.S.C. § 107.

First, Judge Chin found Google’s scanning of copyrighted books to be “highly transformative” as the process “digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books.” *Authors Guild*, 2013 U.S. Dist. LEXIS 162198, at \*20-21. Further, he reasoned that “Google Books does not supersede or supplant books because it is not a tool to be used to read



books.” *Id.* at \*22. Of significance, Google does not provide the entire scanned copy of a copyrighted book that can be read by any online user. Rather, it provides snippets of books to “help users locate books and determine whether they may be of interest.” *Id.* Judge Chin also found the fact that Google is a for-profit entity to be irrelevant, focusing instead on the fact “that Google Books serves several important educational purposes.” *Id.* at \*23-24. Additionally, Judge Chin noted that Google does not offer for sale the scanned works and, thus, does not directly profit from the copyrighted books. *Id.* at \*23. Therefore, he found that “the first factor strongly favors a finding of fair use.” *Id.* at \*24.

Second, Judge Chin found that because the copyrighted books that Google scans “are published and available to the public,” this favors a determination of fair use. *Id.* at \*25.

Third, as for the amount and substantiality of the portion of the copy used, Google scans entire books. Although Google limits what is shown (i.e. it only displays snippets), Judge Chin found that because it provides a “full-text search of books,” this factor “weighs slightly against a finding of fair use. *Id.*

Finally, as for the effect on the potential market for or value of the copyrighted works, Judge Chin noted that “Google does not sell its scans, and the scans do not replace the books.” *Id.* at \*26. On this basis, Judge Chin concluded that “a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders.” *Id.* For this reason, he found that “the fourth factor weighs strongly in favor of a finding of fair use.” *Id.*

In sum, Judge Chin concluded that because Google provides a significant educational benefit and does not directly profit from the scanned copyrighted books, Google has a defense of fair use to the allegations of copyright infringement from the Authors Guild, et al.

The Authors Guild has stated that they plan to appeal the decision. We will continue to monitor this case and provide further updates as the parties continue litigation.

In the meantime, please feel free to [contact](#) our attorneys regarding issues raised by this case.

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