

---

## **ONLINE ADVERTISING 03**

The implications of Google's settlement with Canada's Office of the Privacy Commissioner regarding a complaint that health information was used to deliver targeted ads.

---

## **COPYRIGHT 05**

In re SAS Institute Inc. v. World Programming Ltd, the combined efforts of the English High Court, Court of Appeal and the CJEU, have laid to rest some important questions.

---

## **NET NEUTRALITY 07**

The court ruled that the FCC could not impose anti-discrimination and anti-blocking requirements on broadband internet providers, in view of its 'Open Internet Order.'

---

## **WEBSITE BLOCKING 09**

AG Villalón issued his Opinion in the CJEU case UPC Telekabel Wien.

---

## **LIABILITY 11**

The Regional Court of Hamburg ruled that the chief executive of a software development company is liable for copyright infringements by software adaptations produced using 'open source' development.

---

## **SOCIAL MEDIA 13**

In re KNF&T Staffing v. Muller, a Massachusetts court held that Charlotte Muller, a former employee of a staffing agency, did not violate her noncompetition agreement by posting about a new job on her LinkedIn profile, but solicitation could occur through this channel.

---

## **COPYRIGHT 14**

The US District Court for the Southern District of New York ruled that Google's Library Project is protected by the 'fair use' defence.

---

## **PRIVACY 16**

The Federal Trade Commission's enforcement action against 12 companies alleged to have violated their commitments to the US-EU Safe Harbor framework.

---

## **ONLINE NEWS 18**

In re Flood v. Times Newspapers Ltd, litigation between a former police officer and the Times is closer to resolution following the High Court's decision to award damages.

---

## **LIABILITY 19**

The aftermath of Delfi AS v. Estonia, which was considered in detail in the recent case J19 & J20 v. Facebook Ireland, shedding light on the potential impact of Delfi going forward.

---

## **DATA SECURITY 20**

In a complaint filed in August 2013, the FTC alleged that LabMD, a company providing clinical laboratory services, had two data security breaches.

---

## **WEBSITE BLOCKING 22**

Belgian Supreme Court confirms that ISPs may be ordered to block access to all domain names pointing to an infringing website.

---

## **PRIVACY 23**

The County Court Berlin rules that 25 clauses of Google's Privacy Policy and Terms of Service are legally void.

---

## **JURISDICTION 24**

In re Oak Leaf Conservatories Ltd v. Weir, the High Court ruled it had no jurisdiction to hear a contractual claim brought by a company based in England against defendant consumers domiciled in Scotland.

---

## Authors Guild v. Google

US District Court for the Southern District of New York, 27 Nov 2013 (05 Civ. 8136 (DC))

The Court ruled that Google's Library Project, which scanned copies of library books without the permission of copyright owners for compilation into an online research database, is protected by the 'fair use' defence.

Authors Guild v. Google<sup>1</sup>, a case which has been pending for eight years, has finally reached its conclusion, at least at the district court level. Although most of the litigation and discussion the case has generated over the years was about side issues, such as whether the parties could reach agreement on a settlement, whether the settlement was fair (it wasn't), or whether the case should be certified as a class action (still an open question), the issue on which it was resolved, in the 14 November opinion<sup>2</sup> of Judge Denny Chin<sup>3</sup>, was the central issue - whether Google's scanning of whole copies of library books and making them available for search, without the copyright owners' permission, is 'fair use.'

In July, the US Court of Appeals for the Second Circuit, had remanded the case to the lower court for a determination of the merits of Google's defence, on the grounds that the resolution of that issue could moot the thorny class action issues. So Judge Chin had no choice but to finally go there. And indeed his resolution has mooted the class action issues, since there is no case left, therefore no class to certify.

Both sides moved for summary judgment. In a 30-page opinion, the Court denied the plaintiff's motion. In the judgment entered subsequently, the Court ruled that Google was the 'prevailing party,' and thus entitled to be reimbursed for its costs.

### The facts

At issue in the case was Google's 'Library Project,' which is a part of 'Google Books.'<sup>4</sup> Google had entered into agreements with several research libraries under which, without any permission from the copyright owner: the library would furnish a single book to Google; Google would scan it

and process it for optical character recognition; Google would deliver a single digital copy to the library; Google would include the digital version in an electronic database; Google would make the text available for online searching; Google maintains multiple digital copies of each book; Google maintains an index of all words and phrases in the scanned books. In response to search inquiries, Google returns a list of books in which the search term appears, ranked by relevance; each result contains a link to an 'About the Book' page, which contains links to sellers of the books and/or libraries that list the book in their collections; no advertising appears on the About the Book pages; each page of the book is divided into 'snippets' consisting of a verbatim excerpt of an eighth of the page; each search yields three 'snippets,' and in order to provide 'security,' foiling anyone determined to copy the whole work by assembling all its 'snippets,' the Court cited the following limitations of the software: (a) a user cannot obtain different sets of snippets for the same query; (b) the position of the snippet within the page is fixed; (c) only the first responsive snippet on any given page is returned in response to a query; (d) one snippet on each page is 'black-listed' and will not be shown; (e) at least one out of every ten pages is 'black-listed'; and (f) works which themselves consist entirely of snippets, such as dictionaries, cookbooks, and haiku collections, are excluded from the snippet view.

### The fair use defence

Judge Chin concluded that the project was protected by the fair use defence. His findings included a litany of 'benefits' he felt had been produced by the project:

- 'a new and efficient way for readers and researchers to find

books...[making] tens of millions of books searchable by words and phrases...';

- 'a searchable index linking each word in any book to all books in which that word appears...';
- 'it helps librarians identify and find research sources...';
- 'makes...interlibrary lending more efficient...';
- 'facilitates finding and checking citations...';
- 'promotes...“data mining” or “text mining”';
- 'permits humanities scholars to analyse massive amounts of data...Researchers can examine word frequencies, syntactic patterns, and thematic markers...';

- 'expands access to books...underserved populations will...gain knowledge of and access to far more books...provides print-disabled individuals with the potential to search for books and read them in a format that is compatible with text enlargement software, text-to-speech screen access software, and Braille devices...facilitates the conversion of books to audio and tactile formats...facilitates the identification and access of materials for remote and under-funded libraries';

- 'helps to preserve books and give them new life. Older books...that are falling apart, buried in library stacks, are being scanned and saved';

- 'by helping readers and researchers identify books [it]...benefits authors and publishers... an "About the Book" page...will offer links to sellers of the book and/or libraries...';

- 'librarians can identify and efficiently sift through possible research sources, amateur historians have access to a wealth of previously obscure material, and everyday readers and researchers can find books that were once buried in research archives.'

Judge Chin reasoned that Google's Library Project:

- is transformative in transforming 'expressive text' into a 'word index' and searchable data;
- does not supplant or supersede books since it is not a tool for reading books;
- adds value to the original;
- serves educational purposes, even though Google's own motive is commercial profit;
- limits the amount of text it displays in response to a search; and

● enhances, rather than detracts from, the value of the works, and concluded: 'Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits.'

The Court also exonerated Google from liability for infringement of the copyright reproduction-right and distribution-right claim based on distribution of digital copies to the participating libraries: 'Similarly, Google is entitled to summary judgment with respect to plaintiffs'

claims based on the copies of scanned books made available to libraries. Even assuming plaintiffs have demonstrated a *prima facie* case of copyright infringement, Google's actions constitute fair use here as well. Google provides the libraries with the technological means to make digital copies of books that they already own. The purpose of the library copies is to advance the libraries' lawful uses of the digitized books consistent with the copyright law. The libraries then use these digital copies in transformative ways. They create their own full-text searchable indices of books, maintain copies for purposes of preservation, and make copies available to print-disabled individuals, expanding access for them in unprecedented ways. Google's actions in providing the libraries with the ability to engage in activities that advance the arts and sciences constitute fair use.'

#### Procedural status

The case was finally determined, at the district court level, by entry of judgment on 27 November. The Author's Guild has lodged an appeal with the Second Circuit.

#### Conclusion

This is certainly an interesting decision which, if upheld on appeal, should remove the cloud of doubt that hangs over the scanning of entire works for research, indexing, and cross-referencing purposes, and provides a path forward to new and interesting sources of information, and to new processes for getting at that information.

In view of the need for more certainty and clarity in the fair use area, due to the lack of guidance offered by the impossibly vague statute and case law, and the complete absence of rules or regulations, this author found it

problematic that Judge Chin's decision is laden with numerous references to such subjective factors as the 'major' nature of the research libraries involved, the large scale of the project, and the large acceptance it has found over the nine years the project has existed (during eight of which years Judge Chin had litigation pending before him in which he could have shut down the project had he been of a mind to do so). Should smaller, newer, projects, involving less 'major' participants, or created by smaller or less well known innovators not be entitled to the benefit of the same breathing room, and the same fair use defence? Certainly they should. This author feels that such subjective factors ought not to have been introduced into the Court's discussion and should not have a bearing on applicability of the fair use defence to other innovators.

---

**Ray Beckerman** Attorney  
Ray Beckerman, P.C.  
ray@beckermanlegal.com

---

*The entire decision can be found at [http://beckermanlegal.com/Lawyer\\_Copyright\\_Internet\\_Law/authorsguild\\_google\\_131114Decision.pdf](http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/authorsguild_google_131114Decision.pdf)*

1. 05 Civ. 8136 (DC), United States District Court, Southern District of New York.
2. [http://beckermanlegal.com/Lawyer\\_Copyright\\_Internet\\_Law/authorsguild\\_google\\_131114Decision.pdf](http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/authorsguild_google_131114Decision.pdf)
3. Judge Chin has been a District Court judge throughout the life of this case, but was recently elevated to the US Court of Appeals in the Second Circuit; his ruling in this case, however, is a *nisi prius*, or trial court level, decision.
4. Also included in 'Google Books' is Google's 'Partners Program', which, unlike the Library Project, is non-controversial since the scanning is done with the permission of the copyright owner.
5. 12 Civ. 95 (RJS), United States District Court, Southern District of New York.