Cites & Insights

Crawford at Large

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Volume 15, Number 10: November 2015 ISSN 1534-0937 Walt Crawford

The Front

A Fair Use Trilogy

Stepping away from open access for a bit (except for comments below), I set out to deal with a couple of tagged item clusters—and, somehow, wound up with a themed issue: fair use.

Two medium-length roundups update the situation with the seemingly-endless Google Books case, which (perhaps unfortunately) is now pretty much all about fair use, not orphan works, and the last few years and possible conclusion of the HathiTrust case. Since both of those turn on fair use, I added a third, shorter essay that clears up other items tagged fair use—and, in the process, adds a few notes about the GSU case.

So it's fair use all the way.

Meanwhile…

"Say, how's it going with *The Gold OA Landscape 2011-2014*?" I hear almost nobody asking. As of now (October 5, 2015), the quick answer is "middling to poor where it matters most." To wit:

- The paperback edition has sold a grand total of five (5) copies.
- The site-licensed PDF ebook has sold a grand total of one (1) copy.
- The *Cites & Insights* extract has been downloaded more than 1,467 times (the only way I can get statistics means that the last 19 hours of the last day of a month and first five hours of the first day of a month are not counted at all, so "more than" is probably accurate).

If every ALA-accredited library school purchased one site-licensed copy or paperback, which I'm sure they'd find worthwhile, the base spreadsheet for the study would go up on figshare and we'd be two-thirds of the way toward assuring that this project continues in 2016.

If one-twentieth of the downloads of the C&I issue turned into purchases, I think we'd be at the point of assuring continued research and making the spreadsheet available.

If both happened, or an equivalent combination of purchases or other funding came about, it would not only assure continued research but make it certain that the 2011-2015 spreadsheet was placed on figshare and likely that the PDF version of the 2011-2015 study would be available for free.

It's early yet.

Inside This Issue

Policy

Google Books: The Neverending Story?

I've been writing here about Google Books, the digitization project, the lawsuits and the proposed settlement on and off for ten years or so. Taking only the most obvious examples:

The December 2005 issue featured two essays: "OCA and GLP 1: Ebooks, Etext, Libraries and the Commons" and "OCA and GLP 2." GLP? Back then it was the Google Library Project. OCA? Well…the Open Content Alliance still has a website but the most recent item is dated May 6, 2010, so it's not a thriving operation, at least on the web. I didn't end either of those essays with pat conclusions about what I later came to call GBS,

I started calling it GBS—originally Google Books Search, later Google Books Settlement— a month later, in the January 2006 Cites & Insights: "OCA and GLP Redux"—although the essay title still said "GLP." That eight-page section doesn't have a neat conclusion either.

The essay in the Spring 2006 *Cites & Insights*, "Discovering Books: The OCA/GBS Saga Continues," was just six pages. The last paragraph:

> The saga will continue. OCA's benefits are clear; the alliance's choice to avoid copyright issues is cautious but clears the way for more expansive uses of material. GBS is a muddier situation, not aided by Google's lack of transparency—but there seems little doubt that GBS and the Google Library Project will serve the aims of copyright, at least as stated in the Constitution: "To promote the progress of science and useful arts." Being able to *discover* books based on obscure content within those books doesn't substitute for library catalogs and doesn't seem to have any chance of substituting for the books themselves—but it can promote progress by making it easier to find work on which to build. How can that be a bad thing?

Less than a year later, in January 2007, the title was "Book Searching: OCA/GBS Update," another six-pager starting with this snark:

> It seems unlikely that we'll ever run out of commentaries based on the notion that Open Content Alliance and Google Library Project somehow mean either the death of print books or the death of library circulating collections.

…and ending with this ("LSB" stands for Live Search Books, Microsoft's contribution to the book-searching puzzle):

> The reality of Google Book Search is much less enchanting than the promise; many of the scans seem pretty poor. None of this should be terribly surprising, although it may be disappointing.
>
> Both projects can enhance discoverability for library collections, although LSB must first add "Find a library" functionality. Enhanced discoverability should mean increased use of print collections. Neither project, as far as I can tell, has any serious potential to disrupt libraries or make their print collections less valuable. Neither project will yield a universal digital library. Nor should they be expected to.

A year later, in the January 2008 issue, I devoted 18 pages to "Discovering Books: OCA & GBS Retrospective." That one is mostly a retrospective, repeating key sections of the previous essays, and ending with some four pages on 2007 stuff. There was still seemingly hot competition between Live Search Books and Google Books Search at this point.

That wasn't the case in September 2008, when "Updating the Book Discovery Projects" appeared. Actually, Microsoft shut down Live Search Books and Live Search Academic in late May 2008, and also shut down its digitizing project—but said it would keep adding this stuff to Live Search (which I assume is now Bing). No neat conclusions in an essay that takes issue with the claim of one law library person that Google would "leave [libraries] in the information dust to rot like an old microfilm machine."

The next long *Cites & Insights* essay on the Google Books project appeared in March 2009—indeed, it *was* the March 2009 issue: "Perspective: The Google Books Search Settlement." I naïvely thought it was a done deal and closed the essay:

> The agreement could be a lot worse. The outcome could also be a lot better. I'm sure Google would agree with both statements, as it finds itself in businesses where it has neither expertise nor much chance of advertising-level profits. At the same time, the copyright maximalists didn't *quite* win this round. We'll almost certainly get somewhat better access to several million OP books—and will have to hope (and work to see) that the price (monetary and otherwise) isn't too high.

Silly me. That issue was 30 pages long. More than three years later, the August 2012 *Cites & Insights* consisted of another full-issue essay: "It Was Never a Universal Library: Three Years of the Google Book Settlement." That one was 58 pages, the second-longest C&I ever. The closing paragraphs of that mega-essay:

> It's been an interesting three years. This overview may be too long, but it's as short as I felt I could make it while offering a range of representative viewpoints. I have no idea what the future will bring in the lawsuits, although I do believe another settlement is less likely—and that a settlement that covers so much more range than the cases itself is *really* unlikely.
>
> Google Books should never have been touted as "the last library" or as a national library or the ultimate library or any of those things. Librarians should never have looked at GBS as an opportunity to stop housing physical collections while still being important. At best, GBS should have resulted in an interesting and potentially quite useful additional service. In any case, the settlement was doomed: It overreached fairness as a class-action settlement.
>
> Your library isn't going to be handed access to every book ever published. That probably wasn't going to happen in any case. Life continues to be a little more complicated than that.

And here we are three years later. Certainly no 58 pages this time, but it's worth taking a look at what has *and hasn't* happened in the past three years, culled from a few dozen tagged items and presented in more-or-less chronological order. (If you want to read one roundup among these, I'd recommend the last and longest: there's a lot of interesting legal and other commentary about orphan works, monopoly, confidentiality, the public domain, fair use, legal standing and more.)

Setting the Scene

It's July 2012. (The August 2012 issue was finalized on July 18, 2012, so I probably finished writing it a few days earlier.) The Google Books Settlement (the ambitious plan arising out of lawsuits), first proposed in October 2008, was dead: the judge involved struck it down in 2009 as unfair. An amended settlement worked on in 2009 and 2010 was rejected in March 2011. Google Books was less obvious as a service, hidden in the "More" section of Google's "little black menu" (it's still in the More section of the black-dot matrix) and the lawsuits continued.

We pick up the action in late July 2012.

Summer 2012

Google Motion for Summary Judgment

This one's a Scribd copy of just what it says: a 46-page motion in *The Authors Guild v. Google*: "Defendant Google Inc.'s Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment or in the Alternative Summary Adjudication." There's a quaintness to the opening section: after saying Google Books "is not a substitute for the books themselves" it says it is "an important advance on the card-catalogue method of finding books." That curiosity aside, it seems like a pretty good argument that Google Books and the scanning behind it represent fair use. There's a good explanation of why Google's "snippet view" cannot be manipulated to return the full text of a book or even of a single page.

There's a good discussion of how Google Books can find relevant books that WorldCat (or any other bibliographic catalog) could not, new kinds of research made possible by the mass digitization, and more. I continue to be bemused by Authors Guild's assertion that, without Google Books, "a licensing market for the scanning and display of works in search engines *might* develop."

The brief is readable, interesting, and a good place to start in this chapter of the never-ending story.

Google Book Search Case Threatens Librarians' Access to Information

That's the Electronic Frontier Foundation on August 1, 2012, in a press release on EFF's amicus brief (joined by ARL, ALA and ACRL) supporting Google's claim of fair use.

> For years, Google has been cooperating with libraries to digitize books for a searchable database available to the public. Google Book Search now includes over 12 million works that users can search for keywords. Results include titles, page numbers, and small snippets of text. Google Book Search has become an extraordinarily valuable tool for librarians, scholars, and amateur researchers of all kinds. For example, librarians surveyed about Google Book Search said the service can help them find valuable research sources inside their own libraries as well as lead them to rare books they can borrow from other institutions. Many librarians say that they have purchased new books for their collections after discovering them through using Google Book Search. However, the Authors Guild argues that its members are due compensation in exchange for their books being digitized and included in the database – even though blocking Google Book Search's digitization wouldn't bring any author any additional revenue.

The release also uses "card catalog" to describe traditional library catalogs. It links to the brief itself, which includes use cases to illustrate the benefits of GBS and this commentary on the extent to which the Authors Guild cooperated in Google Books' database becoming so large:

> When Plaintiffs sued Google in 2005, they could have sought preliminary relief–but they chose not to. When the Plaintiffs entered into settlement discussions with Google, they could have demanded that Google cease scanning books–but they chose not to. During the course of the three years of settlement negotiations with Google, they could have demanded that Google discontinue scanning–but they chose not to. When the Plaintiffs agreed to a settlement with Google in 2008, they once again could have insisted that Google cease scanning pending approval of the settlement–but they chose not to. In short, Plaintiffs' litigation decisions over the past seven years have allowed Google to scan millions of books into its search index, and the public to grow reliant on GBS's research capabilities

Interesting.

Google Should Pay $750 a Book, Authors Say in E-Book Suit

So reported David Glavin in an August 3, 2012 item at *BloombergBusiness*. More:

> The Authors Guild today asked the judge for a ruling in its favor on three legal issues, one of which is a claim for damages of $750 a book. The guild also says it wants a ruling that copying books isn't a "fair use" under copyright law, as Google has said it will argue.

As we've learned to expect from far too many journalists, the *explicit portion of copyright law* called fair use gets scare quoted as though there's really no such thing. A short item, to be sure…and then there's:

Authors Guild asks Judge to Ignore the Digital Humanities

Matthew Sag on August 10, 2012 at his eponymous blog. He's referring to an attempt by the Association for Computers and the Humanities and a group of 64 scholars to submit an amicus brief in favor of summary judgment for Google: the Authors Guild asked the court to deny permission for the participation in what it calls "private litigation."

The post links to both the ACH brief and the Authors Guild memorandum in opposition. I have not reviewed those documents. Sag says:

> This case is not a private arbitration, it will establish an important precedent that either confirms the legitimacy of search engine technology, plagiarism detection software and computerized analysis of text.

There's more, mostly about self-contradictions in the AG memo. Odd that Sag feels Digital Humanities needs to be capitalized, as it is several times in the brief itself. (The brief also capitalizes Information Retrieval; I'm not sure what principle is at work.)

James Grimmelmann had a few words regarding this (and AG's opposition to an ALA brief) in "Google Books: Even Friends of the Court Have Enemies" (August 14, 2012 at *The Laboratorium*). In part:

> The move is perplexing, on a number of levels. For one thing, the Authors Guild allowed nearly identical amicus briefs to be filed in the *HathiTrust* case. I can understand that different lawyers might reach different conclusions in different cases, but I would have thought that the Authors Guild itself could at least make its two sets of lawyers talk to each other and reach a common decision. For another thing, the law here is quite clear. District judges have broad discretion either to accept amicus briefs or to reject them. Opposing the filings more or less requires that Judge Chin will have to read the briefs in order to rule on the motion to strike the filings. At the end of the day, he'll listen to the briefs if he thinks they're persuasive, and ignore them if he doesn't. Opposing the filing just comes across as petulance, if you ask me.

Outcome: The judge allowed the briefs.

Court lets Google appeal digital books class status

In this August 14, 2012 story by Jonathan Stempel at Reuters, we learn that—well, what the headline says: Google can appeal certification of Authors Guild as representing the class of all authors. Unfortunately, Stempel also scare-quotes fair use.

Google Books: The Appeal Is On

James Grimmelmann devoted one paragraph to this August 14, 2012 post. In full:

> In a brief order filed today, the Second Circuit agreed to hear Google's appeal of class certification immediately. In an ironic twist, Judge Chin was randomly assigned to the three-judge panel; unsurprisingly, he recused himself. The order means that Google's appeal of class certification will proceed in parallel with Judge Chin's consideration of fair use. The decision strikes me as unsurprising, given the case's high profile.

"Brief" almost understates it. Here's the order, in full:

> Petitioner, through counsel, moves, pursuant to Federal Rule of Civil Procedure 23(f), for leave to appeal the district court's order granting Respondents' motion for class certification. Upon due consideration, it is hereby ORDERED that the petition is GRANTED. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001).

Now that's brief.

Google Books: A Recent Case on Copyright Licensing and Class Certification

Two days later (August 16, 2012), Grimmelmann posted this interesting item at *The Laboratorium*. Seems there was a recent decision in the same district court regarding class certification and copyright licensing: Palmer Kane LLC v. Scholastic Corp.

> In a nutshell, Scholastic publishes an extensive series of books, workbooks, videos, and software called READ 180. It's designed to help students at all levels from elementary school through high school improve their reading skills, although I have to say that the Scholastic site, which features very few words and glossy pictures of graph-heavy "Dashboards" on iPad-like computers, doesn't exactly inspire confidence. READ 180 started in 1999, was updated in 2005 with an "Enterprise" edition, and again in 2011 with a "Next Generation" edition. (I'm curious about the trademark-law backstory here.)
>
> Since READ 180 is a reading-focused curriculum, it naturally follows that Scholastic licenses thousands of images for it. It works with at least eight photo houses, and with numerous individual rightsholders. The invoices for the images set out a variety of payment terms, permissible print runs, start and end dates, reuse fees, product line restrictions, and so on.

Palmer Kane owns copyrights for three stock photos used in the series and claims that the photos were used for too many copies—or that Scholastic didn't have the licenses before it printed the series. And, of course, Palmer Kane wants to be certified to represent *all* image copyright owners who might have these issues: that's how you get a big verdict or settlement.

The court determined that the licenses were too diverse for class treatment:

> Scholastic argued, and the court agreed, that to determine whether any given image was infringed would require an individual inquiry into not just the language but the surrounding circumstances of the license. Scholastic had extensive negotiations with the eight licensing houses, which resulted in Preferred Vendor Agreements that modified the terms of the invoices. Meanwhile, the scope of the licenses those houses offered were themselves shaped by the dealings and individual agreements between rightsholders and licensing house. Taking all of this together, the court concluded that the case for infringement was not susceptible to the kind of "generalized proof" that a class action requires.

Grimmelman says there's a parallel of sorts and that he could see Google citing the case—but there's a big difference: in *Palmer Kane* the licenses were central, whereas in Google Books fair use (which Grimmelmann does *not* scare-quote) is the core.

> The licenses affect the weighing of a few of the fair use factors, and they can affect any individual plaintiff's membership in the class, but they don't preclude the possibility of a ruling on the merits of infringement-by-scanning one way or the other. *Palmer Kane* is interesting and relevant but not determinative.

The fun part: Scholastic's lead attorney in *Palmer Kane*...is the Authors Guild lead attorney in its suit against HathiTrust, its parallel suit.

One Down, One to Go

In early October 2012, Google and the publishers settled their lawsuit. A few items on that settlement and its implications (or lack thereof) follow.

Google and Publishers Settle; Authors Soldier On

That's the title for this James Grimmelmann post on October 4, 2012 at *The Laboratorium*. His link to a press release is dead (that happens over three years), but does suggest that the settlement was essentially ratifying the real-world situation:

> Since Google has already been offering an opt-out for publishers who identify and claim their books, and since Google already works with publishers to sell their books through Google Play, the settlement does not change the situation on the ground in any significant way. In the last few years, Google and the publishers have made their peace; this is just the treaty-signing ceremony. The publishers have embraced the digital transition in books; Google is now a player and partner in that ecosystem, rather than a dangerous disruptive presence. The other terms of the settlement—such as whether any money is changing hands as part of it—are confidential.

He does note one detail (picked up by Andrew Albanese at *Publishers Weekly*, but that link is also dead):

> In addition, under the details released, publishers deciding to have their scanned works included in the Google database can opt to receive a digital copy for their use. Google director of strategic partnerships Tom Turvey told *PW* that publishers will own the scans provided to them by Google, and will have "broad" rights to commercialize them or make them available in other search engines.

So there may be a little more here—but probably not much. A few comments, with the last sentence of the last comment (by Peter Hirtle) worth quoting:

> It is hard not to conclude that AAP spent 7 years and millions of dollars in litigation for nothing.

AAP: Call Me Maybe

Peter Brantley posted this on October 5, 2012 at *Publishers Weekly*'s news blog *PWxyz*, and it's a nice summary of the situation. Excerpts:

> [T]hat nothing changed on the ground, as legal scholar James Grimmelmann of New York Law School notes, marks a pivot from 2007 when the suit was launched with a fulsome and righteous salvo: "Publishers bring this action to prevent the continuing, irreparable, and imminent harm that Publishers are suffering, will continue to suffer, and expect to suffer due to Google's willful infringement, to further its own commercial purposes, of the exclusive rights of copyright that Publishers enjoy in various books …"
>
> Well, so much for that.

But there's more discussion here, and it's probably worth reading in the original (as of September 17, 2015, the link above still works). The close:

> At the end of the day, the publisher litigation with Google feels like the remnant of a bad dream fading in the early morning hours. We are where we must be, except that a small number of authors and their lawyers are still clearly motivated to obtain their own payout for the purported harm done them by the hasty presumptions of networked culture. Hopefully, the absence of a falling sky will spur the minds of judges, lawyers, and juries that our conceptions of rights have evolved over the last 100 years. At the time of the 1909 Copyright Act, to publish meant – more often than not – to actively enter a product into commerce. Today, the majority of our "publishings" have more to do with finding than selling. That one might lead to the other, some have yet to figure out. The AAP, and the publishers it represents, to their credit clearly have.

Google-Publisher Deal Ignores Elephant In The Room: Fair Use

That's Antone Gonsalves' take on October 5, 2012 at what's now apparently called *readwrite* without the "web." He makes a slightly unwarranted assumption:

> While the agreement lets Google continue its work, both sides deliberately avoided tackling the issue at the heart of the conflict: What does fair use mean in the digital age?

Given Google's continued reliance on fair use in the Authors Guild suit, I think it's fairer to say that the settlement simply didn't need to resolve that legal issue—but I give Gonsalves full credit for the missing scare quotes! Indeed, he goes on to characterize fair use as "an exception" (which it is) rather than the usual "a defense." (Calling it "an exception to the copyright law" is tricky, since it's *part* of the copyright law, but never mind…)

Also worth reading.

Publishers Settle with Google—But What About Authors?

If you've been reading *Cites & Insights*, you'll know I have mixed feelings about Victoria Strauss and *Writer Beware*, and this October 5, 2012 piece doesn't clarify those mixed feelings much—but it's valuable as one author-side perspective.

Strauss summarizes what's known of the settlement and that much isn't known.

> The publishers can remove the Google-digitized books if they don't want them included--but what options do authors have? What about orphan works? Will Google be able to sell the digitized books--and if so, what share will publishers receive, and will authors benefit? The contracts for many of the books are pre-digital, and don't incorporate electronic rights--so should publishers have any control over the digitized books at all, much less receive a digital copy "for their own use"?

If you read the piece, be sure to read the comments, including the "cautiously optimistic" one from Marion Gropen and the very negative ones from Frances Grimble. And, sigh, "clairewriteswords" false equation of having the entire book *scanned* with "folks [being able to] read my books for free."

Writers Slam Secrecy of Book Publishers' Deal with Google; Call on Dept. of Justice to Investigate Antitrust Implications

I might not bother with this October 9, 2012 press release from the American Society of Journalists and Authors (cosigned by the National Writers Union and Science Fiction and Fantasy Writers of America), except that it contains at least one blatant falsehood—something you'd think journalists would avoid. To wit:

> Since early 2005, Google has been scanning library books for use in its Google Book Search project. Some 20 million books have been scanned, all without permission.

Bullshit. Google had permission to scan all or nearly all of those books, from the libraries that own them. What ASJA and cohorts are presumably saying is that Google didn't have *their* permission—which presumes that such permission was necessary.

7-Year Battle To Stop Google From Digitizing Libraries Is Ending With A Whimper

Brian Proffitt posted this piece on October 12, 2012 at *readwrite*—and to some extent it overlaps with HathiTrust issues, which I'm treating separately (perhaps wrongly).

> Google's long-running fight to digitize the world's written works has closed two more chapters, but the story hasn't quite reached the end. Despite stakes that include millions of dollars of ad revenue for Google versus the potential loss of revenue and royalties for publishers and authors, however, the epic saga's climax is turning out to be surprisingly muted.
>
> There are three parts to this story so far, with Google Books the protagonist (or antagonist, depending on your point of view) at the center of all of them. Following two separate court decisions this week and last, two of those parts are now concluded, leaving only one more thread of the tale to wrap up.

"Part The First" is, of course, the settlement with AAP. He notes that the settlement is pretty much the terms Google offered seven years ago:

> So why the seemingly endless fight? Because seven years ago the e-book market was very young and the publishers were in freak-out mode.
>
> "[Publishers] invested a ton of time and money fighting something that they realize now really isn't a problem," Jonathan Band, a Washington lawyer and library consultant, told Publishers Weekly. "And it didn't preclude the development of a robust e-book market."
>
> In Band's opinion, the members of the AAP involved in the original lawsuit may not have liked Google's assertion of control over their works, but the chance to make money from sales of books directly linked to Google's display of 20% of the book's content was too great to ignore.

"Part The Second" is Judge Harold Baer's dismissal of the Authors Guild suit against the universities involved in HathiTrust, and while I discussHathiTrust elsewhere in this issue, there's this:

> The Guild's suit charged that the schools and Google were ripping off copyrighted works, which, according to the judge's ruling, made up about 73% of the 10 million digital volumes in the HathiTrust library. Judge Baer ultimately disagreed, indicating that for the purposes of the project, such as book preservation, full-text searching and providing access to anyone with a print disability, it all fell under fair use.
>
> "I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants' [Mass Digitization Project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act]," Baer wrote.

The Authors Guild wasn't happy with the ruling: big surprise!

Part The Third is the Authors Guild lawsuit against Google. More on that later.

I can't comment on the comments…because they seem to relate to entirely different stories.

Class Action and Fair Use

In late 2012 and going into 2013, these appeared to be the major issues in the remaining lawsuit. Some of the items along the way…

Brief of Amici Curiae Academic Authors in Support of Defendant-Appellant and Reversal

Not an exciting title, but that's what this is: the November 16, 2012 brief (by Pamela Samuelson and David R. Hansen) in support of Google regarding the class action certification. Despite the 50-page length of the PDF, it really is reasonably brief: the argument itself is 16 pages and under 4,500 words, followed by a list of academic authors behind the brief.

Rather than attempt to comment on the 16 pages, I'm going to quote the abstract in full:

> Summary of argument: Class certification was improperly granted below because the District Court failed to conduct a rigorous analysis of the adequacy of representation factor, as Rule 23(a)(4) requires. The three individual plaintiffs who claim to be class representatives are not academics and do not share the commitment to broad access to knowledge that predominates among academics. Although the District Court, in rejecting the proposed Google Books settlement last year, recognized that the class representatives and their lawyers had not adequately represented the interests of academic authors when negotiating the proposed settlement, the court brushed aside concerns about adequacy of representation when the case went back into litigation, despite an academic author submission that challenged class certification because of inadequacies in the plaintiffs' representation of academic author interests. These concerns should have been taken seriously because academic authors make up a substantial proportion of the class that the District Court certified; most of the books that Google scanned from major research library collections were written by academics. Academic authors overall greatly outnumber generalist authors such as the named plaintiffs.
>
> Academic authors desire broad public access to their works such as that which the Google Books project provides. Although the District Court held that the plaintiffs had inadequately represented the interests of academic authors in relation to the proposed settlement, it failed to recognize that pursuit of this litigation would be even more adverse to the interests of academic authors than the proposed settlement was. That settlement would at least have expanded public access to knowledge, whereas this litigation seeks to enjoin the Google Book Search operations and shut down access to works of class members even though academic authors would generally favor greater public access to their works. Because of this, the interests of academic authors cannot be adequately accommodated in this litigation by opting out of the class, as the District Court assumed. Indeed, the only way for the interests of academic authors to be vindicated in this litigation, given the positions that the plaintiffs have taken thus far, is for Google to prevail on its fair use defense and for the named plaintiffs to lose.
>
> For this reason, there is a fundamental conflict between the interests of the named class representatives and the interests of academic authors. Academic authors typically benefit from Google Books, both because it makes their books more accessible to the public than ever before and because they use Google Books in conducting their own research. Google's fair use defense is more persuasive to academic authors than the plaintiffs' theory of infringement. The plaintiffs' request for an injunction to stop Google from making the Book Search corpus available would be harmful to academic author interests.
>
> In short, a "win" in this case for the class representatives would be a "loss" for academic authors. It is precisely this kind of conflict that courts have long recognized should prevent class certification due to inadequate representation. The District Court failed to adequately address this fundamental conflict in its certification order, though it was well aware of the

> conflict through submissions and objections received from the settlement fairness hearing through to the hearings on the most recent class certification motions. Because of that failure, the order certifying the class should be reversed.

I find one assertion here especially interesting: "most of the books that Google scanned from major research library collections were written by academics." But then, I didn't realize there were "1.756 million post-secondary academics," so I have no reason to doubt the statement.

The Google Appeal: Is There a Class?

James Grimmelmann on November 23, 2012, but in a different venue: the *PWxyz* news blog at *Publishers Weekly*. He calls the class-action issue a "procedural sideshow" and notes that, unless the HathiTrust fair use finding is reversed, this may not matter much—but offers a useful discussion anyway.

> So, what exactly is at stake in Google's current appeal? Google's first and most fundamental objection to the class action is that the central legal issue—**fair use**—is simply too book-specific to be resolved in one fell swoop. A three-line snippet is a much larger fraction of a 50-page children's book than a 500-page memoir; a snippet of a mathematical table may not show any original expression whatsoever. Popular biographies, medical textbooks, scholarly monographs, science fiction novellas, joke books, and teen paranormal romances are all printed on paper and bound, but the similarities stop there. On the other hand, judges intent on making sense out of fair use have been able to draw reasonably clear lines in a reasonably honest way. The judge in the Georgia State e-reserves lawsuit, for example, came up with some straightforward tests: is the book being licensed digitally, did the library make more than one chapter available, and so on. (Of course, that verdict is also being appealed).

He notes that Google pointed to a Wal-Mart case to bolster its opposition to class-action status, but says it's probably not on point:

> But Google—unlike Wal-Mart—does have a uniform policy. It scans books, and it does essentially the same thing with each book it scans. It seems highly unlikely that Google itself considered fair use individually for each book it chose to scan; it seems anomalous to say that wholesale scanning can only be challenged on a retail basis.

A second issue is ownership: whether the authors in question are in fact entitled to sue. He believes this is easy to deal with—that's what the claims process is all about. Then there's the question of whether three authors can plausibly represent all authors. He calls that "a struggle about defaults." If the default assumption should be that a random author probably approves of Google Books, there should be no class action: those who *disapprove* should each have to sue. And vice-versa.

> There is another reason that this conflict within the class matters: crafting remedies. That so many authors (heart) Google Books is a powerful reason for the court to steer clear of an injunction that would have the effect of shutting the whole thing down. Copyright generally recognizes that different authors prioritize different goals: some want artistic control, some want sales, and some want their ideas to be heard. The academics have a point when they argue that the class as currently constituted threatens their interests *as authors*.

Worth reading on its own, including the handful of comments.

Library Copyright Alliance files brief supporting Google, argues reversal on class certification

A short post by Kara Malenfant on November 21, 2012 at *ACRL Insider*, noting LCA's brief in this case.

> The LCA amicus brief supports Google's appeal and asserts that the May class certification decision should be reversed. It argues three points: class certification in this case threatens to undermine the public interest; this case presents no common issue of law or fact; and using subclasses to determine fair use is an unworkble solution to the problems inherent in litigating this dispute as a class action.
>
> The LCA amicus brief concludes: "Google Book Search is a valuable resource for researchers, scholars, libraries, and authors, and it makes vast amounts of information and learning far more accessible to the public than ever before possible. The public has a strong interest in having continued access to GBS — an interest that class certification endangers. Class certification is not appropriate as a legal, practical, or policy matter, and the decision of the District Court should be reversed."

Second Circuit Decertifies the Google Books Class

Grimmelmann again, back at *The Laboratorium,* but we've skipped a few months to July 1, 2013. (Big lawsuits take time. Eight years at that point.)

> Remember when Judge Chin certified a class action in the Google Books lawsuit? Seven years and a failed settlement into the case, it looked like it might finally be going somewhere. Yeah, well, not so much, because today the Second Circuit just vacated the class certification and remanded to Judge Chin to consider … fair use. The order is brief (five pages), but to my eye it strongly suggests that the judges in the appeal believe that Google has a compelling fair

use defense that will end the case without the rigamarole of a full class action.

Google had argued, with support from academics, that the Authors Guild and its fellow associations weren't good representative plaintiffs for all authors. The court didn't address that argument, except in a brief aside, saying it was "an argument which, in our view, may carry some force." Instead, it turned to fair use, saying:

> [W]e believe that the resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues, including those regarding the commonality of plaintiffs' injuries, the typicality of their claims, and the predominance of common questions of law or fact.

There's more. Grimmelmann finds it "…unusual" that the court wanted Judge Chin to resolve the fair use issues *before* deciding on class certification. His best guess is that the judges were convinced that Google "has a winning fair use defense across the board." Which it couldn't directly decide, because the appeal was about class certification.

> Today's news is good for Google and bad for the authors' associations bringing the suit. Not only does it slow down the one lawsuit in which they've made any significant headway and undo the one major ruling in their favor in the past few years, it also signals that three Second Circuit judges are inclined to see the fair use questions from Google's point of view. If the case ever does manage to reach the fair use merits, Google is now that likelier to get the same kind of sweeping fair-use blessing that its library partners got in the *HathiTrust* decision. The Google Books program lumbers on, one step closer to being unambiguously legal.

Also interesting comments.

Appeals Court Hints VERY Strongly That Google Books Is Fair Use, Even Though It Wasn't Asked About That

Mike Masnick on July 1, 2013 at *techdirt*, and the headline alone makes this one worth mentioning. Masnick links to an earlier article I hadn't picked up regarding oral arguments on Google's appeal:

> Back in May, we noted that the appeal in the Authors Guild case against Google over Google Books had taken something of an odd turn. The specific question on appeal had been entirely focused on whether or not it was appropriate to have this be a class action lawsuit for all authors. Google had, quite reasonably, argued that fair use can be pretty fact specific, and a very different analysis may apply for different kinds of books, and thus it would be a bad idea to lump all authors together in a class action lawsuit. However, the district court had ruled in favor of a class action, and supposedly it was that question that was being discussed on appeal. Instead, we noted that during the oral arguments, the three judge panel seemed to have no interest in that actual question, and instead talked about how Google's book scanning project seemed likely to be covered by fair use.

Masnick seems to have even less uncertainty than Grimmelmann about the court's real opinion:

> [T]he Second Circuit is basically screaming to the district court: "what Google is doing is fair use, full stop, so we're wasting time arguing about whether or not this is a class action: just end the thing by saying it's fair use."

There's a little more here (and some comments), and he includes the court finding itself.

Parallel tracks, parallel successes

Kevin Smith on July 2, 2013 at *Scholarly Communications @ Duke*, commenting on both the Authors Guild suit and the HathiTrust case. Smith looks at it in a slightly different way:

> What makes this so important is that class action certification can really be the end of a case for practical purposes. The process of litigating a class action is so complex and expensive that class action certification is often a signal to the defendant to settle the case. The result is that, if a class is certified, there is much less chance that a full determination about fair use will ever be made. In this case, the fair use argument is very strong, and virtually identical issues were decided in favor of fair use at the trial level of the HathiTrust case. So it would be very unfortunate if the Google case never got to that stage. By fighting off the class certification, Google has won for itself a better opportunity to make that argument. And the precedent set by this decision is important, since it tells trial courts to consider fair use before they make the potentially destructive decision about class certification. In many cases, and the Second Circuit suggests that this may be one of them, the complexity and cost of a class action might be entirely avoided because fair use would lead to a lawsuit being dismissed before it got that far.

He notes the parallel situations in the HathiTrust case, where the trial court *did* find in favor of fair use, and hopes to see the same thing here. He closes:

> It would be nice if the Authors Guild took this ruling as an opportunity to back out of the case. But they have already appealed the HathiTrust verdict, and there is little reason to suppose that the AG will suddenly be seized by a fit of good sense. So we must watch these lawsuits, brought out of a misplaced desire to force copyright to be something it is not and never was intended to be, get decided step-by-step in favor of fair use. This latest decision, which will

> compel courts to consider fair use at an earlier, and potentially less devastating, point in a putative class action is, as they say, "another brick in the wall."

Google calls book scanning "transformative" in latest push for fair use ruling

Now we move forward a little, to late August 2013 and another set of arguments from the parties, as reported in this Jeff John Roberts story at *gigaom*.

Google calls the scanning transformative, one of four factors for determining fair use:

> "Google has copied no more than is necessary to achieve its transformative purpose and give rise to the social benefits of full-text search…Google improved on existing indices so substantially that its use was transformative."

The Authors Guild?

> "[The] only thing 'transformative' about Google's display of snippets of in-print books is that it transforms online browsers of book retailers to online users of Google's search engine."

Because, y'know, book retailers all provide full-text searching and all sell 20 million books. Don't they?

As usual, when certain authors comment, they *wholly* ignore fair use (which, I'd guess, they don't believe actually exists) and focus entirely on what they believe should be an author's total control over "property rights." Never mind that copyright is not a "property right" as such. Oh, and making a book more accessible is "seizure." Got that? Or, alternatively, "theft."

Eight Years Later, the Google Books Fight Lumbers On

I find this September 5, 2013 piece by James Grimmelmann at *Publishers Weekly* unusually interesting and eloquent, even for Grimmelmann.

> Like a pair of boxers staggering from their corners for the ninth round, Google and the Authors Guild traded another round of briefs last week in their long-running, slow-moving Google Books fight. There is very little left to be said at this point in the case, and they said it at great length. The question is, why are they still fighting?

He calls Google Books "a corporate backwater" for Google, noting that it's *still* not part of the primary menu:

> But Google soldiers on because that's what Google does. It litigates online copyright cases as a matter of course. Storing and indexing content are so central to its business that it can ill afford to leave any precedent unturned. And because Google is consistently on the defendant side of copyright cases, and is willing to go to the mattresses when sued, it has endeared itself to academics, activists, entrepreneurs, librarians, and others who identify more with copyright users than with copyright owners.

He then addresses the other side: why does Authors Guild keep pursuing the case?

> For the Authors Guild, going after Google is a matter of principle. The suit reflects a common sentiment among copyright owners: that Google is getting rich in a business that involves copyrighted content, so, therefore, a part of that profit is rightly theirs. But unlike in the now-settled publishers' suit, the emphasis is on "rightly" rather than on "profit." What the Authors Guild seeks is a judicial declaration of authorial power, an official statement from the courts recognizing the proper place of arts and letters in our national culture.
>
> In that sense, Google is a stand-in for all the other massive corporations who sideline individual authors in the publishing world. If the courts order that Google must show authors proper respect, perhaps the others will have to as well. Suing Penguin Random or Amazon, or any of the other companies that authors actually deal with in fraught negotiations on a daily basis would be dangerous. Google and its library partners are safer adversaries, precisely because they stand at a further remove—the perfect adversary for a mostly symbolic fight.

There's more, and I absolutely suggest reading it in the original—including Grimmelmann's use of Google Derangement Syndrome and his note that Google Books "was actually built by book people" but not book *industry* people. I think he might be talking about librarians.

Google Books Case Appears Ready to Be Decided

I could probably skip this September 24, 2013 piece by Andrew Albanese at *Publishers Weekly*, just as I skipped a Bloomberg article that was mostly "this lawyer says this, that lawyer says that, another lawyer says something else"—but this one's a nicely-done summary of the oral arguments in the case (less than 40 minutes of them). (Look at the hyperlink, which gives the "web version" of the article's title—namely, "After Quick Hearing" followed by the title you see here.)

It's worth reading. I'm not sure it's worth summarizing. It strikes me that the AG attorney was offering questionable arguments, but it's fair to say I'm a little biased toward Google in this case. (Not that I'm a Google-lover in all cases—my default search engine is Bing, for example.)

Summary judgment order in Authors Guild v. Google (Google Books)

A Scribd document: Judge Chin's actual judgment, filed November 14, 2013. The key here may be the

introduction: it's a ruling on fair use in Google's favor, dismissing the AG suit.

It's a 30-page document (double-spaced; it's not all *that* long) that includes a brief history of the litigation and the issues involved. A few items from Chin's discussion of the four factors of fair use and how they apply:

> Google's use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books…
>
> Similarly, Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research. Words in books are being used in a way they have not been used before…
>
> Google Books does not supersede or supplant books because it is not a tool to be used to read books…
>
> [As to Factor 2, nature of the copyrighted work, neither party thought that was very important.]
>
> [Amount and substantiality:] Here, as one of the keys to Google Books is its offering of full-text search of books, full-work reproduction is critical to the functioning of Google Books. Significantly, Google limits the amount of text it displays in response to a search.
>
> [Effect on potential market:] Here, plaintiffs argue that Google Books will negatively impact the market for books and that Google's scans will serve as a "market replacement" for books. (Pl. Mem. at41). It also argues that users could put in multiple searches, varying slightly the search terms, to access an entire book. (9/23/13 Tr. at 6).
>
> Neither suggestion makes sense. Google does not sell its scans, and the scans do not replace the books. While partner libraries have the ability to download a scan of a book from their collections, they owned the books already -- they provided the original book to Google to scan. Nor is it likely that someone would take the time and energy to input countless-searches to try and get enough snippets to comprise an entire book. Not only is that not possible as certain pages and snippets are blacklisted, the individual would have to have a copy of the book in his possession already to be able to piece the different snippets together in coherent fashion.
>
> To the contrary, a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders. An important factor in the success of an individual title is whether it is discovered -- whether potential readers learn of its existence… In this day and age of on-line shopping, there can be no doubt but that Google Books improves books sales.

Decision and Appeal

So that's the end of it: right? Of course not. Where there's enough money and enough lawyers, and where the Supreme Court hasn't yet weighed in, there's *always* another appeal.

First, a few commentaries on the summary judgment—and then the inevitable appeal and a few other, more recent items.

Google Books ruled legal in massive win for fair use (updated)

This one's by Joe Mullin posting at *ars technica* on November 14, 2013. The tease: "Scans that show snippets are legal—they don't replace the full book.

The first paragraph makes a common mistake: saying that the lawsuit "is over." Later:

> Along with the First Sale doctrine, fair use is the most important limitation on copyright. It allows parts of works to be used without permission of the copyright owner to produce new things: quotes of books used in reviews or articles for instance.

He says the fourth factor—impact on the market—is often the most important and suggests that Judge Chin found the Authors Guild ideas "ignorant, if not nonsensical, in this regard." (I've already quoted the relevant excerpts.)

Later, in what I assume is the updated portion of the story, Mullin admits that it's *not* over, with the Authors Guild executive director vowing an appeal after saying "~~blah blah Google Bad fair use irrelevant blah blah absolute property rights~~"—oh, wait, that's wrong:

> "Google made unauthorized digital editions of nearly all of the world's valuable copyright-protected literature and profits from displaying those works," said Aiken. "In our view, such mass digitization and exploitation far exceeds the bounds of the fair use defense."

Google did not, of course, make unauthorized editions: those that weren't authorized by publishers (as many were) were authorized by libraries. Was it legal for them to authorize such copies? Apparently…and do note that Authors Guild didn't sue the libraries directly. (Indirectly, yes: thus HathiTrust.)

Lots'o'comments, a whole bunch of which are about how easy it would be to make a script that would build a whole book out of snippets, because wise commenters haven't read any of the background and don't know (or care?) that Google went out of its way to prevent that from happening. (At one point, Mullin intervenes in the comments to point this out.)

Google Gets Total Victory Over Authors Guild: Book Scanning Is Fair Use

Mike Masnick's November 14, 2013 story at *techdirt* adds some angles—noting that Judge Chin has a history of siding with copyright holders and that *techdirt* argued in 2008 that Google "made a huge mistake in dropping its fair use fight here." I seem to remember that quite a few of us, and even of the writers/lawyers/commentators who matter, thought it was unfortunate when Google tried to craft a settlement that ignored fair use.

Otherwise, it's a similar commentary (and also embeds the full judgment). Here's the last paragraph:

> This is a huge win for the public, for science, for research **and** for most authors who will undoubtedly benefit from expanded search and discovery of their works. The Authors Guild, led by luddite Scott Turow, not only look completely out of touch, but they've wasted nearly a decade and a tremendous amount of their members' money on a completely wasted effort to impede the progress of science and knowledge. Isn't it time the Authors Guild had a boss who was forward-looking, rather than trying to pretend he can bring back the world that existed in the 1980s? Even worse, Turow famously is a practicing attorney, as well as a best-selling author. So it's not even like he can claim he was suckered into this by bad lawyers. He should have known better.

As a semi-Luddite myself, I'm not fond of slamming people by labeling them Luddites, but never mind.

Google Books suit dismissed: more affirmation of public interest in copyright

In this case, it's Nancy Sims on November 14, 2013 at *Copyright Librarian*—and I'm including it because Sims is a librarian and lawyer, and offers some useful thoughts from that perspective.

First, there's this: "Appealing a dismissal on summary judgment is generally a weaker place to be than appealing an opinion after a trial."

Beyond that, it's a good commentary on Chin's discussion of the four factors for fair use (f4u?) followed by some implications for libraries and other cultural institutions.

> The great thing about this case moving away from class action settlement and towards actual court rulings on the substantive legal issues, is that the resulting rulings *do not just apply to Google*. If it's fair use for Google to do this kind of stuff, it probably is for others as well.
>
> Like a lot of recent fair use cases, this case affirms the public interest elements of copyright, and how closely fair use is connected to those public interest elements, in kind of screamingly strong language. For institutions that have been reluctant to engage with fair use, this opinion, and the HathiTrust opinion of last year, are extremely strong grounds for contemplating the application of fair use to digitization projects, exhibits, and other such publicly beneficial uses. (The more so because most libraries and cultural institutions are entirely non-profit, unlike Google which has acknowledged commercial purposes.)

That's the first part of a longer discussion, worth reading. (I've omitted another item, from *FurdLog*, that looked interesting because it's titled "An Unexpected Decision"—but it contains no commentary, just excerpts.)

A wide-angle lens on fair use

Kevin Smith on November 17, 2013 at *Scholarly Communications @ Duke*, and you gotta love the opening:

> I first saw the news about Thursday's decision affirming fair use in the Authors Guild v. Google Books case when I turned my phone back on after an eleven hour flight from Istanbul. The Turkish Air plane was still taxiing at JFK at the time, so when I cheered out loud I got a lot of bewildered looks from my fellow passengers. I tried to explain to the folks sitting near me what I was so elated about, but I don't think it translated well.
>
> Fortunately, it is much easier to explain the impact of this ruling here, mostly because so many of our colleagues stepped up to the task quite quickly. The best thing I can do for my readers is probably simply to direct you to a few of those discussions; I especially recommend those by Kenny Crews, Nancy Sims and ~~Brandon Butler~~. There is also this interesting piece by Eric Goldman in *Forbes*, and this story from the *New York Times*.

Of those links, the last one worked when I tried it—and a working current versions of the Sims link appears with that story above. Otherwise…well, it's been almost two years, and linkrot…

Looking at surrounding history, Smith finds the decision "perhaps more predictable than many of us thought."

> What is most remarkable and valuable about this ruling is not any new ground it breaks in fair use law, but its meticulous placement of that law back where it first arose — in the issue of public benefit and the purpose of copyright. It looks at fair use with a wide-angle lens, which helps us see more clearly the correct placement of the discussion. Before he begins his analysis of the question of fair use, Judge Chin catalogs the benefits of the Library Project and Google Books. That catalog includes a searchable word index of tens

> of millions of books that benefits libraries and researchers, the facilitation of new types of research through text and data mining, access to books for traditionally underserved populations, especially including the disabled, book preservation, and the generation of new audiences for authors as well as new income for publishers.

Later:

> The Authors Guild is really asking the courts to forget about students, researchers, blind people, poor people and even the very authors they are supposed to represent in order to preserve some notional expectation of a windfall profit that might be discovered someday when they finally figure out the internet. As Brandon Butler puts this point, "There is no pot of gold at the end of these lawsuits, and the research tools they are trying to kill are their best hope of finding an audience." I am reminded of Aesop's fable about the dog and his reflection, where the greedy dog with a bone sees his own reflection in a stream and, trying to snatch the bone away from the "other" dog, drops what he already has into the water. Increasingly the Authors Guild, as well as the publishers in the Georgia State case, look a lot like that greedy and foolish dog.
>
> The Authors Guild has already announced the mind-bogglingly stupid intention to appeal this case. After eight years of pouring money into it, failing to find the pot of gold they hope to gain from a settlement, and losing on the key legal principle they were fighting for, the AG apparently has learned nothing. But the chances of a reversal on appeal seem very slim.

Smith draws two major conclusions from the ruling:

> First, it is a reminder that the commercial nature of a user does not automatically rule out fair use. In his decision, Judge Chin properly focuses on the use, which has tremendous public benefits and which does not directly generate a profit, rather than the user. In the context of the educational benefits of the Book Search, the fact that Google is a for-profit company is really trivial to the analysis. Second, the decision provides an important perspective on mass digitization. Rights holders often focus on the scale of a project and assume that large-scale reproduction cannot be fair use. This is the core of the publishers argument in the Georgia State appeal, and it is wrong. Both Judge Chin and Judge Baer have now concluded (and Judges Laval, Parker and Cabranes have strongly hinted their agreement) that even massive digitization, when it is done for a transformative purpose, can be fair use.

Finally a Fair Use Finding for Google's Library Project

Barbara Fister wrote this "Library Babel Fish" column at *Inside Higher Ed* on November 20, 2013. She offers some background, not only on Google Books but on Amazon's "search inside," and some commentary. Worth reading on its own, but here are excerpts:

> This is not a just a Google victory, it's a huge victory for libraries, scholars, and the general public, and it's the latest case in which courts (unlike Congress) have demonstrated as much care for the "progress of science and the useful arts" as for rights holders' (not so) limited monopolies. …
>
> [Re Google Books early on:] But was it legal? At first, I assumed it probably wasn't. Google made a fair use claim, though, and as I learned more about it, I found it persuasive and hoped it might prevail. It's not that different than copying websites, which are just as much under copyright, in order to index them. The Web has a simple convention for those who want their webpages left alone: robots.txt. Otherwise, if you publish on the web, you don't object to the copies that are made in order to make an index that works. Sounds fair, right?

There's more, of course.

What we talk about when we talk about the Google Books fair use decision

Another librarian commentary, this time from Elisabeth Jones on November 20, 2013 at her eponymous blog. After she celebrated the decision, feeling like many others that "the ruling is a victory for libraries, for innovation, and for research," she encountered a bunch of emails reposted from Progressive Librarians Guild and SRRT. I believe Jones nicely sums up the core of those emails: "a fundamental distrust of Google as a corporation, and of its motives for getting involved in scanning books."

Jones says, *correctly* (in my opinion), that you don't have to trust or like Google to regard Judge Chin's decision as a good thing for libraries. She offers some useful and pointed commentary that I'll leave for you to read, but I will quote two key paragraphs:

> Judge Chin's decision is beneficial for libraries *not* because it benefits Google (though of course it does) but because of the way the law works – that is, based on *precedent*. This decision sets the precedent that scanning books for the purpose of indexing – even books in copyright, and even without the copyright-holder's permission – is fair use, so long as access to the actual digital versions of those in-copyright books is limited in particular ways. Judge Baer's decision set a very similar precedent. And those precedents are immensely valuable to libraries who wish to go forward with digitizing and broadening access to their collections, whether they choose to do so in partnership with a corporation like Google, with a nonprofit like

> the Internet Archive, with a collection of their institutional peers, or with nobody but their own staff.
>
> The nature of legal precedent is such that you don't have to like the party that wins, and you don't have to like what it's doing, in order for that precedent to benefit you. Heck, I seem to recall that at least half of the cases we read in *Intellectual Property & Information Law* centered on pornographers, hate groups, and other unsympathetic protagonists – and those sketchy characters often won, but that didn't mean the decisions set bad precedents from the perspective of library values and ethics. Often just the reverse.

Yep.

Three Cheers for the Google Books Decision

Let's make it a librarian trifecta with Marcus Banks on November 24, 2013 at *Marcus' World*—largely because Banks raises issues of morality that, while I'm not sure I agree, are certainly worth raising.

He discusses the legal issues first, then moves on to morality:

> Although Judge Chin makes a morally persuasive case, he does so within a legal and economic construct that assumes that ideas can be stamped, coyrighted, and sold. Of course, this is the world we live in and Judge Chin has to operate within it. The very notions of "intellectual property" and "copyright" assume that works of the mind are as discrete and concrete as other forms of physical property.
>
> They are not. All ideas build upon each other, and language and modes of expression require this to be so. If we lived in a world in which every utterance were monetized, nothing would ever get done.

There's considerably more—and I find myself torn. On one hand, *of course* "we must borrow from each other to create anything new"—that's why I wrote a modest proposal for infinite copyright a few years back: that is, you could get infinite copyright on a work if you could demonstrate that it was 100% original—but if you claimed that and it was found not to be true (as opposed to not claiming it and accepting something like Founders' Copyright, that is, 14 years renewable once), your work would enter the public domain and you could be fined for copyfraud. Would you care to assert that any article you've written, any song you've sung, any art you've painted is *entirely* original, with no borrowed ideas? I sure wouldn't.

But I don't think that gets us to copyright *in general* being immoral or even a bad idea. Banks says he'd create new things regardless of copyright, so it's not a required incentive. Good for him—but I'll assert that's not the case for all nonfiction writers or even all fiction writers. Or that it needs to be. (Perhaps worth noting: you can't copyright ideas, only expressions.)

But that's a different discussion.

Two Fair Use Rulings, One Clear Message

Another James Grimmelmann essay, this one on December 6, 2013 at *Publishers Weekly*'s *PWxyz* blog—and after a couple of weeks of perspective. The first paragraph may be a little too final, but…

> By now, you've seen the news: the Google Books case is over. Google won. Scanning books to make a search engine is fair use. Google Books will continue, and other book-scanning projects may start.

Or perhaps I should say a little too appealing, since the Authors Guild would say it's not over until the last appeal has been rejected. I don't recall seeing signs that Google's done all that much library book scanning since December 2013, but maybe it's just not publicizing it. In any case, it could.

Here's an interesting paragraph (and I freely admit that I was not opposed to the settlement, partly because I thought it was the best we could do):

> The ruling also vindicates the scholars who first spoke up against the settlement. (I was not initially one of them; they had clearer foresight than I did.) Instead of a settlement that only Google could rely on, the scholars wanted to see a fair use decision that would benefit other readers and users. Judge Chin has given other potential innovators the same green light Google received, and provided a legal foundation for new kinds of projects, in book scanning and beyond.

Both links there are interesting—the first to a Pamela Samuelson article from April 2009 in *O'Reilly ToC*, "Legally Speaking: The Dead Souls of the Google Booksearch Settlement" that raises a number of pertinent questions about the settlement (which Samuelson regards as a "compulsory license primarily designed to monetize millions of orphan works"), the second to a Grimmelmann article (PDF) that calls the settlement a good thing but primarily discusses the many ways it should and could be improved.

Anyway, back to this essay. The other decision is, of course, the fair use finding in *Authors Guild v HathiTrust*—and Grimmelmann distinguishes between Judge Baer's opinion in HathiTrust and Judge Chin's in Google:

> But where Judge Baer's opinion was quirky, Judge Chin's is sober and restrained. It is worth noting, too, that Chin is hardly hostile to copyright owners.

He adds some evidence supporting that second sentence. Then there's a commentary I find particularly telling, given the number of authors who seem to adopt a stomp-my-feet-and-hold-my-breath IT'S MY

ABSOLUTE PROPERTY RIGHT approach to fair use and other limits:

> At the same time, he found no evidence of economic harm to copyright owners. Google "does not sell its scans, and the scans do not replace the books," he wrote. Rather, because Google Books helps readers identify the books they seek, "there can be no doubt but that Google Books *improves* books sales."

To many copyright owners, this search for concrete harm feels confused, even offensive. Many copyright owners have long seen the clarity of copyright's supposed core command—copying requires permission—as eliminating the need to prove harm in each specific case. But harm in the market has always been one of the four fair use factors, and when a defendant can put on a strong enough showing across all four factors, the lack of identifiable harm becomes decisive.

> The sky has not fallen in the nine years since Google started scanning, and it is not about to start falling now. Nine years is a long time. If the Authors Guild was unable to show specific any specific harm by now, it seems unlikely it ever will.

There's a reason I used to cite the copyright/patent clause of the U.S. Constitution in some copyright discussions: because so many people, especially copyright holders, are unwilling to admit that copyright is about anything other than "property right." It isn't, and never has been.

Grimmelmann offers up "Winners and Loser" (carefully chosen words, those). Winners include search engineers, Big Data researchers looking to do text mining and the like, libraries and archives—and, oh yes, authors who gain added visibility. The loser: the Authors Guild, "which seems determined to press its appeals to the bitter end."

He doesn't understand why. It's not a matter of money. It's not "indexing even if I object"—Google lets authors opt out. And it can't be the need to ask individually for permission: after all, Authors Guild presumes to act as a class for all writers, most of whom have never been asked for permission.

> Rather, the operative principle is the desire to give authors abstract, exclusive, and absolute control over their books. But here, that principle is all but indistinguishable from Grinchiness—the fear that someone, somewhere, might access a book without permission.

There's more, worth reading in the original. Ten days later, Grimmelmann published "The Evolving Law of Fair Use" at *Concurring Opinions*—and that's a charming, informal, sometimes funny piece that I suggest you read yourself.

Authors Guild Appeals Google Decision

With a headline almost as shocking as "California experiences wildfires in summer," this apparently-unsigned item appeared December 30, 2013 at *Publishers Weekly*.

> In a filing with the district court, the Authors Guild gave notice that it is appealing Judge Denny Chin's to dismiss its copyright suit over Google's library scanning program. There was no brief filed at this time, only a basic notice of appeal to the Second Circuit. But the filing makes good on the Authors Guild's vow to file an appeal.
>
> In a statement following the decision, Authors Guild executive director Paul Aiken told *PW* that Chin's decision represented "a fundamental challenge to copyright that merits review by a higher court." Aiken claims that Google's unauthorized mass digitization and exploitation far exceeds the bounds of the fair use defense."

Note the wording here: "fair use defense," not "fair use"; and finding for fair use as a "challenge to copyright" (although fair use is in the copyright law).

In Google Books appeal, Authors Guild decries Google's impact on Amazon sales

Jump ahead a few months to the actual appeal, reported in this April 12, 2014 story by Chris Meadows at *teleread*.

> The Authors Guild is appealing Google's November fair use win in its Google Book scanning case. The Guild says that Google is "yanking readers out of online bookstores" and stifling online bookstore competition with its digitized books.

Huh? "Yanking readers out of online bookstores"? Meadows quotes a bit more of the San Jose *Mercury-News* story in that second link—and it's a doozy, since that "yanking" quote continues that Google is "seeking to bring countless eyeballs to its ads." You know the profusion of ads in Google Books, don't you? Somehow, they don't show up for me, but that's probably a defect in my browser. And here's another astonishing one-sentence paragraph, again quoting Authors Guild president Roxana Robinson:

> She said Congress should create a national digital library.

Sure. That's gonna happen. And it would benefit AG members how?

In any case, Meadows quoted other material from the article and had a two-word response that sounds precisely right to me (third paragraph below):

> "Google emptied the shelves of libraries and delivered truckloads of printed books to scanning

> centers, where the books were converted into digital format," the Guild's lawyers said.
>
> They wrote that the library project was designed to lure potential book purchasers away from online retailers like ***Amazon.com*** and drive them to Google.

Wait, what?

As Meadows notes, Google doesn't make the entire book available—and if you want it, you get referred to an online retailer such as Amazon.com. He also noted that AG's previously assaulted Amazon for its domination of the online book market,

> Now they're suddenly all concerned over *Google's* impact on *Amazon's* wellbeing? Seriously?
>
> ***Do you have no shame at all, Authors Guild? None whatsoever?***

What a silly question.

Read the comments. See if you find the first (and very long) comment more convincing than I do. I never knew that copyright was about an author's right to suppress something that she's changed her mind about. Live and learn…

Authors Guild Appeals Dismissal of Google Books Lawsuit

Ian Chase offers another writeup of the appeal in this April 16, 2014 story at *Library Journal*. Chase offers different quotes from Robinson and a commentary on the chances of the appeal:

> In a statement accompanying the announcement, newly elected Guild president Roxanna Robinson took Google to task, accusing the company of a purely commercial motivation in scanning titles and making them searchable through Google Books. "Authors and authors alone have the right to decide whether and how their books are converted to ebooks," Robinson said in a statement. "Yet in its effort to gain commercial advantage over competitors, particularly Amazon, Google chose to usurp that basic right, putting authors' works and livelihoods at risk."
>
> Court watchers don't seem to think the appeal will have much in the way of legs, though, as the argument is at odds with a significant body of court opinions at this point. "They have made it quite clear that they view the last ten years of fair use case law as a giant mistake, and they would like it reversed," James Grimmelmann, a law professor at the University of Maryland specializing in Internet law told *LJ*. "It's important not to rule out the chance that they could succeed, but their view is in tension with what is very well established case law."

Didn't realize Google *was* creating ebooks? Neither did I—but then, I'm not and probably never will be an Authors Guild member. There's also a bit more about the so-called National Digital Library:

> "Congress should create a National Digital Library that would be available at every campus and in every community," Robinson said in the statement. The Guild suggests that this non-profit digital library would do for books what the American Society for Composers, Authors, and Publishers (ASCAP) does for the music industry, offering a clearinghouse where authors and other rights holders could post full pages of published works—rather than just the "snippets" of relevant content that Google makes available for search. Unlike ASCAP, which is a compulsory service, authors would be free to refuse to participate in the proposed digital library.

There's also a link to an outline of the proposal, "which it hopes to lobby Congress for." Even looking at the bullet points (not the embedded testimony), it's a doozy. Consider the "key components" and see if they sound to you like any sort of library at all:

> A. Authors get paid for the uses, naturally.
>
> B. Licenses would be non-compulsory. Authors get to say no.
>
> C. Licenses would cover out-of-print books only. No disrupting commercial markets.
>
> D. Display uses only. No ebooks or print books.
>
> E. There would be a tribunal to go to if the licensing agency and an institution couldn't agree on the fee.

Come to think of it, that's probably what Authors Guild *would* like libraries to be like: only out-of-print books and authors get paid *for each use*.

The article has some comments, including one from an author mightily upset that Google scanned her book and as a result she "sold very few books." She hopes "the Writer's Guild wins this lawsuit." Um. (OK, so there's a comment from "Dan" that makes the other comment seem wonderful by comparison.)

On Copyright and negligence

This May 8, 2014 piece by Kevin Smith at *Scholarly Communications @ Duke* is a little off to one side—but then, it's in part a commentary on an op-ed by one of the great off-to-one-side writers in the library field, Mark Herring. (Smith was unable to link to the piece as it appeared in *Against the Grain*, but a comment provided the alternative appearance I've linked to here.)

> Although its title asks a simple and moderate question — "Is the Google Books Decision an Unqualified Good?" — the article itself is quite extreme in its point of view and for the most part does not engage with the actual decision. Instead it is a hyperbolic diatribe about why we should all be afraid of Google; it ends with the assertion that "In a sense,

we all work for Google now, free of charge." I have no clue what that means, but it is pretty clearly an exaggeration. Nevertheless, there are a couple of points made in this op-ed that are prevalent enough to be worth discussing…

I want to start with Dean Herring's second reservation about what he calls the "Google Book Theft." He complains that there is "no evidence, no empirical evidence, that shows any additional exposure of any authors' works improves royalties" and calls Google Books "cruel" for "taking away from academics any chance to improve [their] anemic bottom lines." Of course, it is easy to see the shift in this paragraph when I put the two sentences together — from no "evidence of improvement" Herring moves immediately to "taking away any chance" of improvement, a leap not justified by logic. But I am more interested in looking at the decision for what it actually is, a legal opinion at the end of the first stage of a court case. In that context, should we have expected either Google or the judge to have presented evidence of an improvement in royalties?

The point I want to emphasize is that copyright infringement is a "tort" — a civil (non-criminal) wrong for which courts can provide a remedy. In structure, a copyright infringement case is not very different from other kinds of tort litigation. For one thing, there must be a finding of harm. In copyright infringement cases the harm is often presumed — if a plaintiff shows that their copyright has been infringed, the court will usually presume, subject to rebuttal, that there has been harm. But a judge is entitled to look at a particular set of circumstances, as Judge Chin did, and decide that he can find no harm. Some harm is a necessary element of most torts and is explicit as well in the fair use argument (under the market harm factor). So it is asking the wrong question to require evidence of an improvement in royalties; all the court needed to conclude in order to stay within the framework of legal analysis was that the likelihood was more on the side of such improvement than harm.

To put this another way, the burden of showing harm falls on the plaintiff.

This general framework of tort litigation is also important when we look at another argument Dean Herring makes, that after this case fair use could apply to anything. He writes, "Determining what fair use is now is anyone's guess. Everything is, the way I read it." It is a fairly common strategy of those who favor stronger and stronger copyright protection to take the line that copyright, and fair use especially, is too difficult and must be avoided because of its uncertainty. This hand-wringing about how the court has now abandoned all structure or logic in making a fair use finding is really just another version of that argument, in my opinion. But fair use remains today what it was before Judge Chin's ruling, an "equitable rule of reason" that requires courts to examine the specific circumstances of a challenged use and determine, based on those particular facts, if the use was fair. It is not a bright-line rule, but that does not mean it is random, unpredictable or unusable.

There's more, of course, and as always with Smith it's worth reading. He notes a parallel (made by Peter Jaszi) to the ambiguities of fair use: the standard of due care for drivers to avoid charges of negligence.

> Arguably, this standard for non-negligent driving is even more nebulous than fair use (where we are given factors to assess the facts). Yet all of us continue to drive, and I dare say most of us think we know what is an appropriate level of care when we do so. Most of us, anyway, are not paralyzed with fear because the basic rule about legal driving is so uncertain and subjective. Nor should we be about fair use. And, of course, neither "fair use" nor "due care" results in a free-for-all, they just give the courts the discretion to look at specific facts and try to render justice.

You might want to read Herring's piece as well. As is frequently the case, it's a little hyperbolic. *Of course* Herring scare-quotes fair use. He even points to Section 107, Fair Use, "in its inglorious entirety." What?

Google, Photographers Settle Litigation Over Books

There had been a third, much narrower, Google Books lawsuit involving "a group of photographers, visual artists and affiliated associations." As noted in this September 5, 2014 press release from Google, that suit's been settled. Just here as a note—I haven't spent much time on that (fairly recent: April 2010) lawsuit and neither have most others.

Forgotten But Not Quite Gone?

That may be a fair summary of the whole set of Google Books lawsuits—and to some extent of Google Books itself, which is certainly less prominent within Google than it used to be (although it still works and is clearly still adding works provided by publishers, at least).

If you're interested, here's a link to "Oral Argument in Authors Guild v. Google, 13-4829-cv, U.S. Court of Appeals for the Second Circuit, December 3, 2014" by Robert J. Bernstein on December 10, 2014 on *The Entertainment Arts and Sports Law Blog* of the New York State Bar Association.

Bernstein (a past president of the Copyright Society of the U.S.A., among other things) provides a fairly detailed summary of the 75-minute proceeding, in chronological order. I won't comment on it, but it

is interesting. So far, as far as I know, there hasn't been a ruling…but these things take time.

So we'll close with:

What Ever Happened to Google Books?

This essay by Tim Wu on September 11, 2015 begins with a somewhat astonishing tease:

> There are plenty of ways to attribute blame for the failure of the Google Books project.

"The failure of the Google Books project"? Well, you see, it all depends on your definition. To Wu, apparently it was "a plan to scan all of the world's books and make them available to the public online."

> Today, the project sits in a kind of limbo. On one hand, Google has scanned an impressive thirty million volumes, putting it in a league with the world's larger libraries (the library of Congress has around thirty-seven million books). That is a serious accomplishment. But while the corpus is impressive, most of it remains inaccessible. Searches of out-of-print books often yield mere snippets of the text—there is no way to gain access to the whole book. The thrilling thing about Google Books, it seemed to me, was not just the opportunity to read a line here or there; it was the possibility of exploring the full text of millions of out-of-print books and periodicals that had no real commercial value but nonetheless represented a treasure trove for the public. In other words, it would be the world's first online library worthy of that name. And yet the attainment of that goal has been stymied, despite Google having at its disposal an unusual combination of technological means, the agreement of many authors and publishers, and enough money to compensate just about everyone who needs it.

"That had no real commercial value…" is one of those modest statements that can jump right out at you, since it's a presumptive assertion that if it's out of print it might as well be in the public domain. I like to think of myself as a copyright centrist (certainly not a maximalist), but that strikes me as a bit strong.

Then there's some simple bad history. Wu cites the 2008 settlement and notes that Google "didn't ever get around to" putting terminals in public libraries—but that might just be because the settlement *could not take effect* until it was blessed by the courts. Which it wasn't.

And that's where Wu seems to leave it: the courts threw out the settlement, Congress hasn't acted, and "we're still waiting."

> There are plenty of ways to attribute blame in this situation. If Google was, in truth, motivated by the highest ideals of service to the public, then it should have declared the project a non-profit from the beginning, thereby extinguishing any fears that the company wanted to somehow make a profit from other people's work. Unfortunately, Google made the mistake it often makes, which is to assume that people will trust it just because it's Google. For their part, authors and publishers, even if they did eventually settle, were difficult and conspiracy-minded, particularly when it came to weighing abstract and mainly worthless rights against the public's interest in gaining access to obscure works. Finally, the outside critics and the courts were entirely too sanguine about killing, as opposed to improving, a settlement that took so many years to put together, effectively setting the project back a decade if not longer.

Whew.

Wu has a solution:

> Congress should allow anyone with a scanned library to pay some price—say, a hundred and twenty-five million dollars—to gain a license, subject to any opt-outs, allowing them to make those scanned prints available to institutional or individual subscribers. That money would be divided equally among all the rights holders who came forward to claim it in a three-year window—split fifty-fifty between authors and publishers. It is, admittedly, a crude, one-time solution to the problem, but it would do the job, and it might just mean that the world would gain access to the first real online library within this lifetime.

Odds of Congress coming up with something like this (at a dollar amount that is, if I'm not mistaken, *less* than Google was offering in the settlement: certainly true if more than 2.5 million books were claimed by rightsholders, as seems likely): Zero. Fairness of splitting the big bucks fifty-fifty between publishers and authors, even though many authors of out-of-print books have retrieved sole rights (as is true in my case): Less than zero. At least in my opinion.

An oddly deficient piece for *The New Yorker*—and an anticlimactic ending for this roundup. So it goes.

Policy

Catching Up on Fair Use

Since the longer essays in this issue both turn out to be heavily about fair use, it's a good time to catch up on other items regarding fair use. I discussed fair use at some length in the June 2012 and July 2012 issues of *Cites & Insights*, but not since then. I'll admit that I would be happier if one of the two long essays in this issue turned heavily on orphan works, but things didn't work out that way. Since this roundup is, in essence, leftovers—fair use items not already picked

up for Google Books or HathiTrust—it will be in chronological order.

First, though, a golden oldie as a reminder to those who've been conned into thinking that fair use is either "fair use" with scare quotes or nothing more than a defense after admitting copyright infringement. It's not: it's part of copyright law itself. To wit, Section 107:

> Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 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;
>
> 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.

And here's the tl;dr version to remember whenever anyone uses the lame "defense" line:

> [T]he fair use of a copyrighted work...is **not** an infringement of copyright.

It's been a good three years for fair use, by and large. Now, on with the items.

Some of these items deal with the Georgia State University (GSU) case—but, despite having 31 items tagged "gsu," I'm not going to do a GSU-specific roundup, for several reasons (among other things, I'm already pointing to Kevin Smith way too often and more than half of the 31 items are from his blog, and I honestly don't feel I have anything useful to add to cites on GSU). If you're really interested in the last three years or so of the GSU situation, I'd suggest you start at *Scholarly Communications @ Duke*. Smith cares about the issues, he's knowledgeable, he has a JD, and he writes well and sometimes passionately.

Redefining research

Kevin Smith on July 16, 2012 at *Scholarly Communications @ Duke*, mostly talking about changes to copyright law in Canada "that I wish we could import south of the border to the U.S."

> First, the exception to the exclusive rights of copyright in Canada that is known as "fair dealing" was expanded by the addition of three additional purposes to the two — research and private study — already mentioned in the provision. Those new purposes are education, parody and satire. The way fair dealing works, in order for a finding that an activity that implicated one or more of the exclusive rights was not an infringement because it was fair dealing, a court must first decide if the activity fit into one of the enumerated purposes, and then do an analysis to decide if that activity within one of the purposes was fair. The Supreme Court of Canada enunciated six factors that are used in this second step of the process, which really look a lot like US fair use. But the absence of education from the list of dealings that were eligible for a finding that they were fair (the first step in the analysis) was a significant problem for universities and schools. Bill C-11 remedied that problem, and it has really changed, I would imagine, the debate over the license for universities that has been offered by the collective rights group known as Access Copyright (which recently jumped in price from $3.75 per student to $26).

That's the key change for purposes of this essay. Then there are court findings:

> Less than two weeks after the royal assent to bill C-11, the Supreme Court of Canada ruled on five copyright cases that had been before it. Two of those cases had major implications for the definition of "research" in the fair dealing provision which is outlined above. Collective rights organizations had challenged two practices — Access Copyright had asserted that teachers making copies for students was outside the scope of fair dealing, and a music licensing organization called SOCAN had made the same assertion about short preview clips of songs that consumers could listen to before buying the complete piece. Both organizations were seeking additional licensing fees for the challenged practices, and both lost.

You need to read Smith's careful delineation of what the courts said. It does seem clear that the Canadian court was coming to conclusions similar to those in the GSU case, basically ruling against extreme definitions of potential lost revenue.

Let's Spread the Word About Fair Use

So says Zick Rubin on September 23, 2012 at *The Chronicle of Higher Education*, and he uses a direct personal example to back it up. It's a nicely written commentary, and I'd suggest you read the whole thing, but I'll offer a quick version.

Rubin wrote a book a while back (OK, 39 years back); a professor uses a chapter of that book in a

course pack; every year, the Copyright Clearance Center faxes Rubin a request for permission so he can name his price for that use—with CCC taking a 15% cut.

> Given how oppressively high college tuitions have become these days, I doubted that the students would notice the extra three or four dollars that I could ask each of them to pony up for the right to have his or her own copy of Chapter 5. The form had blanks to check for "fee for page," "fee per copy," and "flat fee," but not for "no fee."

But, see, Rubin has gone from being a professor of social psychology to being a publishing and copyright lawyer-and he's aware of Judge Evans' findings in the GSU case.

> Under current copyright law, Middle Earth College probably doesn't need my permission—or anyone else's—to include my chapter in the course pack. The university and its bookstore have a right to make copies of the chapter for enrolled students without even asking, under the copyright doctrine of fair use.

Rubin thinks Judge Evans got the law right—and believes CCC should revise the form to offer another choice: blank for "this looks like fair use to me." He wrote that in and faxed the form back to CCC.

The comments are interesting, including one commenter who seems to have a comprehension problem—which isn't unusual for online comments.

The six million dollar fair use standard

Back to Kevin Smith and *Scholarly Communications @ Duke*, this time on October 2, 2012. As with a number of other items in this roundup, it's about the third leg of the fair-use adjudication trio, the GSU case.

> The trial judge in the Georgia State copyright infringement lawsuit filed her final judgment in the case yesterday, bringing that portion of the lawsuit to a close. The only news left for this final order was the amount of money that the plaintiff publishers would be forced to pay to Georgia State. Judge Evans had already ruled that GSU was "the prevailing party" and therefore entitled to have the other side pay their fees and costs, and a lot of motions were filed arguing over what those numbers would be. The final amount (including both attorney fees and court costs) is $2,947,085.10.

Smith says you can argue over the numbers, but chances are it's a pretty good estimate of the cost for *one side* to litigate the case—which means the total cost is in the six million dollar ballpark. (Which for a pro ballpark would be cheap, but then you get to reuse ballparks, unlike lawsuits.)

Smith also notes that half of the plaintiff's costs were covered by the Copyright Clearance Center—which, in effect, means "Our own dollars—lots of them-are being used to bring this lawsuit to squeeze more dollars out of us."

Smith says the fair use "standard" found by the judge is "too rigid for my taste, and too permissive for the publishers, but it is not unreasonable." He believes we could all live in a world where Judge Evans' ruling was the final word.

> Unfortunately, the publishers are unwilling to live in such a world; they have already announced their intent to appeal, and they now have thirty days to file that appeal in the 11th Circuit Court of Appeals. The only excuse for their decision is the desire to force universities to pay even more money than the already do to publishers. Prices are not rising fast enough, apparently, so greater income from permissions is required. If other parts of the educational mission of universities have to suffer, that too is price the publishers seem willing to pay.
>
> We can no longer preserve the illusion that all this was about was to provide some certainty about fair use for digital course content. The publishers spent 6 million and now could walk away with a workable, if unpopular, standard. Instead the battle against universities and higher education will continue. How sad.

Famed quotation isn't dead—and could even prove costly

Call this one an extreme case—as reported by Todd Leopold on November 11, 2012 at *CNN*. The gist: Woody Allen used a rephrased version of a William Faulkner line in one of his best recent movies, *Midnight in Paris*. Faulkner: "The past is never dead. It's not even past." Allen (via Owen Wilson): "The past is not dead. Actually, it's not even past." That's it. The original is eight words out of a 1950 novel. And, atypically for Hollywood's "EVERYTHING MUST HAVE A PERMISSION" culture, Allen didn't ask for permission or pay for a license.

Faulkner's estate sued. And, for a change, we have a major entertainment company on the *pro*-fair-use side, with Sony Pictures Classics saying it's fair use. (OK, so Leopold uses scare quotes around fair use and calls it a defense, as you might—unfortunately—expect.) Meanwhile, the Faulkner executor is asserting a hard copyright line: It's Faulkner's, so you gotta pay. Period. (By the way, presidential candidate Barack Obama also paraphrased Faulkner's line in what the article calls "the most famous speech of the 2008 campaign," with no indication that he paid or got permission.)

So what happened? Jump forward to July 19, 2013 and an AP report by Holbrook Mohr: The judge

threw it out—and, *of course*, the executor called the ruling "problematic for authors throughout the United States" and "damaging to creative people everywhere." Because, you know, *how can you survive* if somebody can quote (or paraphrase) eight words from your novel, more than sixty years after it's published, without you pulling in more bucks? Well, not *you*: Faulkner's dead, so his willingness to create more novels presumably won't be devastated by the finding, but…

The Fair Use/Fair Dealing Handbook

Here's a case where all I can do is point admiringly to this March 2013 document, prepared by Jonathan Band and Jonathan Gerafi, and suggest that you might find it worthwhile if you're looking at international issues. From the introduction:

> More than 40 countries with over one-third of the world's population have fair use or fair dealing provisions in their copyright laws. These countries are in all regions of the world and at all levels of development. The broad diffusion of fair use and fair dealing indicates that there is no basis for preventing the more widespread adoption of these doctrines, with the benefits their flexibility brings to authors, publishers, consumers, technology companies, libraries, museums, educational institutions, and governments. This is particularly the case considering that the copyright laws in many "civil law" countries currently allow their courts to apply a specific exception in a specific case only if the second and third steps of the Berne three-step-test are met. That is, the court may permit the use only if it determines that the use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rights holder. These steps are at least as abstract and difficult to apply as fair use or fair dealing.

The handbook contains the fair use and fair dealing statutes Band and Gerafi were able to identify. It's an impressive work.

Second Circuit Restores Traditional Fair Use Tests

This one, by Alan Wexelblat on April 28, 2013 at *Copyfight*, is brief and a little off to one side, as it has to do with a non-library case, but still worth noting.

The gist: a judge had held that a work *must* be transformative to be fair use. A higher court disagreed. Since the judge's ruling would have dramatically *narrowed* the scope of fair use, this is a good thing. And to place it in a broader context…

Fair use for appropriation art

Keven Smith comments on the finding on April 30, 2013 at *Scholarly Communications @ Duke*. The situation: Richard Prince, an "appropriation artist," made collages and other artworks from a series of photos taken by Patrick Cariou and published in a now-out-of-print book. The trial court issued a summary judgment saying the artworks were copyright infringement—and that a fair use claim required that the new work "comment on, relate to the historical context of or critically refer back to the originals." Which, if you go back to Section 107 at the start of this roundup, is an interesting judgment. Remarkably, the judge even said that the plaintiff could *destroy* the new works—but Cariou's counsel said they opposed such destruction.

> The Second Circuit begins its opinion by pointing out, in clear and forceful language, that copyright is not intended to give authors or other creators "absolute ownership" in their works, as if by natural right. Instead, the Court notes, copyright is designed to stimulate creativity and progress in arts and sciences. This is not new, but placed as it is in the opinion, it strongly reinforces the point that fair use is part of the structure of copyright, not an oddity or a mere exception for extraordinary situations. Without fair use, copyright fails in its Constitutional purpose.
>
> As for the correct standard for deciding if a work has a transformative purpose, the Second Circuit wants a broader rule than that articulated by the trial judge. Transformation can exist even without direct comment on the original, whenever the original work is altered with "new expression, meaning, or message" (quoting the Supreme Court in the *Campbell* case). The new work can be transformative if it "superseded the object of the original creation" by offering "new information, new aesthetics, new insights and understandings."

Prince refused to say what the "point" of his artworks was—but he shouldn't have to. (I'll admit that there are some "appropriation artists," one high-profile sculptor in particular, that strike me as thieving kitschmeisters, but that's a different issue, ain't it? I don't know Prince's work, so won't suggest he fits into that category.)

There's more to this article, and it's excellent.

Educational Fair Use Brief in Support of Georgia State University on Behalf of Amici Curiae Academic Authors and Legal Scholars

Mostly pointing to this 54-page PDF, posted May 3, 2013 by five authors, for those interested in the details of the GSU case. (The link is to the SSRN abstract, which in turn links to the PDF.) Quoting the abstract:

> For centuries, scholars and educators have excerpted the works of their colleagues, transforming them from individual, static monographs into dynamic pedagogical and intellectual tools for classroom learning. Such transformations reside at the heart of fair use, a core copyright law doctrine established to protect socially beneficial uses of works

> that increase public access and promote the progress of human understanding.
>
> In this case, Plaintiff Publishers accuse GSU and its faculty of violating their copyrights through this practice. But, as the district court correctly found, such uses are fair, especially because they primarily use factual information to promote the purposes of education and teaching, the amount taken was reasonable in light of its purpose, and because Plaintiffs' evidence of a cognizable copyright market harm was speculative at best. However, the district court erred when it incorrectly concluded that these uses are not transformative. Using an unduly narrow definition of the concept, it failed to consider how educators repurpose scholarly works in productive ways that bring new meaning to and understanding of the works used.
>
> As scholars and educators who produce and repurpose such works, amici urge this Court to affirm that these uses constitute a transformative use under the first fair use factor, and to reaffirm the findings under the other factors that these uses are fair. A finding of fair use in this case not only furthers the underlying goals of scholarship and education - access to knowledge - but also the very purposes of the Copyright Act itself.

Executors or Executioners?

I'm a little reluctant to cite this Joseph Thomas piece on October 11, 2013 at *The Slate Book Review* because Slate has become one of those pages where you have to keep dealing with popover ads, interspersed ads with autoplaying video and the like. But it's an interesting piece. Here's the tease:

> Why can't my biography of Shel Silverstein quote the works of Shel Silverstein? His censorious estate.

Thomas spent five years writing a scholarly book about Shel Silverstein—and has "come to realize that my book will very possibly never be published."

> It comes down to this: the Silverstein estate is especially reluctant to give out what's called "permissions," the right to quote from (or reproduce parts of) work protected by copyright. Last year an academic journal asked me to obtain permission to reproduce some of Silverstein's material in an essay of mine they were about to publish. Most of the required images first appeared in *Playboy*; the magazine gave me an email address belonging to Silverstein's nephew, who evidently handles this kind of thing for the estate. I wrote this nephew several times, and after a handful of attempts over the course of months, I heard back from a law firm whose name seemed to come straight out of a Shel Silverstein poem: Solheim, Billing, and Grimmer.

That letter—which Thomas says he can't reproduce because the letter itself is copyright—basically says Thomas can't ever reproduce any of Silverstein's work anywhere. Not only did they deny permissions for the scholarly article, they "decided to muzzle me completely."

Fair use? Thomas is pretty clear about this:

> You see, scholars have to request permission to reproduce more than a few lines of a copyrighted poem or song lyric. Or, more precisely, we don't *have* to, but our publishers (largely academic, nonprofit university presses) tend to insist that we ask permission in order to protect themselves from lawsuits. You may have heard of something called "fair use." One would think fair use was custom built to protect scholars and artists who want or need to reproduce excerpts from copyrighted work in the service of education or art or scholarship—and one would be right. But whether we're protected or not, most presses prefer to play it safe and make scholars request permission.

Points off for the scare quotes, but he only uses them once—and his point about the "permission society" (precisely what CCC and hardline copyright folks want) is telling: fair use is useless if publishers won't use it. As he says, "this situation is disastrous for serious scholarship…"

There's more to this article, which is actually quite good; I should note that the article includes some Silverstein lyrics and that *Slate* is apparently a little more willing to assert fair use.

What's up

Back to the GSU case and back to Kevin Smith at *Scholarly Communications @ Duke*, this time on October 29, 2013, musing as to possible reasons that publishers and CCC continue to pursue the GSU case. "Is it just greed?"

> Usually one hears two different explanations for this lawsuit. One is that publishers just want clarity about fair use. The other is that permissions income is vital for the survival of academic publishing.

He believes that Judge Evans' ruling should have covered the first motive, in his opinion with too-inflexible guidelines (but, he says, it's not so much that publishers want clarity: they want fair use rendered toothless). He doesn't believe the second motive holds up too well either—especially with CCC showing record licensing revenues. But then…

> I have always believed that behind this lawsuit is a belief that copyright exists so that rights holders, who most often are intermediaries and not the original creators, can extract every conceivable penny from every use of every copyrighted work. From that perspective, fair use is a gigantic mistake and these revenue figures from the CCC are irrelevant. But that

> is not the purpose of copyright law. The copyright monopoly exists to give an incentive to authors and creators to continue writing and creating. Since very little of the $188.7 million that the CCC distributed to rights holders in FY 13 actually goes to creators, it is deadweight loss, in economic terms, as far as the incentive purpose of copyright is concerned. And it raises the question of how much income is enough; how much inefficiency in the system is required before these publishers will be satisfied?

I'm beginning to feel like I'm quoting too much from Kevin Smith's work, so I'll just note his December 2, 2013 discussion of what he regards as a more sensible fair use settlement in an Israeli case—and note also the single comment, from an Israeli publisher (part of the lawsuit) looking forward to suing more academic institutions and hoping that publishers win the GSU appeal.

Timid About Fair Use?

This story by Colleen Flaherty appeared on January 30, 2014 at *Inside Higher Ed*; it relates to a report from the College Art Association saying that visual arts professionals, including art historians, "let real and perceived fears about copyright law get in the way of their work." It's worth reading. One would have to note that "timidity" may well be the result of publishers insisting on permissions for everything, thus helping to inculcate a timid mindset. But there's more, and it's a good piece.

Harvard Professor Settles Fair-Use Dispute With Record Label

Here's an odd one—a brief item by Nick DeSantis on February 28, 2014 at *The Chronicle of Higher Education*'s "The Ticker," an example of what can happen when a strict-copyright outfit runs up against an aggressive scholar. To wit: Lawrence Lessig used a song in a lecture posted online. The Australian record label that owned the song threatened to sue him. Ah, but he's Lessig: He didn't just say fair use, he sued the record company. Which, as noted here, agreed that his use *was* fair use…and paid him some undisclosed amount.

A Smith Quartet

Oh look: four of the five remaining tagged items are by Kevin Smith at *Scholarly Communications @ Duke*, and I'm beginning to feel as though this whole roundup should be replaced by a single sentence: "For eloquent thoughts and clear reporting on other fair use issues, go read Kevin Smith's *Scholarly Communications @ Duke*." But instead, I'll offer even shorter notes about these four posts.

- "Are fair use and open access incompatible?" on September 25, 2014 asks a most curious question. How could they *not* be compatible? And in the discussion we have Laura Quilter talking about "the policies of open content publishers"—which raises another question: What are open content publishers? In this case, the publisher is Wiley—or maybe Quilter's talking about PLOS. In either case, adding a neologism hardly seems necessary. The gist: the author of a paper critiquing earlier papers needed to include some illustrations from the earlier papers; Wiley objected because PLOS uses CC BY and Wiley didn't want the copyright of the illustrations changed. An interesting discussion that points out how things may have gone wrong (fair use could have handled it; PLOS was being ham-handed—the CC licenses explicitly allow for exclusions, and you may note that my own license—on the back page—explicitly says "All original material"; and so on)—and also notes one probably more important issue with mainstream journal publishing: journals that only publish Hot Stuff, excluding articles that critique or disprove earlier articles or refine earlier studies. Which seems to undermine the whole way science works.
- "Free speech, fair use, and affirmative defenses" on November 3, 2014 is an excellent discussion of why fair use is not just a defense, starting from a mistaken comment on another site: "Fair use doesn't "allow" large scale digitization and didn't "allow" digitization in the case of HathiTrust. The fair use provision does not allow anything up front- it has to be won through litigation. The fair use provision was used as an affirmative defense in litigation concerning the HathiTrust et al., and after much time and money spent in litigation, the court ruled, and the appeals court ruled, that HathiTrusts's activity could be considered fair." The second sentence is erroneous, and Smith explains why.
- "Learning how fair use works" on May 7, 2015 discusses a newish index of fair use cases on the Copyright Office's website, and that's all the useful commentary I can provide.
- "Ignore fair use at your peril!" on September 14, 2015 discusses the "Dancing Baby" case (remember the "Dancing Baby" case? the YouTube clip with a, well, dancing baby, with

29 seconds of a Prince song in the background?). This case was unusual because the mother, Stephanie Lenz, didn't just fight against Universal Music's DMCA takedown of the video—she sued Universal Music for copyfraud, knowingly misrepresenting the legal situation by issuing the takedown notice. Now, two levels of court have affirmed that the lawsuit can go to trial—and in the process, the Ninth Circuit Court of Appeals strengthened the cause of fair use considerably. Consider these paragraphs from that finding:

> Universal's sole textual argument is that fair use is not "authorized by the law" because it is an affirmative defense that excuses otherwise infringing conduct. Universal's interpretation is incorrect as it conflates two different concepts: an affirmative defense that is labeled as such due to the procedural posture of the case, and an affirmative defense that excuses impermissible conduct. Supreme Court precedent squarely supports the conclusion that fair use does not fall into the latter camp: "[A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).
>
> Given that 17 U.S.C. § 107 expressly authorizes fair use, labeling it as an affirmative defense that excuses conduct is a misnomer.

Good stuff.

Silver Linings in Fair Use

Let's wind up this odd assortment with a post by Iris Jastram on September 15, 2015 at *Pegasus Librarian*—a post based on the same ruling as the bullet point just above. The gist (which may be too much of the post to be fair use, but Jastram's blog has a CC BY-NC license, just as *Cites & Insights* does, so…):

> Now, nobody knows exactly what "considering" fair use means, and the case will almost certainly be appealed. Still, this is a very interesting moment for copyright folks, YouTube and its ilk, and pretty much anyone who has ever had copyrighted material stripped out of their uploaded content for dubious reasons. As far as I can tell, music and movies are the two areas where fair use has been practically nonexistent unless people have lots of money for lawyers and all their ducks in a row, so any hint that fair use is a real thing that applies to these kinds of content is pretty exciting to me.

"Pretty exciting times for believers in fair use" may be a good way to sum up not only this roundup but all three of this issue's essays.

Intersections

Tracking the Elephant: Notes on HathiTrust

As I've written about Google Books and associated lawsuits over the years (including an update in this issue), HathiTrust (sometimes abbreviated Hathi) has come up from time to time—but I've never really written about it.

Time to correct that, although this will be a once-over-lightly covering four years and with nothing much about HathiTrust's first years. (Just checked: I've only mentioned HathiTrust a few times, always in conjunction with Google Books—and, sigh, pretty consistently used "Hathi Trust" rather than HathiTrust.

Brief Background

Since I have no independent knowledge of (or opinions about) HathiTrust, I'll quote from the organization itself:

> HathiTrust began in 2008 as a collaboration of the universities of the Committee on Institutional Cooperation and the University of California system to establish a repository to archive and share their digitized collections. HathiTrust has quickly expanded to include additional partners and to provide those partners with an easy means to archive their digital content.
>
> The initial focus of the partnership has been on preserving and providing access to digitized book and journal content from the partner library collections. This includes both in copyright and public domain materials digitized by Google, the Internet Archive, and Microsoft, as well as through in-house initiatives. The partners aim to build a comprehensive archive of published literature from around the world and develop shared strategies for managing and developing their digital and print holdings in a collaborative way.
>
> The primary community that HathiTrust serves are the members (faculty, students, and users) of its partners libraries, but the materials in HathiTrust are available to all to the extent permitted by law and contracts, providing the published record as a public good to users around the world.

That's from the Partnership page, which has links to various aspects of HathiTrust's organization and operation. I won't spend more time on HathiTrust itself, except to note that its costs seem reasonable (to the extent that you can figure them out), it's clearly committed to legal uses of material and it now includes

an impressive list of institutions—the "usual suspects" of leading academic libraries and more.

This roundup isn't really about HathiTrust as such; it's about legal and other issues involving HathiTrust. ("The elephant"? HathiTrust's logo is an elephant, and *hāthī* is the Hindu and Urdu word for elephant—or, if you want to get fancy, हाथी and ہاتھی).

2011

With Google Settlement in Limbo, Universities Press Ahead With Research on Digitized Books

This relatively brief item by Marc Parry on April 19, 2011 at *The Chronicle of Higher Education* notes the announcement of the HathiTrust Research Center, designed to provide a computational and data environment for research based on the HathiTrust Digital Repository.

> The new research center will initially focus on works that are no longer protected by copyright—roughly 2.3 million books in HathiTrust's 8-million-plus collection.
>
> "Right now, the safe path is working with the public-domain materials," said John Wilkin, executive director of HathiTrust. "That's a phenomenally large amount of material."
>
> Researchers will not need to be affiliated with Hathi member institutions to access the center, Mr. Wilkin said.

Authors' Guild sues universities over book digitization project

Now we get to the heart of the matter: not HathiTrust and what it could do, but *suing to make them stop!* Because, to oversimplify the Authors Guild's apparent stance, authors should have total control over what they write and supposed limitations on copyright, even if written into the law itself, are *theft*. John Timmer provided this article on September 12, 2011 at *ars technica*.

Timmer calls this "a legal battle by proxy" given that the planned Google Books settlement was still on "indefinite hold."

> The suit seeks to block two separate efforts. In the first, the universities have created a pooled digital archive of the contents of their libraries, maintained by the Hathitrust. No one contests that these works remain in copyright, or that the universities have rights to the nondigital forms of these works. What the authors object to is the fact that the digital works are derived from an unauthorized scan, and will be stored in a single archive that is no longer under the control of the university from which the scan was derived. The suit suggests that the security of this archive is also suspect, and may allow the mass release of copyrighted work.
>
> A separate issue in the suit is an orphaned works project started by the Hathitrust that focuses on some of the works within this archive. The group is attempting to identify out-of-copyright books, and those where the ownership of copyright cannot be established. If attempts to locate and contact any copyright holders fail, and the work is no longer commercially available, the Hathitrust will start providing digital copies to students without restrictions. This has not gone over well. The executive director of the Australian Society of Authors, Angelo Loukakis, stated, "This group of American universities has no authority to decide whether, when or how authors forfeit their copyright protection. These aren't orphaned books, they're abducted books."
>
> The authors' coalition would like to see everything grind to a halt—Google and the libraries kept from any further scanning, the HathiTrust's orphaned works project shuttered, and the digital copies on its servers impounded. The digital works wouldn't be deleted, but it wants to see "any computer system storing the digital copies powered down and disconnected from any network, pending an appropriate act of Congress." (Note that they want them shut down and unplugged, just to be sure.)

I find the second and third sections especially interesting. The stance regarding orphan works strikes me as what I'd expect from AG: *no matter how much effort someone puts into locating an author*, it's not enough: the author should be able to come back and win Copyright Lotto (claiming a huge sum for infringement). The idea that servers need to be *powered down*, not just kept off networks, is…I don't have a word for it.

The Orphan Wars

James Grimmelmann on September 12, 2011 at *The Laboratorium*, with this note about the Authors Guild suing when they did "You have to say this for authors: they sure know how to time a plot twist for maximum dramatic impact." (You're going to see a lot of Grimmelmann in this roundup.)

After a little background on what HathiTrust had done up to then with its copies of digitized books (most, but not all, scanned by Google), including the fact that HathiTrust only provides page numbers from full-text scans unless the book's in the public domain, we get to what interests Grimmelmann the most about this situation:

> This spring, HathiTrust announced the "Orphan Works Project," which aimed to investigate the rights status of the books still in copyright. It would investigate the author and publisher information

> available about the book; if they could not be located and the book was unavailable, it would be flagged as a possible orphan and put on a list of candidates. If at any time a copyright owner is identified and located (e.g. because they step forward), the book is removed from the list.
>
> Then the Michigan library announced that it would take these identified orphans and make them available for full view to the university's students, faculty, and other affiliates. Other universities announced their own participation later in the summer. Each university is preparing to make the books that came from its library and that the process identifies as being orphans available to its own affiliates, but not to the other universities. The first batch of book is scheduled to go in full view on October 13.

The suit—which didn't ask for damages—looked for a declaration that HathiTrust was violating the law and an injunction to stop scanning or display and "impound" the digital copies.

> **Defenses**: Libraries have a complicated set of specific statutory privileges, set out in Section 108 of the Copyright Act. They let libraries make certain kinds of copies for preservation and research use. I haven't heard a detailed argument that what HathiTrust is doing fits within Section 108's finely-drawn categories; of course the Authors Guild asserts that it doesn't. That leaves Section 107: fair use. Except for the Orphan Works Project, the libraries' fair use case is arguably even stronger than Google's: they're using the copies for preservation, and unlike Google, they don't even show snippets. The orphan works uses … let's just say that's legal *terra incognita*. The complaint also argues that the libraries' copies contribute to security risks that the books will leak out, but it doesn't allege any specifically unsafe practices, nor does it claim that any books have actually leaked out.

Also interesting: this suit was not a claimed class action; it was filed on behalf of three authors' groups and eight authors (seven of them officers or board members of one of the groups).

To sum up Grimmelmann's reactions (it's a fairly long post), he thinks the timing suggests that AG believes the settlement talks have broken down, so that "the authors now have nothing to lose there by alienating the libraries they were until recently working with." Then there's standing—and reasons why this wasn't a class action suit. And this:

> **Grand Strategy**: The Authors Guild has staked a tremendous amount of its institutional legitimacy on big copyright lawsuits. After the *Authors Guild* and *Literary Works* settlements were both rejected in the same year, it might have looked for an exit strategy. Instead, it doubled down — and whom did it sue? Not the multinational publishers, not Googlezon, but the cuddly lil' old libraries. Perhaps this suit will vindicate the strategy and bolster authors' standing in the world of electronic books, but it could also turn them into the party of no. Internally, if this new adventure turns out poorly, one wonders how much longer the Authors Guild's members will continue to support its long-on-litigation portfolio.
>
> The libraries had to have seen this coming. I'm sure that their general counsel have been stockpiling memos on the scans since 2004, and updated them this year with new memos on the Orphan Works Project. The exact form of the lawsuit and its timing may have been a surprise, but they clearly knew they were risking one. Indeed, the Orphan Works Project comes across as a deliberate attempt to test boundaries, perhaps even an attempt to provoke a suit so that the first orphan works battle would be fought on ground of the libraries' own choosing. But no battle plan survives contact with the enemy, and the libraries are now very much caught up in things in a way they weren't before.

I've wondered for some years at what point the Authors Guild becomes known as the Book Attorneys Support Guild, given that funding lawsuits seems to be the primary activity of the group.

Grimmelmann suggests that the suit gives Congress "yet another excuse to keep well clear of orphan works" (but was there any suggestion that even the somewhat-less-obstructionist Congress of 2011 would ever seriously deal with orphan works?) and concludes that there won't be Orphan Discussions or Orphan Debates: "The Orphan Wars it will be."

Lots of comments, representing a fair range of viewpoints and questions, many providing useful added insights. The stream also clarifies that Frances Grimble, one of the frequent hard-copyright commenters at various fora, is now explicitly "a library opponent" and says libraries "have become largely unnecessary" and "sacred cows." Always good when an author comes clean on her feelings about libraries!

Stop the Internet, we want to get off!

This post by Kevin Smith on September 13, 2011 at *Scholarly Communications @ Duke* comes after one I didn't pick up on, explaining why HathiTrust's orphan works project shouldn't be controversial. He leads: "It seems I spoke too soon."

> Let's start by being very clear about what these plaintiffs are asking. In their complaint they list 62 works to which named plaintiffs hold copyright and also assert "associational standing" based on their representation of other unnamed copyright holders in unnamed works. To protect those few works from

> distribution by Hathi, which as I far as I can tell is not actually imminent, the plaintiffs ask to impound and remove from Hathi 7 million files. AG President Scott Turow calls Hathi "an intolerable digital risk." To me the real risk is that the foolish actions of Turow and his handful of followers (all but one of the plaintiffs are officers of one of the associations) will threaten the tremendous cultural potential of Hathi and similar projects simply because they are frightened of the Internet and have not yet figured out how to make money off of it.

Smith wonders how the plaintiffs can claim to have any standing in the orphan works project, since none of their books are or are likely to be involved. He also finds illogical the explanation for digitization and preservation being illegal, and I can see this turning on a confusion of copyright clauses I've seen elsewhere: to wit, supposing that Section 108 (special copyright exceptions for libraries) is *definitive* as to library rights—even though the section includes an explicit statement that "Nothing in this section… in any way affects the right of fair use as provided by section 107."

Smith believes the plaintiffs are trying to hold off any progress on orphan works until they convince Congress to see to it that "they get paid before anyone is able to take advantage of" benefits from orphan works.

HathiTrust Single-Handedly Sinks Orphan Works Reform

Here's where things started to get really strange. James Grimmelmann on September 15, 2011 at *The Laboratorium*, linking to blog posts from the Authors Guild purporting to have found copyright owners or literary agents for three or four of the works on HathiTrust's short initial list of orphan works candidates.

> This would be a dog-bites-man story, except for the fact that all of these books were on HathiTrust's list of orphan works candidates. Oops. All of these books had gone through HathiTrust's workflow, which was supposed to carry out "due diligence" to determine whether these works were likely to be orphans.
>
> Once is a mistake, twice bad luck, and three times is a sign of a broken process. The Authors Guild's experiment demonstrates that HathiTrust's orphan-tagging workflow cannot be relied on to identify genuinely orphan works with sufficient confidence to be usable. Out of 166 books originally on the list, at least four have been identified as non-orphans. A 2.5% false positive rate isn't going to be acceptable.

As it happens, the non-orphans may not matter much for this lawsuit—but, well…

> And, looking to the broader picture, these revelations will discredit other efforts to make genuine orphan works more accessible. No one will ever be able to make the orphan works argument again without opponents bringing up the HathiTrust orphans that weren't. Copyright owners will always regard such efforts with suspicion, as a pretext just for distributing the books, copyright be damned. And the idea of a "diligent search" sounds a lot less reassuring now that HathiTrust's initial searches have been shown to be ineffective in multiple cases. The title of this post may be an exaggeration, but not by much.

Not a very long post, but one with a *lot* of comments (including responses from Grimmelmann): 178 of them. Including a fair number of interesting points as to just what Authors Guild actually found (T. Scott wonders whether they've found rightsholders, as opposed to authors), along with a lot of verbiage from some copyright maximalists who are beginning to feel like old (and cranky) friends. I can't honestly say I read the whole stream; it began to degenerate partway through. Frankly, after Frances Grimble informed me that Lulu and all other PoD agencies are "vanity presses," I just wanted her to go away. (She also apparently doesn't understand that publishing through Lulu with an ISBN and Global Reach, both free, means the book is explicitly "publicly listed as commercially available.")

Say it ain't so, Superfudge!

This piece, on September 15, 2011 by—I think—Tom Bruno at *The Jersey Exile*—is to some extent a little semi-comic relief. It's in the form of an open letter to Judy Blume, based on her role as Vice President of the Authors Guild at the time the suit was filed.

> Now AG President Scott Turow I can understand--heck, the guy's a lawyer, isn't he? But librarians getting sued by Superfudge? Try as I might, I could not wrap my brain around this, and I still can't.

After noting some other commentaries on the lawsuit and its merits, Bruno adds:

> The consensus seems to be that you're massively overreaching here, but given the recent court decisions backing some fairly counterintuitive readings of copyright maybe you'll get lucky and successfully bar the HathiTrust and its library partners from rescuing forgotten books from oblivion.
>
> The irony, of course, is that would there even be an orphan work problem, if not for libraries? These books would have long since been remaindered and pulped, if libraries like the ones you sued had not graciously given them the precious shelf space to endure through the years past their popularity. That's what we're good at, you see: the long haul. And now

> you say that you don't trust the same librarians who dutifully preserved these books for decades to make a fair and honest determination of orphan work status? I understand that you believe that Google crossed the line, but the HathiTrust is not Google. Libraries are not Google. Have you been so jaded by the publishing industry that you refuse even to entertain the possibility that librarians might just have authors' best interests at hand here?

There's more; read it in the original.

Crowdsourcing orphan detection

This piece, by the Library Loon on September 15, 2011 at *Gavia Libraria*, should probably follow Grimmelmann's 9/15/11 post since the Loon begins with a direct comment on it:

> Oof. Ouch. That's *not* what the Loon wanted to hear. She cannot deny the justice in it, though.
>
> She also must admit that Hathi's procedures don't pass her inspection. She's rather surprised by that, as Hathi's public-domain clearance procedures are clear and comprehensive and smart. But in a way, she's *not* surprised; it's a very libraryish way of going about the business, a way that doesn't take into account Google-fu, social media, or any other 21st-century way of finding people.

The loon suggests crowdsourcing orphan-works searches, which is effectively what the Authors Guild did.

> It's a win for everyone: the copyright-hawks can do their own due diligence, Hathi and its member libraries may well be able to spend less effort and money on it, and the opening of orphan works needn't be blocked.
>
> Frankly, given the personalities involved, Hathi should have thought of that in the first place. The Loon can only hope that Grimmelman's predictions don't pan out… but she's horribly afraid they will.

Is it all about the Orphans?

Kevin Smith asks and attempts to answer that question in this September 15, 2011 post at *Scholarly Communications @ Duke*, and finds himself at least partly disagreeing with Grimmelmann:

> He says that the AG has switched positions and now opposes action on orphan works, and he suggests that the effect of the lawsuit will be to discourage Congress from getting into the orphan works arena at all. On the contrary, I believe that this is part of a campaign to get Congress to address orphan works by setting up a licensing scheme, similar to the one Canada uses, in which each use of an orphan work must be licensed and a royalty paid. I think the hope is to collect royalties on using orphans that will ultimately be distributed to authors (or ~~publishers~~?) of similar "categories" of work. With the failure of the Google Books Settlement, I think this is the next attempt by the content industries to sell what they do not own on behalf of parties they cannot identify, and then keep the money.

He cites evidence for his opinion, and you're better off reading that directly. And then there's fair use:

> The most significant issue raised by the article is the relationship between licensed uses and those that benefit from a statutory exemption. In the US, that raises the issue of how a licensing scheme for orphans would fit in with fair use, which is exactly the issue the Authors Guild tries to duck by not addressing fair use in its complaint against Hathi. If we approached orphan works by creating a licensing regime, would a license be available even if a use was arguably fair use? Who would decide? And would the license thereby provide a protection against liability for a negative judgment on the fair use case, thus usurping the role of the federal courts?…
>
> Really the choice between a license model and fair use is an instance of the proverbial choice between security and liberty. By suing over a fair use claim about orphan works, the Authors Guild, I think, is hoping to force libraries to opt for security, and therefore pay for licenses.

Smith thinks orphan works should be treated as a species of fair use. I don't understand that enough to comment on it. I do see the, let's call it "specialized justice," involved in collecting mandatory fees to use orphan works (that is, works *where the rightsholder can't be found*) and turning those fees over to publishers or other agencies.

The Procedural Swamp

I'm going to cite and link to this September 26, 2011 post by James Grimmelmann at *The Laboratorium*—and that's about it. It's a fairly detailed consideration of some difficult procedural issues facing the plaintiffs in the HathiTrust suit, and links to another somewhat intricate discussion.

If you care about the intricacies of lawsuits such as this—and maybe you should—you'll want to read this. But I have nothing to say about it.

2012

GBS: HathiTrust Moves to Knock Out Orphan Works Claims

A brief item by James Grimmelmann on January 19, 2012 at *The Laboratorium*, noting some filings in the HathiTrust case over the holidays.

> First, the Authors Guild and HathiTrust reached an agreement on how to litigate, given the state universities' sovereign immunity. Under the stipulation, all of the individual regents named in the lawsuit are out. In their places, the presidents of the universities involved have agreed to be defendants. If they lose, they agree that they have the authority to order their libraries and HathiTrust to knock off whatever activities the court orders them to knock off.
>
> Second, HathiTrust filed a motion for "judgment on the pleadings." As usual, the motion itself is boring; all the action is in the associated brief. HathiTrust claims that the Authors Guild and other authors groups' don't have standing to sue on behalf of their members, and that none of the plaintiffs have standing to sue to stop the use of orphan works. In both cases the basic argument is the same: you're not allowed to sue for infringement of a copyright owned by someone else. This doesn't go to the part of the lawsuit over the HathiTrust database itself: the motion would narrow the lawsuit, not block it entirely.

Unfortunately, the site to which both links point—*The Public Index*—yields 404s for both of them. But it appears that this is the first item and this is the brief for the motion. You'll find them as well as other documents in the case here, at "Authors Guild v. HathiTrust."

GBS: Authors Guild Goes for an Early Knockout

Grimmelmann again, this time on March 4, 2012 at *The Laboratorium* with a comment on "judgment on the pleadings" and Authors Guild's tactic:

> Judgment on the pleadings is an early pretrial tactic: the party asking for it, in essence, says that there's no need to move to the fact stage of the lawsuit. Even if every single thing the other side alleges turns out to be true, it wouldn't make a difference: the law still favors the moving party.
>
> Well, two can play at that game. The Authors Guild and its allies filed their own motion on Tuesday for partial judgment on the pleadings. And this one is a doozy: it asks the court "to hold that Defendants' mass digitization and orphan works projects are not protected by any defense recognized by copyright law." If they win this motion, the case is all but over, and the libraries will almost certainly need to suspend their cooperation with Google and give up their digital copies of the books.

No, the link doesn't work; yes, you can probably find it from the overall case link in the previous discussion.

Grimmelmann discusses the reasoning behind AG's claims, most of them related to knocking down Section 108 (library-specific limits on copyright) defenses—but three pages at the end that attempt to derail fair use (Section 107) as a defense.

> [T]he Authors Guild's argument here is aggressive and more than a little breathtaking:
>
> > Defendants will undoubtedly seek to defend themselves by arguing that their activities constitute fair use … However, rules of statutory construction, case law and legislative history definitively establish that Section 107 is unavailable to Defendants under these circumstances.
>
> There's a reason, though, why this sweeping argument—failure to qualify for Section 108 automatically disqualifies a library from claiming fair use—is relegated to the tail of the brief. It's just not very strong, and the brief's authors know it. Part I does an excellent job knocking down some of the specific Section 108 defenses, but Part II on fair use is tactical. It could wrong-foot HathiTrust's legal team and force them to litigate fair use before they have developed sympathetic facts. It could dispose the judge to regard the fair use claims with suspicion from the start. It could fire up the Tea Party anti-library faction of the author community. All of these are part of a good litigator's toolkit: confuse your opponents, sway the judge, please your client. But they shouldn't be mistaken for an argument that the litigator expects to prevail.

But, as Grimmelmann has already pointed out, Section 108 *explicitly* does not rule out fair use defenses.

> The brief also features some creative but unpersuasive arguments about the fair use savings clause. First, it gives a standard specific-controls-the-general argument:
>
> > The savings clause cannot be permitted to supplant the specific limitations on library copying contained in Section 108. Further, the general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. (citations omitted)
>
> But this gets the structure of the statute wrong: Section 108 contains additional *defenses* for libraries, not additional *limitations* on what they may do. The savings clause, therefore, doesn't derogate from the specific statements of Section 108 in the slightest: nothing it does takes away from any of the library privileges that Section 108 creates.

This wasn't the first and probably wouldn't be the last time that maximalist-copyright lawyers tried to perform this particular trick—not quite as blatant as asserting that fair use is only a defense, not a right, but pretty close.

Only three comments, but they're amusing if not much else. One person says he doesn't know of any authors who are anti-library. Grimmelmann cites Frances Grimble, specifically:

> It is time for libraries to go. Clearly, their only goal these days is to maintain their existence—with the aid of public funding, which most writers and publishers do not get—in a world where libraries have become obsolete. …

Grimble then shows up with this charmer:

> I'm not a tea party member, James. Just a historian. The library system we now have was established in a vastly different world in terms of the availability of books and of education. This isn't the world of Thomas Jefferson or Andrew Carnegie.

No, it isn't—but anyone who believes libraries are now obsolete isn't much of a historian either.

A masterpiece of misdirection

This March 5, 2012 article by Kevin Smith at *Scholarly Communications @ Duke* concerns the same Authors Guild (etc.) brief and specifically the claim that HathiTrust can't use fair use as a defense. It's a considerably different discussion than Grimmelmann's and decidedly worth reading as well.

> The memorandum strikes me as a masterpiece of misdirection, trying to make plausible arguments that do not quite fit the actual case in front of the judge. The problem is that if the judge accepts these arguments, it could be devastating for libraries. At its heart, the motion argues that libraries do not have any fair use rights, since their entire set of privileges under the copyright act are encompassed by section 108. I think there are lots of reasons to reject this logic, which runs counter to the express language that Congress used in section 108 itself, which says (in subsection (f)(4)) that "Nothing in this section… in any way affects the right of fair use.
>
> One way to see the flaw in the AG's argument is to look at the odd results that arise if it is accepted. For one thing, libraries would thereby become disadvantaged actors under the copyright act. Other institutions and persons would still have the broad and flexible opportunities under fair use, but libraries would not. Indeed, in the other lawsuit about mass digitization in which the Authors Guild is a plaintiff, against Google itself, Google will be able to argue fair use to justify its mass digitization, if the case gets that far. But the plaintiffs argue that libraries cannot assert the same defense in regard to the same activity, simply because they are libraries, and thus disadvantaged by the existence of an exception that was supposed to benefit them.

While I suggest reading Smith directly, I'll quote a couple of other paragraphs:

> The are many other specific exceptions in the copyright law, and viewing them as limits on fair use again shows the absurdity of the argument. There is an exception that allows photographers to take pictures of publicly visible architectural works, even when those works are protected by copyright. If that exception is taken as the entire expression of the rights of photographers, then they could not argue fair use when taking photographs of other publicly visible copyrighted works, like a piece of public sculpture. That result is absurd, of course, and was implicitly rejected by cases allowing such photography. There is also an exception that allows public performance of music in the context of religious worship, but its existence does not mean that someone who sings a song in public outside of a worship service would not be able to argue fair use…
>
> One more potential absurdity – If libraries have no fair use rights, would it automatically be infringement for a library to capture and print a single still image from a film for a student to include in a paper? Section 108 excludes film from all but its preservation sections, so making a copy for a patron from a film would not be permitted under the 108 subsections on copying for users. Yet this activity would seem like an obvious fair use if anyone else did it. Why, we should ask, would libraries (and their users) be penalized simply for being libraries?

It appears from reading Smith that the plaintiffs are trying to convince the judge that subsection (f)(4) simply doesn't exist or should be ignored.

GBS: Oral Argument Report in HathiTrust

Pretty much inside-baseball from James Grimmelmann on May 18, 2012 at *The Laboratorium*, but if the details of this case matter to you, you might want to read it. The same can probably be said for Grimmelmann's fairly detailed discussions of the July motions for summary judgment: This one on July 3, 2012 (dealing with Section 108), this one on July 9, 2012 (dealing with fair use, and it's well worth reading) and this one on July 14, 2012 concerning brief from three other groups (the National Federation of the Blind, a brief from ALA, ACRL, ARL and EFF, and a group of digital humanities and law scholars).

Author's Guild v Hathi Trust: A Win for Copyright's Public Interest Purpose

Nancy Sims posted this on October 10, 2012 at *Copyright Librarian*. She's discussing an opinion from the District Court hearing the HathiTrust case, after the motions for summary judgment, partly (but not wholly) granting HathiTrust's motion and denying Authors Guild's motion. Her post links to a PDF of the opinion itself; I find the Scribd version nearly unreadable (and partly blocked by ads), so you're better off with her link.

Here's her "TL;DR version" in full:

> The Author's Guild sued Hathi Trust, a collaborative organization of several major research libraries, claiming that the access Hathi was providing to scanned materials (both scanned via the Google Books project and via other projects) was in violation of their members' copyrights.
>
> Today the District Court issued its opinion (full text) in the case, finding that:
>
> - The fact that libraries have specific enumerated rights to make certain kinds of copies does *not* mean that they can't call on fair use to make other kinds of copies. (Section 108 does not limit libraries' section 107 rights.)
> - Providing access for users with disabilities is a valued purpose under fair use.
> - Providing digital copies to make analog works accessible to users with disabilities *is* transformative use.
> - Making copies of an entire work can be transformative fair use when it is for a transformative purpose, such as making the work searchable.
> - Hathi's activities are fair use.
>
> "The enhanced search capabilities that reveal no in-copyright material, the protection of Defendants' fragile books, and, perhaps most importantly, the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers in the ways imagined by the ADA protect the copies made by Defendants as fair use." (p. 21)
>
> My overall initial take: This is really great. Well reasoned, well written, and a great win for libraries, innovation, and accessibility. Judge Baer is, at least with respect to this case, extremely awesome.

That's her summary; it's followed by a much longer discussion, well worth reading directly. I think it's worth quoting this from introductory material to the main discussion ("MSJ" means "motion for summary judgment"):

> [I]t has more recently become pretty common to make MSJ's in copyright cases (thanks to DMCA takedowns and Righthaven, basically.) So now, it's pretty common for both sides to file these motions (as they did in this case), which means they're both arguing that their own arguments are a slam-dunk. When both sides do have reasonably good arguments, the court usually denies both MSJs, and proceeds further with the case. But *winning on summary judgment* means *the court* ***agrees*** *your arguments are a slam-dunk*. It's a very good place to be; appeals of decisions on MSJ are often a significantly harder process than appeals from a regular judgment. As James Grimmelmann said, this opinion "makes the case seem so lopsided that it makes the appeal into an uphill battle."

And the last paragraph, because Sims is making such a good point: for fair use to be useful, we need cases where it's actually used.

> I am intensely grateful to the folks at the HathiTrust who made the initial decisions to participate in these projects, knowing there was likely to be legal objection, and to fight the good fight (now, and possibly in the future) with this case. Too often, users with high, good, socially- and legally-valued purposes make the choice not to engage in a use because it is "too risky" to rely on fair use. Every time that happens, fair use shrinks and becomes more brittle. It does take resources to make a stand, and not every individual or institution can take these risks – but HathiTrust's decisions to take them on benefit all of us in libraries, and every user around the world. Copyright exists (at least in U.S. law) to "promote the progress of science and useful arts" – today's decision is a big win for fair use, and for progress!

The October 2012 decision was recognized as deeply important, finding broadly for HathiTrust and with fair use as a primary basis, and I seem to have tagged more than a dozen items from October 10-12 alone, with several more later in the month. Some of them follow.

HathiTrust Wins

James Grimmelmann on October 10, 2012 at *The Laboratorium*, and he starts by calling it "a near-complete victory for HathiTrust and its print-disabled codefendants." He says the opinion doesn't make it seem like a close case. He closes:

> [T]his opinion together with the Georgia State e-reserve opinion and the UCLA streaming-video opinion strike me as a real trend—universities making internal technological uses of copyrighted works are doing quite well in court of late. Something significant in judicial attitudes towards copyright, computers, and education has clicked into place of late.

A concise post (read the whole thing: shouldn't take more than a minute or so) followed by 89 comments, not always so concise. Unfortunately, most of them are from The Usual Suspects, who seem to become more mean-spirited with each round. (Actually, one non-US Usual Suspect comes off as a troll more than anything else, and one could almost suspect that Frances Grimble is a Grinch-like fantasy created by librarians to serve as a straw woman. But maybe not. It appears that Grimble despises libraries and regards copyright as a straightforward property right, which it never has been.)

A big win for fair use and libraries

Kevin Smith commented on October 11, 2012 at *Scholarly Communications @ Duke*, coupling this decision with the July decision in the GSU case (finding that most excerpts in the case were fair use) and one I haven't covered at all, the second dismissal of a lawsuit against UCLA over digital streamed video.

After noting some secondary findings in the decision, Smith comments on Judge Harold Baer's four-factor analysis regarding fair use and quotes Baer's conclusion, which was later cited in the Google Books case:

> I cannot imagine a definition of fair used that would not encompass the transformative uses made by the defendants and would require that I terminate this invaluable contribution to the progress of science and the cultivation of the arts that at the same time effectuates the ideals of the ADA.

That's Judge Baer, not Kevin Smith, but Smith is applauding it. He concludes:

> So overall this is a comprehensive win for the libraries and for the important public interest that they serve.
>
> This opinion follows a clear line of reasoning in fair use cases over the past three decades, and it applies that reasoning squarely to library services. I have bemoaned these lawsuits in the past, but I have to admit that I am beginning to feel grateful for them. The string of opinions that is now taking shape ought to give librarians a great deal more confidence when they are making reasonable applications of fair use. Where once I feared a chilling effect, I am now sensing a warming glow.

Desultory comments on a Pyrrhic lawsuit

The Library Loon offered a few well-chosen words on October 11, 2012 at *Gavia Libraria*, pointing to James Grimmelmann's summary as well. The Loon notes that the publishing industry's "addiction to shooting itself in the foot" sometimes misses: "missed foot shots sometimes lodge directly in vital organs."

I like this paragraph:

> Perhaps "*copyright is not your gravy train*" would be a suitable mantra for authors and publishers considering stupid legal actions (and the Loon is sorry, but several of the arguments from the Guild were just plain *stupid*). The Loon almost hates to dissuade stupid legal actions, though, when the results so clearly benefit the public good! Oh, and libraries too, of course.

There's more—including the Loon's recognition that HathiTrust's initial handling of the orphan works process was "a seriously (and wholly evitably) stupid play"—they made such a bad choice of initial "orphan" candidates that it handed Authors Guild a club to beat them with.

Court Hands Huge Victory to Universities' Digitization Efforts

Rebecca J. Rosen on October 11, 2012 at *The Atlantic*, with the tease "Universities can proceed with their efforts to scan books, not just because of the ability to search, but because of the huge benefits to blind students."

I include this partly because it's written for a different audience from much of what I cite, partly because—in a relatively short piece that summarizes the lawsuit and comments on the main findings—Rosen does include a few nicely-put notes. For example, her take on Judge Baer's finding that digitization for the purpose of searching and text mining is a transformative use: "Just because the digitization process does not add anything "new" does not mean the work has not been transformed. Purchasing more copies of the books -- even infinity copies -- would not make search possible."

Then there's this:

> Animating Judge Baer's opinion throughout is a question that, somehow, tends to get a bit overlooked in the constant legal back and forth about copyright, and that is: What is the point of all this copyright anyway? He quotes another legal decision from earlier this year, which itself quotes a 1998 circuit-court decision: "The ultimate focus is the goal of copyright itself, whether 'promoting the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it."

Of course, if you hold that the copyright is simply a property right, then this is all nonsense—but also the Constitution and the law.

Judge Rules Against Authors Guild in HathiTrust Lawsuit

This time it's from "the other side"—Victoria Strauss on October 12, 2012 at *Writer Beware*. Strauss briefly summarizes the suit, points to a summary of the finding, and points to Grimmelmann's discussion.

After quoting Grimmelmann's comment that "This seems like an appropriate time for the Authors Guild to take stock of the litigation, ask what it's accomplished for authors, and consider what the consequences of pressing on would be"—not only for the HathiTrust suit but for the Google Books suit—we get the predictable Authors Guild response: it disagreed with "nearly every aspect of the court's ruling." Strauss provides three full paragraphs of quotations

from AG's statement, mostly having to do with the orphan works aspects and ending with this:

> "The so-called orphan works program was quickly shown to be a haphazard mess, prompting Michigan to suspend it," said Paul Aiken, the Guild's executive director. "But the temptation to find reasons to release these digitized books clearly remains strong, and the university has consistently pledged to reinstate the orphan works program. The court's decision leaves authors around the world at risk of having their literary works distributed without legal authority or oversight."

I won't comment on that, except possibly to note that this court and others have pretty much consistently said that you can't win a suit based on potential harm or on something that might some day occur. (I wrote "can't sue" there—but as has been shown repeatedly, you *can* sue for damn near anything and with little or no basis; you just can't win—and you might wind up liable for a few million dollars in legal fees.)

A couple dozen comments, including from the eternal Grimble, who's now busily associating Grimmelmann with Microsoft, "which has a keen interest in using copyrighted works in search engine works." I cannot for the life of me figure out why that's a bad thing, but that's me. Then again, in another comment it appears that she's now extended her hatred beyond libraries:

> I started writing how-to materials because I wanted to help people. Now I hate my readers and I don't want to do a damned thing for them. There are jobs I can get (and have held in the past) where I will actually be paid a fair living and given respect for my skills.

Isn't it a shame that book publishing (e- and otherwise) has disappeared, leaving authors with no ways to earn a living? Except that *it hasn't happened* and doesn't seem likely to. Unlike the music "industry" (at this point, I think the scare quotes are warranted), book publishing is doing just fine, and authors *who write things people want to read* seem to be making livings at it. I would suggest that, once a writer has decided that she hates libraries and hates readers, she really should go get one of those other jobs. Early on while putting this together, I had some mild respect for her perspective, even if it struck me as wrong; by now, I don't.

I think that's it for October 10-12 (some items had gone 404, some didn't seem to offer new insights); let's see what the rest of 2012 had to say.

Why Are Some Publishers So Wrong About Fair Use?

Kevin Smith on October 18, 2012, but in a different venue (*Library Journal*'s "Peer to Peer Review" column) and with an intriguing question.

He notes the GSU situation (which was at best a "limited win for libraries") and the much more positive HathiTrust decision, then gets to the question:

> All this is a hopeful sign, but it is worth asking where things went so wrong. Why are we in this situation in the first place, where academic publishers are suing libraries – their own customers – over using academic publications for teaching? One answer, cynical but probably partially correct, is that this is a business ploy, an especially aggressive market technique on behalf of rights holders and, especially, the Copyright Clearance Center, which is trying to drive business towards its blanket academic campus license. But I think there is another, more fundamental problem, one which lies behind both the GSU case and the Authors Guild suit against HathiTrust.

But he looks a little more deeply: Yes, "plaintiff publishers" fail to understand the place of fair use—but "The root issue is a failure to understand what copyright is for."

> What has developed in the content industries is a sense that copyright exists to support their businesses, so any new way they find to extract a little extra money from the rights they hold should be endorsed and protected by the courts. If you start from that premise, it makes sense to sue libraries for providing digital copies to blind people and professors for giving students access to short excerpts from a scholarly book because you believe you are acting from within the core purpose of copyright. But the premise is wrong.

Since this is a nicely written column and protected by copyright, I'll leave the remainder for your direct reading—noting that, as you'd expect, Smith works from the Constitutional basis for copyright. He closes with this:

> One of the great things about Judge Baer's opinion in the HathiTrust case is that he clearly understood this situation. His ruling affirms the fundamental role of libraries in promoting the public good, and of copyright both in setting the boundaries and in defining the opportunities for that work. What we do in libraries is key to effectuating the purpose of copyright in the U.S., and fair use is there to help us provide a public service, the value of which has been recognized since the founding of our Republic.

Scrivener's Error: Warped Weft

This long, *long* post by C. E. Petit "originally September 2011 and later" may actually have "Suing HathiTrust" as a title, since the blog is *Scrivener's Error.*

Did I mention that it's long? Also full of salty language and apparent legal expertise. Petit doesn't think the HathiTrust suit should have been allowed

in the first place (I think). I find the post overwhelming, so can't really say much more than "you may find this interesting or enlightening." (Oddly, when Petit notes a bunch of things that Judge Baer did *not* hold but which Petit says he's seen in "bloviation," I haven't seen *any* of those things claimed—but then, I haven't looked at all the commentaries.)

But I will say one thing. Petit [sic]s a mention of "Authors Guild" in quoting the AG press release disagreeing with the ruling—and Petit consistently calls it Authors' Guild.

Which is fine, except that, based on its own website, the name of the organization is The Authors Guild. No apostrophe. The quoted material has it right (which, you know, you *might expect in its own press release*); Petit has it wrong. By and large, organizations get to choose not only their own names but the orthography of those names. (Of course the "The" goes away in most discussions—but based on the mini-history of AG on its site, it began as the Authors League of America and became The Authors Guild—with no apostrophe in either case.

I wouldn't even mention this, but if you're going to [sic] somebody, you should check on it first.

November 2012 and Beyond

Why November 2012? Because on November 8, 2012, the Authors Guild appealed the verdict. Gary Price reports on this on November 9, 2012 at *Library Journal*'s "InfoDocket" in "Authors Guild Appeals HathiTrust Decision, Library Copyright Alliance Issues Statement."

The piece includes a Scribd insert showing the appeal itself (very short, no details) and offering a quote from LCA (which is basically ACRL, ALA and ARL). Key paragraph:

> We are deeply disappointed by the Authors Guild's decision to appeal Judge Baer's landmark opinion acknowledging the legality, and the extraordinary social value, of the HathiTrust Digital Library. Libraries have a moral and a legal obligation to provide the broadest possible access to knowledge for all of our users, and the HathiTrust and its partners have assembled an invaluable digital resource that will ensure for the first time that library print collections can be made available on equitable terms to our print-disabled users. The database also facilitates preservation and cutting-edge scholarship, all with no harm to authors or publishers. As we predicted, Judge Baer did not look kindly on the Guild's shortsighted and ill-conceived lawsuit, saying, "I cannot imagine a definition of fair use that…would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA." If there is an upside to this misguided appeal, it is that the Second Circuit will now have the opportunity to affirm that powerful insight.

The Library Copyright Alliance may be deeply disappointed, but I'm fairly certain they weren't even slightly surprised.

Fair use? Experts comment on universities' digital books project ruling

A somewhat unusual source: Melissa Sachs in a November 2, 2012 item at Thomson Reuters' *The Knowledge Effect*.

> We asked practicing attorney experts what they think is significant about the judge's analysis and whether the decision was expected. We also asked about the impact of this decision on future cases. Click past the jump to read a few of the responses we received. Do you agree or disagree?

Seven responses in the post (no comments), from seven lawyers with seven different perspectives. Excerpting briefly, Mary Ann L. Wymore thinks that Judge Baer's ruling "may well give new life to arguments unsuccessfully advanced by defendants in recent years in a line of cases under the Digital Millennium Copyright Act involving movie studios and the DVD Copy Control Association,"

Jeffrey Loop is intrigued by the second transformative use, facilitating access by print-disabled individuals. "What I find unusual about this is that purpose served by the supposedly transformative copies is the precisely the same purpose served by the original work: conveying to the reader the ideas and information contained in the original work, albeit via a different medium (text-to-speech or text-to-tactile readers). It appears then the court is suggesting that at least under certain circumstances merely altering the medium by which a work is conveyed to a reader or consumer is sufficiently transformative to constitute fair use."

Mary Minow focused on library aspects: "The decision provides a strong favorable opinion for libraries and library users that make or wish to make accessible digital copies to patrons with print disabilities. The creation of a digital index to a massive multi-million volume collection of books was ruled to be Fair Use. This is enormously useful to scholars, students and the general information-seeking public."

Maurice Ross isn't as thrilled: While he says "no one can quarrel" with the finding that digitization for purposes of providing access of works to blind per-

sons is fair use, he considers the finding that "digitization for purposes of scanning" (?) is transformative "deeply troubling" because he doesn't think it creates something new—and he believes the associational finding is flat-out incorrect. "In short, I believe the Author's Guild has substantial grounds for appeal." (I didn't [sic] Author's Guild because I don't know whether the error is in Ross's statement or is an editorial error.)

Hillel Parness focuses on *differences* between the Google Books case and the HathiTrust case, which seem to boil down to Google being a commercial enterprise. (Turns out that didn't much matter.)

Glen Pudelka also tries to differentiate Google from HathiTrust and stresses that fair use is case-specific, so this case may not set a trend.

Dave Bennett thinks "the court reached the proper decision" and offers this interesting comment:

> "This case reflects the tension that exists between the interests of copyright owners and the public at large. Overprotection of copyright may be as harmful to the public interest as under protection of copyright is to copyright owners. The problem is finding the correct balance. There is a strong public interest in a large-scale searchable database. A searchable database enables researchers, scholars, scientists, engineers, and others to find works relevant to their interests. In my view, a large-scale searchable database would likely provide more benefit than harm to copyright owners by enabling potential purchasers to identify the copyrighted works in which they have interest. The lawsuit appears to be a miscalculation and based on the short-sighted goal of increasing licensing revenues at the expense of long-term sales."

The post explicitly ends "What do you think?"—and, as noted, there are no comments.

HathiTrust Appeal: The Authors Guild's Opening Brief

James Grimmelmann on February 27, 2013 at *The Laboratorium*, with the necessary next step in an appeal: the brief. Unfortunately, the link doesn't work, but his summary may be all you need.

He finds it interesting that the brief compares Google's digitization to "an exercise in eminent domain" and isn't too surprised that the brief talks a lot about sovereign immunity (state agencies can't be sued for damages in federal court—a major reason the HathiTrust lawsuit asks for injunctive relief rather than damages).

> • The brief does an effective job portraying HathiTrust's dancing around the Orphan Works Project as a whipsaw. The libraries announced the Orphan Works Project, then suspended it, and say that if they relaunch it, then and only then would it be ripe for adjudication. The brief points out that the libraries could also re-suspend the project if challenged a second time, perpetually evading review. In one sense, this isn't a problem for copyright holders: if the project never actually launches, nothing has been lost. But the brief calls this "an expensive game of 'Whac-a-Mole,'" in an effective turn of phrase that shows why it's unfair to deny the authors their ruling on the Orphan Works Project as it was announced and almost implemented. If the libraries want to avoid that ruling, they really ought to be prepared to make a stronger commitment that the project will not come back in a similar form.

Hard to argue with that. On the other hand, Authors Guild's notion that having scans of the book connected to a campus network *inherently* represents a security risk is, well, "spectacularly bad."

Since the assertion that Section 108 *precludes* Section 107 (fair use), an argument so "spectacularly bad" that you can only make it by explicitly ignoring Section 108 itself, didn't work, now the plaintiffs argue that going beyond Section 108 "should weigh heavily against a finding of fair use."

> The plaintiffs' brief tries to disaggregate the different uses for the scans: even if searching is a fair use, there's no need to retain numerous electronic copies of the full texts of the works. Judge Baer's opinion anticipated this particular objection: "Not to mention that it would be a tremendous waste of resources to destroy the electronic copies once they had been made for search purposes, both from the perspective of the provision of access for print-disabled individuals and from the perspective of protecting fragile paper works from future deterioration." The plaintiffs respond that they don't want to destroy the digital files, "but rather to have them taken offline and stored under lock and key."

Plaintiffs directly challenge both Judge Baer's finding that the digital collection was transformative and that it had no market impact. Grimmelmann finds the first argument "plausible" but the other "doesn't do much for me."

There's a little more—and overall, it causes Grimmelmann to adjust "upwards my estimate of the likelihood that the Second Circuit will affirm."

One of the comments is so curious that I feel compelled to quote most of it; it's from "john walker":

> I think a better way of putting it is: *you can only read so many books at a time* therefore a very big increase in the supply of lots of free unlicensed books must, to some degree, negatively impact on sales, unless

> there is a matching increase in total number of readers of books (or people who buy books they haven't the time to read)

Huh. Quite apart from recent findings that, in fact, ebook buyers may very well buy books they don't read, this seems to suppose that books are fungible: that any old book will do. In which case, Project Gutenberg and the portion of Google Books that's in the public domain should surely have destroyed publishing completely by now; I surely won't have time in my lifetime to read all the books that are legally and freely available to me, and neither will anybody else.

Academic Authors: Guild Does Not Speak for Us

This one's a news report by Meredith Schwartz on June 13, 2013 at *Library Journal*—and the link to the brief itself *does* work (at this writing, at least).

> The brief distinguished their interest from that of the Guild's members and pointed out that they are not only different, but diametrically opposed. "A 'win' for the Authors Guild would be a 'loss' for academic authors," the brief stated bluntly. Academic authors, it argued, benefit from the Trust, "both because it makes our books more accessible to the public than ever before and because we use HathiTrust in conducting our own research."
>
> The authors also pointed out that their works "are likely more typical of those in the HathiTrust corpus than works of the Authors Guild and its members," since much of the Trust's holdings came from three partners' participation in the Google Books project, and of those scans, 93 percent were nonfiction and 78 percent of the nonfiction was aimed at a scholarly audience.
>
> The authors therefore asked the court to limit the Guild's standing to the copyrights it actually holds (about 116, the brief estimates) rather than allowing its broad theory of associational standing to cover the trust's 7.3 million potentially in-copyright books.

There's more to Schwartz's report, including a link to a Library Copyright Alliance brief on the issue.

HathiTrust Doubles DPLA Collection with More Than Three Million Books

This news report by Meredith Schwartz on June 20, 2013 at *Library Journal* isn't directly related to the HathiTrust suit, but I'm including it since this essay is catching up with HathiTrust.

The heart of the story is in the headline—HathiTrust providing metadata records to DPLA for more than three million volumes that are in the public domain. The rest is details.

Of fences and defenses

I particularly like this Kevin Smith piece on June 20, 2013 at *Scholarly Communications @ Duke* because of what it's saying (based on one of the briefs filed in Authors Guild's appeal):

> It is very common to hear people say, in a discussion of copyright, that fair use is "an affirmative defense." One of the amicus briefs filed in the Authors Guild's appeal of the favorable fair use decision in their lawsuit against the HathiTrust, however, puts that common assertion into question and raises an argument worth considering. The brief on behalf of the HathiTrust that was filed by a group of universities (Illinois, Michigan State, Minnesota, Nebraska, Northwestern, Penn State and Purdue) argues at some length that fair use is not and was not intended as an affirmative defense but is better viewed as a positive limitation on the rights held by a copyright owner. They argue, in short, that fair use is not so much a defense as it is a fence — a boundary that courts have built to prevent the exclusive rights in copyright from expanding too far. (Hat tip to Jack Bernard of the University of Michigan, who pointed this argument out to me but is not, of course, responsible for what I make of it).

Smith provides some first-rate explanation and discussion of why this matters. An affirmative defense basically says "even if I did exactly what the plaintiff says I did, I should be excused because…"—and where copyright's involved, it's basically saying "sure, I infringed copyright, but it's OK because fair use."

> The "public relations" problem with this position is that talk about affirmative defense is often used to frighten potential users of copyrighted works away from their proposed use by telling them that if the copyright holder objects, they will have to "prove" fair use, which is difficult and expensive. The legal problem with maintaining that fair use is an affirmative defense is found in that word "prove" — the HathiTrust amici maintain that, because fair use is NOT an affirmative defense, the burden of proof shifts to the plaintiff, who should be required to prove that the use in question violates their rights.
>
> Burden of proof is very important in most litigation. We all know that in a criminal trial, it is the state which must prove "beyond a reasonable doubt" that the defendant committed the offense. In a copyright infringement case, which is usually a civil trial rather than a criminal one, the standard of proof is lower — usually infringement must be proved by "a preponderance of the evidence."

This brief would turn that around:

> [T]he HathiTrust amici argue that that is not how fair use works. They suggest, based on language in

> the statute, that fair use is about establishing the plaintiff's right in the first place, so that the burden falls on that plaintiff to show ***that they have any right*** to prevent the particular use.

Based on the text of the copyright law itself, this seems reasonable: it says that fair use *is not an infringement*. And it could encourage people to be a little bolder about fair use. Smith closes:

> If we understand fair use as a positive right that creates a boundary limiting the control of rights holders, we ought to be less afraid of exercising it. After all, we do not fear to walk on a public sidewalk just because some landowner might scream "trespass;" we recognize that rights over land have boundaries and do not shirk from exercising our positive right to use public land. The argument in this amicus brief points us to a similar confidence when exercising our fair use right. While we should respect the legitimate rights held by an intellectual property holder, we should not let attempts to expand those rights beyond the boundaries set by Congress dissuade us from making fair use of materials under this public right that is equally a defining part of copyright.

I wouldn't bother with the comments.

Authors Guild v. HathiTrust — Libraries 3 : Authors Guild 0

Jumping forward a full year—big lawsuits take a long time—we get this Matthew Sag piece on June 10, 2014 at his eponymous blog, including a link to the Second Circuit Court of Appeals' decision on the appeal.

I'm not sure the post title is quite right. Charitably, you could call it "Libraries 3: Authors Guild 0.5." One issue—whether copying books for preservation represents an infringement—was remanded back to the lower court.

But fair use applies for digitizing to make books available for vision-impaired users, fair use applies for digitizing to create a search engine or support tetmining (probably), and the plaintiffs lack associational standard.

Sag calls it "a great win for humanity and the Digital Humanities respectively."

Google Books Round 86: Libraries Win Yet Again

James Grimmelmann on June 10, 2014 at *The Laboratorium*, also commenting on the decision. Noting that Judge Baer offered a "positively exuberant opinion," he says:

> The Second Circuit's opinion drops the grand rhetoric, but otherwise the bottom line is basically the same: mass digitization to make a search engine is fair use, and so is giving digital copies to the print-disabled. The opinion on appeal is sober, conservative, and to the point; it is the work of a court that does not think this is a hard case.

Grimmelmann offers a fairly detailed precis of the decision, and notes that the lack of novelty "sends a strong signal that these uses are now clearly established."

> What next? The Authors Guild could ask for rehearing, or petition for certiorari. I personally don't like those odds, but I have never really understood the Guild's decision-making process around this case, so who knows? The opinion sends a strong signal that the case against Google, also on appeal to the Second Circuit, is also likely to go in favor of scanning. At the very least, if the two cases are to be distinguished, it will have to be on narrow grounds: that Google makes commercial uses or shows snippets. Even that would provide clear guidance for digitizers. The holding may also cast a shadow on other search, education, and access cases, for example the Georgia State e-reserves case.

What Does the HathiTrust Decision Mean For Libraries?

Always good to hear from Jonathan Band, who apparently wrote this seven-page article (PDF) for the Library Copyright Alliance on July 7, 2014. Band's focus is on implications going forward for libraries, beyond the specific facts of the case.

He sees the broadest implication in a footnote: to wit, putting to rest the nonsensical idea that Section 108 limits the availability of fair use by libraries, *despite the clear wording of Section 108*. "[T]he decision holds unambiguously that libraries may take full advantage of the fair use right."

There's a lot more, of course, but you should read it in the original.

Closing the Drama

Now we get to 2015 and the presumably final outcome of this extended drama.

Statement on the Resolution of Authors Guild v HathiTrust

This one's from HathiTrust, on January 8, 2015, and since it's a press release I'll quote the whole thing:

> On January 6, the remaining plaintiffs in Authors Guild v HathiTrust resolved their dispute with HathiTrust institutions[1]. Judge Naomi Buchwald has now dismissed the remanded issues in the case with prejudice, bringing this case to its conclusion. In resolving this case, the parties have stipulated that the

> defendants have and will continue to follow the procedures of Section 108(c) of the Copyright Act when making "replacement copies" of copyrighted works.
>
> During the course of this lawsuit, which began in the fall of 2011, federal courts have cogently and consistently ruled that the services we provide—including full-text search and access for users who have print disabilities—are lawful, non-infringing uses that fall well within the definition of fair use. These rulings have reminded us all that copyright law promotes the progress of knowledge and discovery by balancing the rights of the public and copyright holders. We are sincerely grateful to the many organizations and individuals who have expressed public support for our work, and to each of the universities named as defendants in the suit for their unwavering commitment to the principles at stake.
>
> HathiTrust has always acted with the intention and conviction that our activities are lawful and benefit the public good. Since 2008 our membership has grown to more than 100 libraries, and our collections now include more than 13 million volumes. We have launched major initiatives to promote access to government information, to transform how libraries manage print collections, and to support large-scale computational research on our collections. We now turn our attention full time to these initiatives and others that will continue to transform how libraries collect, manage, preserve, and provide access to the record of human knowledge.
>
> 1. The University of Michigan, Indiana University, the University of California, the University of Wisconsin, and Cornell University.

There's also a link to the final district court filing.

Authors Guild Gives Up Trying To Sue Libraries For Digitally Scanning Book Collection

Mike Masnick on January 9, 2015 at *techdirt*, in a brief article that embeds the filing from the Authors Guild (which may be a joint filing).

> The Authors Guild is basically giving up in *this* case, saying that should the libraries change their practices, it may want to revisit the issue. But for now, it's giving up the case while "reserving" its position.

He notes that Authors Guild had not yet given up on theGoogle Books case; that is, of course, a separate article. I do note his close: "[I]t's likely that the Authors Guild recognizes that if it's going to take one of these cases to the Supreme Court, it has a better shot against Google directly, rather than a bunch of university libraries..."

5 Million Public Domain Ebooks in HathiTrust: What Does This Mean?

Let's finish with another item that really isn't related to the lawsuits at all, since there isn't any valid copyright issue in public domain works. Rick Anderson posted this on April 7, 2015 at *the scholarly kitchen*, noting that earlier in April HathiTrust's public domain collection reached five million volumes.

It's a good, thoughtful piece, and worth reading—with the caveat, explored in the comments, that these are *not* five million books: multiple serial volumes count as separate volumes. But it's still a lot.

In Closing

It's been a good three years for fair use. It's been a bad three years for The Authors Guild as a litigious group. One would think the group might take that into consideration in planning future activities; surely there are better ways to promote the interests of authors than by fighting against expanded research capabilities and academic libraries?

Then there's orphan works, where there has been no progress and apparently a fairly grotesque proposal from the Copyright Office. But that's another essay for another time.

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