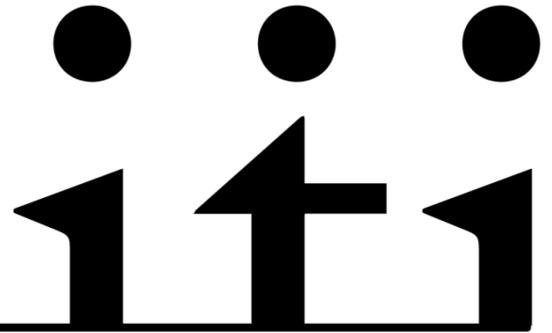


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An Insight into the Emerging Trends in Digital Copyright Law

BHAVIK SHUKLA

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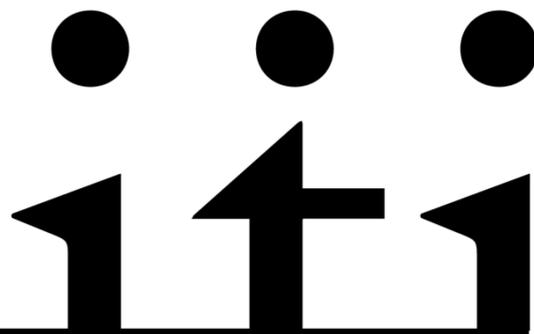
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The Google Books Case

An Insight into the Emerging Trends in Digital Copyright Law¹

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Copyright law across the globe has been severely impacted due to the emergence and the widespread application of the Internet in almost all media.

The law in its traditional form has tried to adapt and equip itself with the challenges posed by such contemporary technologies but success still seems far away. This paper seeks to identify the emerging trends in copyright law through the lens of the Google Books Case, in order to ascertain the major changes, which the Internet has summoned.

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I. Introduction

Copyright law serves the basic purpose of providing specific exclusive economic rights to the owner. It includes for example, exclusive rights to reproduce, publish, publicly perform, broadcast or assign the work.³ It is also true, that another purpose of copyright law is to seek promotion of public interest by increasing general public access to works.⁴ However, it is crucial that balance between the protection of the authors' works and the right of public to access

¹ This paper is based on a work written as part of the lecture *Copyright in the Digital Age*, held by Privatdozent Dr. iur. Mira Burri in the spring semester of 2018 at the University of Lucerne.

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the spring semester of 2018 as part of the partnership programme.

³ Section 14, Indian Copyright Act, 1957; 17 U.S.C. § 106.

⁴ THAMPAPILLAI DILAN J., *The Balancing Act of Copyright*, Cornell law Library, January 1, 2003, at p. 4; *Penguin Books Ltd. v. India Book Distributors and Ors.*, 26 DLT 316 (1984).

copyrighted works needs to be struck.⁵ By facilitating the reproduction and distribution of authors' works without prior permission, digitization and technological advancements have strongly challenged the attainment of balance between the protection of authors' works and the right of public to access copyrighted works.⁶

The indiscriminate reproduction and distribution of works brought about by the invention and widespread use of radio, television, VCRs and Internet are all indicative of this phenomenon.⁷ The advent of the Internet and its growth brought forth applications which allowed users to stream, download and share legitimated material – including electronic versions of books.⁸ Shortly after, the Internet also became a medium where copyrighted material could be distributed through certain applications, without seeking the authors' permissions. Such acts are certainly prejudicial to the interests of the authors⁹ and are a consequence of the emerging technology, a premise, which shall be further analysed in view of the *Authors Guild, Inc. v. Google, Inc.* case (II.).

On the basis of such analysis, this article will seek to delve into the existing digital copyright laws in the United States of America and India to allude to the emerging trends in digital copyright law (III.). The concluding remarks of the author will summarize the findings of this article (IV.).

II. Analysis of *Authors Guild, Inc. v. Google, Inc.*

The Google Books Case serves as an important landmark in explaining the

consequences of a situation, which may be equated to the *crisis of the law*.

The factual matrix of the case arose from Google's decision to digitize all books available worldwide, in order to increase their accessibility. To do so, it introduced the Google Books Project, which claims to be "the world's most comprehensive index of full-text books".¹⁰ The most significant part of this Project was to scan books under the Library Project and the Partner Project. Under the former Project, Google got in touch with libraries to scan the repository of their physical books and subsequently promised to provide the libraries with the digitized versions of those books.¹¹ While under the Partner Project, the authors would themselves permit Google to scan books written by them.¹² Thus, began Google's Project of indiscriminately scanning entire books and storing their backup copies.

Such copying of texts without seeking the permission of authors infuriated them as well as the publishers. The Authors Guild, pointing out the "massive copyright infringement" by Google in scanning books under copyrights, without authors' permissions, filed a first suit. Subsequently, there was a second suit filed by the publishers. There were two attempts to settle the cases that were dismissed by the judges twice in 2008 and 2009, claiming that they were unfair, inadequate and unreasonable.¹³ After the rejection of the settlement cases,

⁵ *Donaldson v. Beckett* 2 Brown's Parl. Cases (1774); *Gramophone Co. of India Limited v. Birendra Bahadur Pandey*, 2 SCC 534 (1984); *The Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (2015), at p. 12.

⁶ JAMES T.C., *Indian Copyright Law and Digital Technologies*, J. of Intell. Prop. Rights 425 (2002).

⁷ POLLACK WENDY, *Tuning In, The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 Fordham Law Rev. 2445 (2000).

⁸ According to KLEIN BETHANY/MOSS GILES/LEE EDWARDS, *Understanding Copyright: Intellectual Property in the Digital Age*, 1. ed., United Kingdom 2015.

⁹ HUGENHOLTZ P. BERNDT, *The Future of Copyright in a Digital Environment*, 1996.

¹⁰ *Google Books*.

¹¹ MULLER LANGER FRANK/SCHUEFEN MARC, *The Google Book search settlement, A law and economics analysis*, 8(1) Rev. of Eco. Research on Copyright Issues 9 (2011).

¹² *Id.*, at p. 9.

¹³ Settlement Agreement, *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (October 28,

the Court entered a summary judgment for the dismissal of the Google Books Case.¹⁴

The plaintiffs filed an appeal to the aforementioned dismissal. This appeal was finally decided by the Court of Appeals for the Second Circuit, which upheld the summary judgment of the New York District Court¹⁵ after analysing the four factors of the fair use doctrine. Before substantially dealing with the four requirements to constitute a legal fair use, it is important to note that the exception of fair use seeks to exculpate a person from infringing the rights of others if the use of copyrighted work is for the purpose of criticism, comment, news reporting, teaching, scholarship or research.¹⁶ However, such exemption from liability is contingent on the satisfaction of the following four factors.

A. Purpose and character of the use

An analysis of the purpose and character of the use requires the determination of whether the material has been used to create something new or is merely a verbatim copy of the copyrighted text.¹⁷ In relation to this aspect of the test, the Court stated that the digitization of books expanded public knowledge without offering substitutes to the books. The copying of the books' entire texts enabled Google to provide exact results for a query by a searcher, through highlighting a particular word or phrase in the book.¹⁸ Because of this sort of a search function, the Court considered that Google's use of the books was transformative in nature. Moreover, the Court also opined that the use of snippets by Google was randomized and could not be construed to grant the reader all the information that was sought on a particular topic.¹⁹ In order to counter

the objection of Google's profit motive raised by the Appellants, the Court stated that commercial motivation was not enough to outweigh a convincing transformative purpose of a work.²⁰ The Court considered the search and snippet functions, which enables a researcher to enter a specific search term and obtain snippets of the book containing such results, as convincing transformative uses. Thus, the Court confirmed that Google's use of the books was transformative.

B. Nature of the copyrighted work

In respect of the nature of the copyrighted work, the Court noted that this factor has historically not played an influential part in the determination of fair use.²¹ Furthermore, the Court opined that the "nature of the copyrighted work" could not be viewed in isolation of the first factor. As the purpose and character of use had been satisfied by the transformative nature of the work, the Court held that, even the second factor of fair use had been fulfilled.

C. Amount and substantiality of the portion used in relation to the copyrighted work

The purpose of the amount and substantiality of the portion used in relation to the copyrighted work is to ensure that the work created on the basis of the original does not serve as a substitute to the original. Because of this factor, fair use is more likely when small amounts of the text are copied.²² The Court considered that Google had copied entire versions of the books for their digital library project and stated that any lesser copying would defeat the purpose of a library. In addition, the Court noted that the

2008); Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. November 13, 2009).

¹⁴ [The Authors Guild Inc. & Betty Miles, Joseph Goulden and Jim Bouton v. Google Inc.](#), No. 05 CV 8136 (DC) (2013), at para. 87.

¹⁵ [The Authors Guild Inc. & Betty Miles, Joseph Goulden and Jim Bouton v. Google Inc.](#), 804 F.3d 202 (2015), at p. 2.

¹⁶ 17 U.S.C. § 107 (2016).

¹⁷ [Campbell v. Acuff-Rose Music, Inc.](#), 510 US 569 (1994), at p. 1169.

¹⁸ Cf. supra note 15, at p. 22.

¹⁹ Cf. supra note 15, at p. 23.

²⁰ Cf. supra note 15, at p. 25.

²¹ Cf. supra note 15, at p. 27.

²² [Harper & Row v. Nation Enterprises](#), 471 US 539 (1985), at pp. 564–565.

real contention was not that related to the copying of books, but making them available to the general population.²³ In calculating the total volume of a book made available, the Court concluded that the texts of such books were scattered in snippets and this revelation of scattered text could not be considered substantial.²⁴

D. Effect of the use upon the works' potential market

The effect of use upon the works' potential market as the last factor of fair use involves examining the commercial motivation of the party claiming fair use. The Court held that the mere display of snippets could not be sufficient to present a substitute to the original work²⁵, as the snippets were disjointed and incomplete in nature. The Court also noted that this factor is not satisfied due to the fact that the information revealed was merely indicative of what the books contained and did not lay down all the ideas of the authors.

E. Critique of the Google Books Case

This decision is imperative from the view of public interest, wherein the Court emphasized that the "ultimate goal of copyright is to expand public knowledge and understanding".²⁶ However, the Court's ruling disregarded authors' rights by allowing Google to scan and display copyrighted books, without seeking the authors' permissions. Secondly, the risks arising out of storing the back-up copies of books are significantly high in light of programs for circumvention of Technology Protection Measures being developed swiftly in recent times. The Court conveniently dismissed this reality as "speculative". A particular focus has to be given to the aforementioned points as it indicates the callousness of the law enforcing agency in allowing the scanning of books without the consent of its authors. Moreover, such scanning occurred on a scale unparalleled with any in the past, and

at the same time ignored the presence of digital back-up copies of the books on a large scale. Through this verdict, it appeared that technology had slickly swayed the judges in its favour and, as a result, affected the authors adversely.

It is evident from the examination of the four factors of fair use by the Court of Appeals for the Second Circuit that the mould of the factors of fair use was itself designed to fit this case – and not the other way around. From the ruling, it appears that the Court focused more on the "transformative" nature of Google Books, which the author considers misleading as it draws away from the analysis of Google's commercial motivation.

While dealing with the factor of substantiality, the Court noted that the snippets did not reveal enough to satisfy this factor.

However, if a researcher enters a query about a particular matter, he/she will be able to find all information on the same within a couple of pages with the help of Google Books. If certain pages are unavailable, the researcher can scroll down and either return to the page sought, or apply a proxy server to reveal those pages. Thus, adopting these means, a researcher can view a considerable portion of a book under query.

Ultimately, with respect to the fourth factor, the court agreed that the use of Google Books and the snippets may cause certain losses in sales to the authors but emphasized on how an average person would want to buy the book. The Court failed to consider a student or a layman researcher who specifically submits a query and derives an answer for it. In doing so, such a person obtains the information without having to pay any money for it. Thus, looking from this perspective, Google Books can serve as a substitute to the original books.

²³ Cf. supra note 15, at p. 31.

²⁴ Cf. supra note 15, at p. 33.

²⁵ Cf. supra note 15, at p. 35.

²⁶ Cf. supra note 15, at p. 12.

III. Emerging trends in digital copyright law

Having considered the Google Books Case and its subsequent impact on the right of authors, it has become imperative for the law to evolve and fit the needs of the digital societies. While some countries like the United States of America have found the right set of tools to do so, developing countries like India have recently implemented laws in this regard. So correctly speaking, the emerging trends in digital copyright law which have produced the so called *disturbance to the previous concepts and ideas of traditional copyright law* have been dealt with through the introduction of new laws in the digital age (A) and the deprivation of certain rights of the authors, examined in light of the Google Books Case (B).

A. Changes in law due to the digital age

The enquiry concerning changes in law in light of the digital age will be carried out with a developed and a developing country. The United States of America is selected in the former category due to its premier and extensive experience in implementing laws to curb digital piracy, while India represents the latter due to its growing action against digital piracy.

As for the United States of America, the journey of regulating the digital space began quite early with the Digital Millennium Copyright Act (DMCA) in 1998. The Act was introduced to curb piracy generated by illegal use of works on digital media.²⁷ The DMCA introduced measures to prevent the sale of software to circumvent copyright protected material,²⁸ sharing of files and limiting the liability of Internet Service Providers (ISPs) to take down infringing material.²⁹ The DMCA still remains seminal in the American digital copyright field.

The beginning of the Indian digital experience was more commerce-centred. The Information Technology Act of 2000 was meant to deal with the transition from a paper-based economy to one that ventured into “electronic commerce”.³⁰ With respect to digital copyright, the law got the required thrust with the Copyright Amendment Act of 2012 coming into force. One of the most important changes introduced by the Amendment Act was that libraries could create digital copies of books whose non-digital copies they possessed.³¹ In addition, the copyright law was amended to include an anti-circumvention clause,³² similar to the one in the DMCA, and a provision to prevent the unauthorized distribution, broadcast or communication of certain works by electronic means to the public.³³ The analysis of the Indian laws shows that it derives its experience from the developed jurisdictions – more than a decade after such laws were a reality in most countries.

The essential trend in digital copyright laws is that the conventional laws need to adapt to the newer surroundings. The developing countries have evolved over a period of time to assimilate uniform principles in their laws. Though the evolution in law has been protracted for the developing countries, the developments in the digital sphere have adversely affected the authors’ rights in all countries since their inception.

B. Effect of digitization on the authors’ rights

The threats to the rights of copyright holders come from the development of means to circumvent copyright protection. The emerging trend in the copyright sphere is to disregard authors’ rights, especially, the dual rights of reproduction and communication

²⁷ Steve Campbell, [What is Digital Media Copyright Act?](#), MUO, March 9, 2010.

²⁸ 17 U.S.C. § 1201.

²⁹ 17 U.S.C. § 512.

³⁰ Preamble, Information Technology Act, 2000.

³¹ Section 52(n), [Copyright Act, 1957](#).

³² Section 65A, [Copyright Act, 1957](#).

³³ Section 65B, [Copyright Act, 1957](#).

to the public. This is closely related to the Google Books Case³⁴ discussed above.

The Right of Reproduction is one of the most fundamental rights offered to the holder of a copyright, known across almost all jurisdictions. However, the digital age has brought new forms of transmission of copyrighted works.³⁵ This enables certain works to be directly copied from their medium, for example the text from a webpage, which contains copyrighted material on it. Taking a cue from the Google Books Case, the scanning of copyrighted books without permission essentially amounts to reproducing entire books. Even if it is argued that entire books are not made available to a reader, such a reader can still go through certain pages and reproduce those parts. This also happens with other digital media, including music and motion pictures when uploaded to the Internet. The notorious work of torrents is a classic example of how copies can be created digitally by downloading a file from the Internet. Such indiscriminate reproduction has put the modern copyright law into a quandary that cannot be effectively solved in spite of established laws to that effect.

The right of communication to the public is another integral right that is threatened by the novel means of the digital age.³⁶ A reference to this right is usually made in the case of digital media but seldom ever in the context of print media. However, the Google Books Case was a landmark in indicating how physical books could be communicated to the public without the author's permission. When looked at it from a digital media angle too, the right of communication to the public is severely threatened. The use of technology has made it possible for communication of works without authors' permissions. This was

explicitly conveyed by the case of *Viacom, Inc. v. YouTube, Inc.*, where unauthorized users uploaded certain videos copyrighted by Viacom on YouTube.³⁷ The same is also evident from the working of torrent sites, which provide users access to media and e-books available on the Internet.

IV. Conclusion

The aim of this article was to increase the understanding of the transition from conventional to digital based copyright. The Google Books Case showed how the ruling was extremely public interest oriented, and did not reflect the law practically. The trends of digital copyright include growth in infringement, sometimes by torrent providers and at other times by individuals. In any case, the trends are more or less circuitous in nature, where the law consistently and tirelessly tries to contain the growth of infringement, whereas the infringers continue to assail attacks on the authors' integral rights. It will require a utopian world if we are to imagine a complete disappearance of such a *crisis of the law*, at least in the copyright context.

³⁴ MATULIONYTE RITA, [10 years for Google Books and European: Copyright law lessons that the EU could learn from the USA](#), 24(1) Int'l J. of Law and Info. Tech. 52 (2016).

³⁵ HELMUT ANHEIER/ YUDHISHTIR RAJ/ ANNIE PAUL, [Cultures and Globalization: The Cultural Economy](#), 2008.

³⁶ BOON, [Copyright Norms and the Internet](#), Sing. Jnl. of Int'l and Comp. Law 85 (1998).

³⁷ [Viacom Int'l, Inc. v. YouTube, Inc.](#), 676 F. 3d 19 (2012).