

GLOBAL TRENDS IN COPYRIGHT: FAIR USE AND BEYOND

Remarks of Jon A. Baumgarten

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I want to express my appreciation to our Panel Chair, Paul Doda, and to Jose Borghino of the International Publishers Association, Emma House of the UK Publishers Association, and Jacks Thomas of the London Book Fair for inviting me to speak here today. This is particularly the case because it is a homecoming of sorts for me. I spent many years of my career as outside copyright counsel to the Association of American Publishers and a number of individual American houses, and in that capacity worked closely with the PA here and with the IPA and STM, as well as with FEP, IFFRO and other international publisher and affiliated organizations. I fondly recall a number of prior International Publishers Congresses that I participated in and attended in those days, and many lessons learned and warm friendships developed in those forums. So, thank you for the opportunity to revisit those thoughts and memories.

I am pleased to acknowledge the privilege of appearing together with WIPO Director General Francis Gurry, as for many years I had the honor and benefit of working alongside and experiencing the importance of the World Intellectual Property Organization and its critical leadership in world copyright affairs.

My purpose today is to describe, indeed to emphasize, revolutionary change -- a **clear and notable expansion** -- that has emerged in application of the fair use doctrine in the United States. This change is currently highlighted by the well-known Google Books decision of the Second Circuit Court of Appeals --- a decision that our Supreme Court is now considering whether to review --- but in some parts it is also reflected in a few earlier cases. [*Author's Note*: On April 18 the Supreme Court declined to review the decision of the Court of Appeals, leaving it as controlling precedent in at least the Federal courts of that Circuit, comprising New York, Connecticut, and Vermont.]

It is important to note for this audience that this drastic expansion of fair use in the United States is very far from a parochial concern of American publishers or American markets for world publishers. This matter is, instead, critical to all of your interests, for at least three reasons:

First – because it raises substantial questions of the United States’ compliance with its international obligations under copyright and trade treaties and agreements; and to the extent that US case law may be emulated or even looked seriously at abroad, it thus impairs the very fabric of a vibrant, multi-national copyright system. Time does not permit studied analysis here of the compatibility or incompatibility of emerging US fair use law with international standards, so for the moment I will only say that a legal regime that permits regular, concerted, systematic, commercially purposed, 100% complete, uncompensated, copying, without permission, day in-day out, of millions of copyrighted books is hardly one that seems compliant with international strictures that contemplate unauthorized reproduction only in “special cases”, in “narrowly defined circumstances”, and under conditions protective of the interests of authors and rights holders. Google and its allies commonly dismiss this issue on the theory that since the US fair use doctrine has generally been considered compatible with treaties and trade agreements, then if the Google Books project is fair use, it must also be compliant. The fatal flaw in this syllogism is that it fails to recognize this: the fair use doctrine now emerging in the United States is *fundamentally different*, in root and branch, from the doctrine as previously known and considered. It is very different, for example, from the doctrine I have understood, taught, explained to courts, congress, and international bodies, implemented, litigated, and counseled under over many decades of law practice and government service, and what I and others had viewed as treaty compliant.

A second reason for international concern with dramatically expanding fair use in the United States is the increasing attention being given by policy makers in other countries to the purported benefits of the so-called “flexible” American approach of fair use over the more cabined principles of fair dealing and specific exemptions typical of other national copyright laws. As I recently remarked elsewhere, the appropriate adage for those who may be attracted to proposals to adopt US-type fair use to supplant or supplement other regimes is this: “*Be careful what you wish for; you just may get it*”; and what you get will likely be very

different from what you expected or understood to be meant by fair use heretofore, and far more inimical to a healthy copyright system vital to authors, publishers and other copyright owners, and to the public interest.

A third international context in which to view changing American fair use law is the growing policy and public contention between creators and distributors of copyrighted works on the one hand, and powerful interests in the technology sector on the other. The astonishing promise of new technologies is seductive to the consuming public, to jurists, and to policy makers alike, throughout the world; and there are more than a few who see and portray copyright as a fatal impediment, or at best a troublesome inconvenience, to be swept aside or largely diminished in the interest of technological innovation and progress. It is hard to escape the belief that such proclivity is a meaningful motivating force in the American fair use expansion. And it is not by accident that arguments to export American fair use have been put forward by some interests who hold out the inducement of possibly enhanced local technology investment in return. (Nor should it be missed that some of those proponents have a curiously artificial, myopic view of “innovation”; one that ignores both the symbiotic need for compelling creative content to move over their newly invented magical channels to generate commercial success; and the considerable, demonstrable, cutting edge efforts of publishing companies and other copyright owners themselves in discovering, building out, and offering exciting new platforms and means of creating, finding, and disseminating works and information.)

Now that I have several times described the changes in American fair use law as “revolutionary” and “dramatic”, let me summarize why that is the case. But first I must emphasize that I am *not* simply speaking of difference of opinion over the end-results or ultimate decision on the facts of a particular case, such as Google Books, as lawyers are commonly disposed to put forward. The more troubling point is that the Google Books decision and a few others have effected substantial change in the very details, doctrines and tests of fair use across the board; these changes are *systemic* and will, I believe, undoubtedly affect, indeed *infect*, a great array of circumstances – whether complex, new and “digital”, or mundane, old and “analog” – quite removed from the particular facts of these cases and, probably at times even remote from the intent of the judges who rendered these precedents.

Briefly put, these changes include the following, among others:

First, although these cases purport to apply each of our statute's four fair use factors, the opinions rest overwhelmingly on twin conclusions that the unlicensed activity is "transformative" and that the defendant's service or product promises great societal benefit. In fact, many commentators believe with good reason that our fair use doctrine has been effectively reduced to a *single* question: is the defendant's use a "transformative" one?

Second, previously the American fair use notion of "transformation" pertained to changes or adaptations in the *content or expression* of a work, or use of a limited portion of such content in new, creative works. Now, however, "transformative use" appears to reach new, perhaps almost any, "*purpose*" or "*idea*" for the use of an unchanged work from the creator's intent

Third, traditional fair use has generally been a matter of occasional, non-systematic activity, incidental to other creative effort and applicable to unlicensed use of entire works in only few cases. Now, however, fair use is apparently to be readily applied in the United States to regularized copying, including of entire works, as a core, enterprise level activity.

Fourth, previously, **copyright** law was premised most fundamentally on securing the *reproduction right – the right to make copies* – to which other rights such as those of performance and display were accreted. Now, however, US courts appear to have wholly subordinated unauthorized reproduction of even entire works to the question of whether the infringing copies are publicly exposed, hence perhaps reopening older, even settled, questions of internal (for example, within institutions) , intermediate, and like copying.

Fifth, in the Google Books decision, the Court of Appeals apparently ignored, undermined, or perhaps silently overruled an important principle that publishers attained in earlier litigation and that has since, until now, been a settled matter of guiding principle in all American courts for all copyright owners – namely, that a commercial entity accused of direct infringement could not justify its own unlicensed copying by relying on the allegedly fair or other use of those copies by its customers. The implications for the intrusion of unlicensed intermediaries into the making and distribution of unauthorized copies to consumers, students, libraries, and the like are apparent.

Sixth, recent case law has also ignored another staple of prior fair use law (again, a principle largely established years ago in successful infringement actions brought by publishers), this one that the court must consider not just the effect of the defendant's actions, but instead, must explore the impact of the defendant's conduct *if it were to be widely adopted or practiced by others*.

Seventh, Google Books and related cases have failed to fully and adequately consider the impact of the unauthorized copying on *potential* new or evolving licensing markets, even at a time when licensing is increasingly facilitated and made more attractive and valuable to users, authors and publishers alike through technology and, where apt, collectivization. Similarly, with the emphasis on exculpating "transformation" they have inevitably diluted the commercial value to authors and publishers of self-exercisable or licensable adaptation or derivative work rights. I recently noted a commentator's suggestion that unlicensed translations might now be considered fair use because intensely transformative [a characterization which ignores that, in the US, copyright protection of books goes beyond their literal words to elements of plot and story detail and arrangement that are preserved in translation]. Although one would understandably and probably rightly think that the new cases would not yield any such outlandish result, the harsh implications for other unlicensed, perhaps newer forms of unquestioned adaptation of a work's protected expression cannot now be dismissed.

I will close with a note of particular concern and warning. There has been and apparently continues to be in some circles, *not excluding* elements of the publishing community in the United States, a notion of complacency in the face of the decisions expanding and changing fair use, including the thought that the Google Books case is a one-off -- a sui generis, unlikely to be repeated, set of judicial reactions to the unique perceived benefit and purportedly singular degree, scope and commitment of Google and its Book Project. In part this approach may be tactical or political, and in part wishful thinking. In any case, I urge you to avoid falling unduly prey to this impulse. As I remarked earlier, the changes wrought by several courts are systemic to the fair use doctrine itself. If left unchallenged or at the very least unquestioned, they will undoubtedly find

their way around the world, into the many emerging “mass digitization” and large corpus text and data mining deliberations; will certainly create pressure to supplant or avoid new licensing bodies and systems with claims to privileged unlicensed use; will reinforce demands among some for export of American fair use in lieu of other national exemption systems; and will intrude as well into far more prosaic, even previously settled, contexts and disputes. If seemingly easily tolerated by those affected, these changes will infect and diminish international copyright and trade standards of protection as well as national reviews and restatements of copyright law. You cannot, I submit, afford to be silent or quiescent.

Thank you.