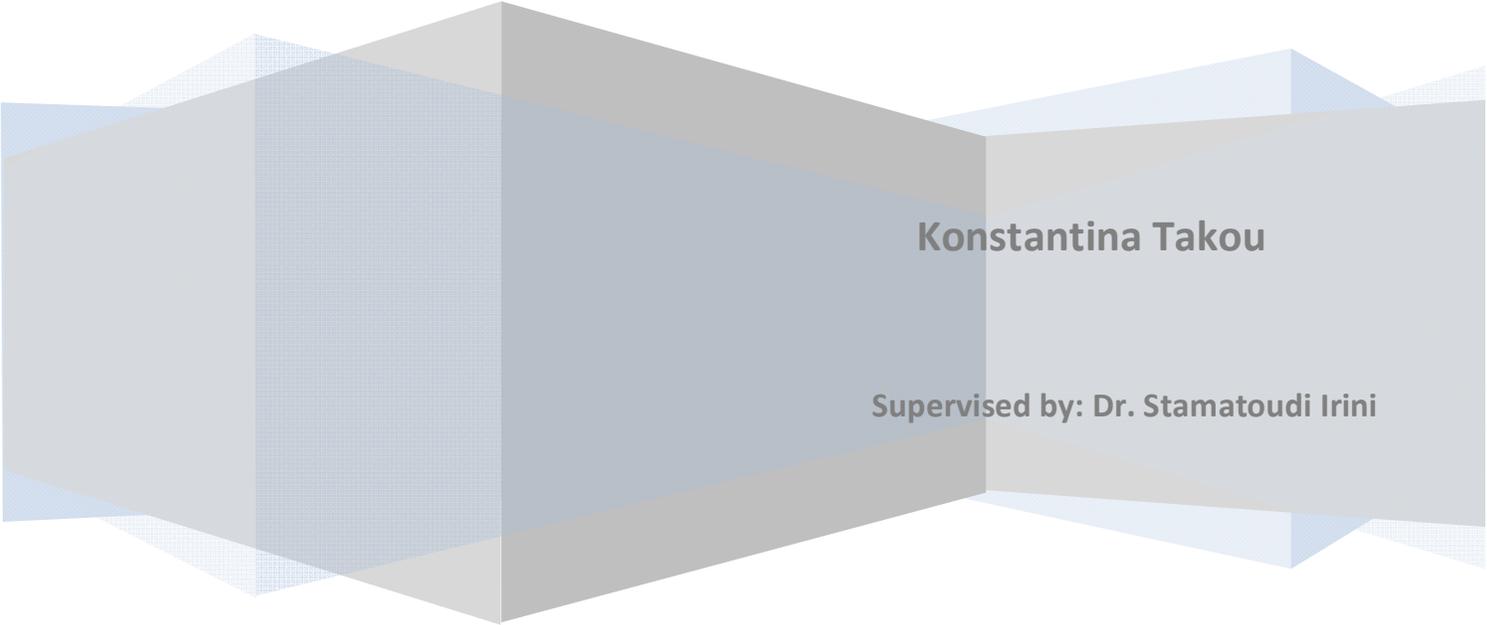


Google Books: Fair Use or an Act of Piracy?

***Examining the Boundaries of Copyright Protection
under the US and EU Law.***

International Hellenic University

MA in Art, Law & Economy 2012 – 2013



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*õKnowing I loved my books, he furnish'd me
From mine own library with volumes that
I prize above my dukedomö.*

(Shakespeare, The Tempest)

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ABSTRACT

During recent years we have witnessed the continuous growth of internet as an information resource. In 2004, Google Books Project brought about a sea change in the future of books. All the literary works were made searchable through Google Books search engine, regardless of their copyright protection. In addition, public domain books were made available to the public directly in their entirety.

However, this initiative was brought before the courts. The reason was that the project was infringing copyrights of authors and publishers. The most important copyright case was *Authors Guild v. Google Inc.*, which was litigated in the United States. In late 2013, the presiding judge reached to a decision, which is analyzed below. Other lawsuits against Google Books were also brought in front of EU courts, where the EU legal framework is completely different from the US one.

Furthermore, because of the territoriality principle, copyright law is enforced only within the borders of every state. Questions have surfaced regarding how copyright law applies, with the rise of Internet. Some legal initiatives to address this problem will be discussed, too.

KEYWORDS: Google Books Project, Copyright Law, Fair Use Doctrine, Orphan Works, Multi-territorial licensing.

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INTRODUCTION

During the past two decades a breathtaking increase in computing power has been observed all over the world. Personal computers, smart phones, and tablets have shaped the landscape of computing. People at any time and in any place pay bills or read newspapers, watch movies or purchase almost everything, are socialized and date online. In the workplace, this change has been expressed through the increasing abandonment of printed materials and the demand for more dynamic electronic resources. In the universities, digital libraries, personal computers and electronic readers have changed sharply the way of research. Even though the doors of most important libraries are open to all who need access to their collections, the expectations of "Google generation", a generation more web-literate, are very different. This new and younger generation relies heavily on personal computers and tablets for its research. Google is always considered the first port of call when somebody needs information and the sources of research are derived mostly from e-libraries, reports in scientific electronic journals and official blogs. Universities and libraries therefore should realize the new possibilities and meet the changing needs and expectations of this new generation which is interested in the digital reality and future.

Books constitute a significant part of our cultural heritage. They preserve our cultural environment and its identity. They enrich and inform our societies. They help us be connected with our legacy. Google Books Project, just like other million-book digital libraries, having realized the importance of literary works offers access to them whenever and wherever someone needs it. Problems like the limited storage space, the scheduled time of operation and the needful physical presence to the library disappear. Many users are now able to utilize the entire collection of libraries simultaneously. Moreover, digitization is considered the only way of preservation of physical collections for future generations. Many books left to rot in physical libraries or deemed lost, stolen and discarded now rejuvenate again through this database. The quality of images is improved and out-of-print books are rescued from certain destruction. Google Books Project is especially urgent for the promotion of culture and heritage preservation, as well as for the defense of our cultural identity and the economic growth of the relevant market.

COPYRIGHT LAW However, the digital libraries phenomenon raises several questions regarding copyright problems to be solved. Copyright law grants to the creator of an original

work moral and economic rights for a limited period of time, usually up to 70 years, in order to support him financially and to promote his incentive to create. These exclusive rights include the right to exploit the work, the right to copy and to distribute these copies, the right to decide who has the permission to product derivative works and who gains financial profit from them. Most jurisdictions under copyright law protect only the expression of an idea and not the idea itself, and works are protected from the moment of their creation without any formalities. At this point, it should be noted that copyright law is territorial in nature. It does not extend beyond the territory of the state unless that state has signed an international agreement.

Under the U.S. legal framework, the need for exceptions and limitations in copyright law was recognized gradually. It led to the adoption of provisions like the fair use doctrine, which was developed by the Congress and codified by the Copyright Act of 1976, (17 U.S.C. Section 107). The fair use doctrine permits the limited use of copyrighted works without their copyright holder consent in circumstances of commentary, parody, criticism, reporting and teaching. According to Section 107, four factors determine whether a particular use is fair or constitutes an infringement. These derive from *Folsom v. Marsh* case (1841) and are detailed below.

So, what is the situation with regard to copyrighted books that are displayed in international digital libraries? Does copyright law apply? And if so, to which extent? Are those works subject to specific treatment at international level?

The creation of large online libraries is not feasible under current copyright law. Any attempt towards this direction didn't lead to the desired results. The Google Books Project was the first effort to create such a large digital library. But, this initiative, as was to be expected, was criticized by the rightsholders and resulted in lawsuits.

The Authors Guild¹, on behalf of a class of all U.S. copyright holders, filed the first and most important lawsuit against Google Books Project in 2005. Google defended its actions under the doctrine of "fair use", claiming that its project was consistent with the Copyright Act. It also alleged that the project balanced the rights of copyrights holders with the public needs and expectations. The scanning and storing of entire books was necessary for the operation of a fully functional and comprehensive database. The specific case is so important because, if the lawsuit is dismissed and the court affirms the legality of Google Books Project under the "fair use" doctrine, it will open the way for the creation of truly large

¹ The Authors Guild is the oldest and largest professional society of published authors within US, representing more than 9,000 writers. (www.authorsguild.org)

digital libraries and it will change everything on the way of gaining knowledge, working and understanding.

My paper focuses on the reconciliation of copyright law with Google Books phenomenon under the U.S. and E.U. legal framework. The first chapter attempts to identify Google Books Project and its function followed by a presentation of the neglected/orphan works problem and a description of its legal status in EU, Greece and USA. The next section is referred to *Authors Guild v. Google* case (2013), focusing on the examination of fair use doctrine as an exception in copyright law, and followed by the two Google Books Settlement Agreements and the final decision of the court. Coming up next is a discussion about the two most important international conventions on this issue and EU copyright law with a view to the future. The last part concludes and discusses the key points of this progress, including some interesting observations.

I. ðGOOGLE BOOKSö PROJECT: HOW ALL THAT STARTED?

Once upon a time¹ in 1996 two researchers then and Google co-founders afterwards, Larry Page and Sergey Brin, were conducting their PhD research in computer science at Stanford University with the support of the Stanford Digital Library Technologies Project². Their main target was to devise technology that would enable people in the future world to index the content of literary works and improve their ability to access them in a way that respects copyright law and at the same time creates new opportunities for their copyright holders. In the end, what they succeeded was the creation of a ðweb crawlerö, which inspired them to produce the ðGoogleö search engine.

However, Larry Page and Sergey Brin never lost sight of their dream for such a technology. They were considering that books were fundamental to the world, as they contain a huge amount of knowledge and cultural heritage. And this is just as true today as when they

² The goal of Stanford Digital Library Technologies Project was to design and implement the infrastructure and services needed for collaboratively creating, disseminating, sharing and managing information in a digital library context. (<http://diglib.stanford.edu:8091/>)

thought it. Especially nowadays, where a huge amount of information and reading material is available through Internet.

So, in 2004, Larry Page and Sergey Brin started the creation of what later became known as the Google Books phenomenon. What was the goal they wanted to achieve? Primarily,

to use a web crawler, to index the books' content and analyze the connections between them, determining any given book's relevance and usefulness by tracking the number and quality of citations from other books (Google Books History, 2007)³.

That was indeed an ambitious goal but Page and Brin through Google Books Project managed its realization. In December 2004, they announced the formation of the project and its partnership with Harvard University, University of Michigan, New York Public Library, Oxford University and the Stanford University, namely, the "Google 5"⁴. Google came to an agreement with these five prestigious institutions in order to receive permission for digitizing their collections, instead of asking copyright license of the rightsholders of every book. The participating universities were literally opening their libraries to the world. However, the project led to heated controversies around the globe, primarily from groups, such as Authors Guild and the American Association of Publishers. Nowadays, despite the disputes that had arisen, there is an ever growing number of libraries working with Google as part of its digitization project⁵ and British Library became recently its newest partner.

³ Google Books. Google Books History.[online] Available at:

< <http://www.google.com/googlebooks/about/history.html> > [Accessed 3 December 2013].

⁴ The number of projected items is all eight million volumes of Stanford University, all seven million volumes of University of Michigan, a pilot of 40,000 selected items out of Harvard University's 1,5 million volumes, a pilot of the New York Public Library's 20 million items and one million public domain volumes of Oxford's Bodleian Library. These numbers are presented on Andersen, D.L., 2004. The Google Library. *Journal of the Association for History and Computing*, [e-journal] 7(3), Available through: University of Michigan Library <<http://quod.lib.umich.edu/j/jahc/3310410.0007.305/--google-library?rgn=main;view=fulltext>> [Accessed 3 December 2013].

⁵ The other partners are University of Michigan, Harvard University, Oxford University, the New York Public Library, Stanford University, the University of California Libraries, University of Texas at Austin, University of Virginia, University of Wisconsin ó Madison, Princeton University, the University Complutense of Madrid, the Bavarian State Library, the National Library of Catalonia, the University Library of Lausanne, the Lyon Municipal Library, the Italian Ministry of Culture with the Rome National Library and the Florence National Library, the National Library of the Netherlands, the National Library of the Czech Republic, Ghent University Library, Keio University Library, Cornell University Library, Columbia University, the Austrian National Library and the Committee on Institutional Cooperation (CIC) schools, including University of Chicago, University of Illinois, Indiana University, University of Iowa, Michigan State University, University of Minnesota, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University. Google Books, 2010. Library Partners. [online] Available at: <<http://www.google.com/googlebooks/library/partners.html>> [Accessed 3 December 2013].

II. THE LIBRARY PROJECT AND THE PARTNER PROGRAM

The "Google Book Search Library Project" (formerly the "Google Print Library Project")⁶, also known as the "Google Books Project", is divided into the Library Project and the Partner Program (formerly the Publisher Program). The Partner Program is considered mainly as a promoting tool while, the Library Project as a book-finder. By this division, Google Books reflects better the interests of publishers and libraries and meets in a more efficient way the wishes and expectations of public. Generally, we cannot identify key differences between the two programs except of the way of authorization and how they grant users access.

THE LIBRARY PROJECT Under this project, Google intended to make the content of books more accessible to researchers. There are four different "presentations" of a book to its reader and are as follows, the "full view", the "limited preview", the "snippet view" and "no preview" at all. In response to user's search queries, the distinction between copyrighted and public domain books will dictate the amount of information he is able to browse. With regard to public domain books, the full text will be ultimately available to the user for viewing or downloading (Full View). On the other hand, concerning in-copyright works, only if the work has the permission of its publisher or its author, a limited number of pages from the book will be accessible by the user (Limited Preview). For books still under copyright but without this permission, only three "snippets" of the search term will be presented to the user, some basic bibliographic information and the total number of times the search term appears in the volume (Snippet View)⁷. It is very important to be mentioned that, under the snippet view, the full page of the book will never be accessible to the user because of the absence of the copyright owner permission. Finally, with regard to reference books, such as dictionaries, thesauruses, cookbooks, anthologies of short poems, or books of famous quotations, there

⁶ In November 2005, Google changes the name of the "Google Print Library Project" to "Google Book Search Library Project" to express clearly its product's evolution. "Google Books" is the current name. Grant, J., 2005. Judging Book Search by its cover. Google Official Blog,[blog], 17 November. Available at: < <http://googleblog.blogspot.gr/2005/11/judging-book-search-by-its-cover.html> > [Accessed 4 December 2013].

⁷ This example shows how the Snippet View is displayed in Google Books: [Bear's Last Journey by Udo Weigelt](#)

will be no available preview, because any snippet may harm the relative market (No Preview Available). According to Lichtman, concerning the reference books

“the idea is to exclude books for which most of their value comes from having the ability to access a small, relevant excerpt at the right time.” (Lichtman, 2009)⁸

The text of those books will be scanned and exist into the search database, but only bibliographic information will appear in response to a search query.

GOOGLE'S OPT-OUT POLICY As a response to the criticism, in August 2005, Google announced its revised opt-out policy. According to it, copyright owners could opt-out their works from the Library Project by asking Google not to scan their books or not to retain them in its database. Google committed to respect these requests, even if the books were in the collection of one of the participating libraries. Moreover, it decided not to scan any in-copyright book for the period between August and November 2005, so as to provide to the rightsholders the opportunity to exercise their right to opt-out from the Project. Thus, under the original Library Project, Google provided rightsholders with three choices with respect to their works: at first, they could participate in the Partner Program; secondly, they could let Google scan their book under the Library Project and display snippets in response to user queries; or thirdly, they could opt-out from the Library Project, in which case Google could not scan the book. This opt-out policy certainly made the Google Books project more attractive.

THE PARTNER PROGRAM From November 2005, Google provided copyright holders with the choice of the Partner Program. Under this program, Google enabled authors and publishers to submit the full text of their books and to include them in Google's search results, pursuant to an agreement between the copyright owners and Google. The copyright holders controlling the rights of their works authorized Google to display the title of the book and the name of the authors, a limited number of pages, links to bookstores and online retailers, and other public data about the work. So, readers, who would potentially borrow or buy a book, could firstly take a look at it from their computer and then follow links to online bookstores. In addition, Google assured participants of the program that their works would be protected and secured as Google's search data. Finally, this program was not subject to

⁸ Lichtman, D., 2009. Copyright as Innovation Policy: Google Book Search from a Law and Economics Perspective. *Innovation Policy and the Economy*, 9 (1), pp. 58.

allegations of copyright infringement because of the existence of the agreement and copyright owners could remove their works from the program at any time.

III. THE NEGLECTED WORKS PROBLEM

While the legal framework is quite clear concerning the public domain books and in-copyright works, ambiguities arise in regard to orphan or neglected works, namely, works whose copyright owner cannot be identified or located. Ideally, the copyright owner should be identified, negotiate with the potential user and permit exploitation of his work subject to conditions or to a license fee, or maybe deny any use of it. However, users desiring to acquire the legal consent for the digitization and further exploitation of an orphan work, have to overcome their inability to locate or contact with the copyright holder. It should be underlined that many users hesitate or prevent from creating a derivative work, owing to a fear that in the future someone may be able to prove he is the rightful owner and ask for compensation. The fear of infringement suits has been incredibly debilitating to the whole copyright market and to every nation's heritage.

A possible digitization of orphan works will make available to the public their different and new way of expression, their ideas and their content. The works will have greater public access and will motivate new creations. Moreover, in some cases, as they will be re-commercialized, their principal copyright owner will be interested again both for the future of the work and his economic gains. A lost work will be recognized again and will be salvaged from the forgotten and dusty bookshelves.

THE EU POLICY At the EU level, in 2011 the Commission came with a proposal for a directive on certain permitted uses of orphan works. On 25th October 2012 the Directive on Certain Permitted Uses of Orphan Works⁹ was adopted. It forms part of the Europe 2020 Strategy¹⁰, which includes as one of its flagship initiatives the development of a Digital Agenda for Europe¹¹. It aims at creating a legal framework for the digitization and dissemination of the so-called orphan works and promotes the adoption of common rules by the Member States with regard the determination of the status of an orphan work and its

⁹ DIRECTIVE 2012/28/EU.

¹⁰ "Europe 2020: A strategy for smart, sustainable and inclusive growth"

¹¹ See Recital 2 of the Directive 2012/28/EU.

permitted uses. In addition, it promotes legal certainty within the internal market concerning these works¹².

According to the Directive, knowledge and cultural heritage institutions first carry out a diligent research in good faith in respect of every orphan work, trying to track down the absentee copyright holder before using his writing. The institutions proceed to inform the appropriate national authorities with the results of their searches. Following this, restricted rights are allocated to the bona fide user, namely, only the public offering and the reproduction of the work for the interest of the public, including the interest of science and education. Article 5 provides for the ending of orphan work status after the re-appearance of the right owner and a fair compensation to him (Article 6, par. 5).

The Directive is to be considered as a decisive step for the preservation and diffusion of orphan works, achieved after years of negotiations. It is the result of endeavors embarked on August 2006 with the Recommendation on the Digitization and Online Accessibility of Cultural Material and Digital Preservation¹³. According to which, member states should encourage the use of orphan works in their countries and promote the creation of lists of known orphan works.

GREECE On 3 December 2013, Greece implemented the Directive 2012/28/EU (Law 4212/2013¹⁴). There was not concrete legislative provision previously in relation to orphan works, apart from the general rule that an orphan work can be used in the cases described as limitations and exceptions to copyright law 2121/1993.

THE USA POLICY Concerning the issue of orphan works, there were several legislative bills that had been introduced to Congress, the most important of them being the Orphan Works Act of 2006 (H.R. 5439) and the Orphan Works Act of 2008 (H.R. 5889). However, the Congress had not passed any of them.

¹² See Recital 9 of the Directive 2012/28/EU.

¹³ COMMISSION RECOMMENDATION 2006/585/EC.

¹⁴ Law 4212/2013 Implementation of Directive 2011/77/EU of the European Parliament and of the European Council of September 27 2011 and of Directive 2012/28/EU of the European Parliament and of the European Council of October 25 2012 in the Greek Law and amendment of law 2121/1993 «Copyright, related rights and cultural matters»

IV. AUTHORS GUILD V. GOOGLE INC

On 20 September 2005, the Authors Guild, which represents more than 8,000 published writers and several individual authors, sued Google in the Federal District Court of Southern New York, alleging that the defendant unlawfully reproduced works that still enjoyed copyright protection and made them available for search through the Google Print Library Project without permission. The Authors Guild was maintaining that Google was

“engaging in massive copyright infringement” and that “had not compensated copyright holders for its copying of or displaying of verbatim expression from in-copyright books or its making available to libraries for downloading of digital copies of in-copyright books scanned from their collections.” (Authors Guild, 2005)¹⁵

Against these claims, Google in order to defend its actions invoked the fair use doctrine (Copyright Act, 17 U.S.C. 107). The doctrine is generally understood as a legal way to exploit copyrighted material without the rightsholders consent for certain purposes.

V. THE FAIR USE DEFENSE AND ITS FACTORS

In the age of globalization, free trade and society’s continuous interest in information and ideas, the interests of copyright holders in the control of their works should be restrained for the benefit of humanity. According to *Stewart v. Abend*, the doctrine is considered an

*“equitable rule of reason,” that “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”*¹⁶. (*Stewart v. Abend*, 1990).

The determination of fair use is established by the examination of four non-exclusive factors. At first, “the purpose and character of the use”, secondly, “the nature of the copyrighted work”, thirdly, the “amount and substantiality of the portion used”, and lastly, “the effect of the use on the copyright owner's potential market”. After the examination of these four factors in the light of the purposes of copyright, the judge weighs the results and decides

¹⁵ *Authors Guild v. Google Inc.* [2013] 05 Civ. 8136 (DC). Available at: < <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=355> > [Accessed 11 December 2013].

¹⁶ *Stewart v. Abend* [1990] 495 U.S. 207. Available at: < <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=495&invol=207> > [Accessed 27 December 2013].

whether the application of the fair use doctrine is suitable or not. In general, the standard for fair use is that

"the fair user copier must copy no more than is reasonably necessary ... to enable him to pursue an aim that the law recognizes as proper"¹⁷. (Chicago Board of Education v. Substance, Inc., 2003).

The four fair use factors are detailed below.

- **THE PURPOSE AND CHARACTER OF THE USE**

The first fair use factor - section 107 (1) - examines the commercial nature of the use, its purposes (educational or not), its transformative character, as well as the public benefit from that use. Apparently, educational purposes do not establish the application of fair use doctrine, nor do commercial purposes mean that the use is unfair.

THE COMMERCIAL NATURE OF THE USE What is perceived as a commercial nature of the use and what not, under section 107 (1) is ambiguous at best. The Supreme Court has held that

öevery commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright¹⁸ö. (Harper & Row v. Nation Enterprises, 1985)

Google as a commercial enterprise promotes the company's long-run financial interest. According to its 2012 financial reports¹⁹, Google's \$ 40 billion in revenues were derived from advertising fees. However, the company does not seek to generate revenues directly from the Library Project, but mostly to reap profits through increased page viewership. Under this project, if somebody's curiosity piqued by the sentences on the Snippet View, he will have access only to websites, which sell the concrete books, or to libraries, where he can find them and not to the full text of the work directly. On the other hand, under the Partner Program, Google indeed profits from the sponsored advertisements on the search result pages, because the corporation itself with the copyright holder consent has signed agreements in order to advertise products and services. Google finances the Google Books Project and is interested

¹⁷ *Chicago Board of Education v. Substance, Inc.* [2003] 354 F3d 624, 629. Available at: < <http://caselaw.findlaw.com/us-7th-circuit/1423085.html> > [Accessed 27 December 2013].

¹⁸ *Harper & Row v Nation Enterprises* (1985) 471 U.S. 539. Available at: < http://www.law.cornell.edu/copyright/cases/471_US_539.htm > [Accessed 7 December 2013].

¹⁹ Google, 2012. 2012 Financial Tables, Google Investor Relations[online] Available at: < <http://investor.google.com/financial/2012/tables.html> > [Accessed 27 December 2013].

indeed for the future of books, but at the same time, as a private enterprise, anticipates reasonably an ultimate return on its costs.

IS IT TRANSFORMATIVE OR NOT? According to *Campbell v. Acuff-Rose Music, Inc.*, any transformative work

*“supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message”*²⁰. (*Campbell v. Acuff-Rose Music, Inc.*, 1994).

Why is it important to know if the work is transformative or not? Firstly, it is considered a new work, it adds new and sufficiently different perspective of meanings and constitutes an important contribution to the society. Secondly, from an economic point of view, transformative works, as opposed to infringing ones, are less likely to affect the percentage of sales of the originals.

Google Book Search, as a new and useful tool for digitizing books and not for permitting users to read them, is sufficiently transformative. The scanning, archiving and indexing of huge amounts of books is a precondition, necessary for the accomplishment of the project's purpose. Google Books Project must have in its possession the full text of the original works so as for the search engine to sort out terms that are relevant to the searching one. In this respect, it should be emphasized that only a few sentences of the text are displayed within the given search result (the Snippet View). Therefore, just as publishers display excerpts of books to their websites, Google quotes an excerpt from the scanned copy of the copyrighted work into its public worldwide searchable index. The interests of publishers are not essentially any different from Google ones. The key differences are firstly that Google does not purchase the books, and secondly that its program does not display the full text to the inquirer.

- **THE NATURE OF THE COPYRIGHTED WORK**

The second fair use factor evaluates the nature of the copyrighted work. That means evaluating its creativity, its originality and its general availability to the public.

²⁰ See *Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569.

CREATIVITY AND ORIGINALITY OF WRITINGS Copyright law is intended to protect creation and innovation. As *Campbell v. Acuff-Rose Music, Inc.* referred

*“some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”*²¹. (*Campbell v. Acuff-Rose Music, Inc.*, 1994)

It is, therefore, more difficult the application of the fair use doctrine to highly creative works, with sufficient originality in expression and ideas, such as fictional or romantic novels. While the protection of writings not significantly expressive but more factual or informational in nature, such as biographies or chemistry textbooks, is reduced and the establishment of fair use doctrine is deemed easier. Since Google has scanned more than 20 million books in their entirety, every one of them is protected as a highly creative or a not significantly expressive respectively.

GENERAL AVAILABILITY TO THE PUBLIC The question here is whether the works are adequately available to the public. At this point, I would like to combine the subject of this research with my study of Greek language and literature, and especially with Cavafy's poems. C.P.Cavafy's poems are categorized according to their general availability to the public as the “canonical or “acknowledged” poems, published by the poet himself; the “repudiated” poems, which are early Cavafy's works, followed by the claiming that they didn't belong to him; the “hidden” or “unpublished” ones; and lastly, the “unfinished” poems. On the basis of these, I would like to support my hypothesis that, in general, writings are divided into three categories, the published ones (1), which include the copyrighted and the public domain works, just like the “canonical” poems; the neglected or orphan works (2), just like Cavafy's “repudiated” poems, which lost their “spiritual father”; and thirdly, the out-of-print works (3). In my view, the last category includes both the “hidden” or “unpublished” and the “unfinished” ones because neither of them had been ever published, at least not while the author was alive.

²¹ See *Campbell v. Acuff-Rose Music, Inc.*, supra note 18

According to their general availability to the public	Cavafy's Poems	Writings in general
	Poems not canonical or not acknowledged	Published works (copyrighted and public domain books)
	Poems not repudiated	Neglected or orphan works
	Poems not hidden or not unpublished and not unfinished	Out-of print works

The published works are adequately available to the public and the problem of neglected works has been sufficiently explained above. Regarding out-of-print works, we have to consider that the application of the fair use doctrine might be justified, because it could be seen as the only way to facilitate their use and their availability to the public. But, on the other hand, unpublished works may need more protection since the first appearance of their author's expression has never been occurred.

- THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

Along with the nature of the copyrighted work and the purpose and character of its use, in evaluating the fair use statute, courts focus on the proportion of the copyrighted work which has been used by the defendant, as well as, on the proportion that he would be legal to use. Generally speaking, if a

*user only copies as much as is necessary for the intended use... this factor will not weigh against him*²². (*Kelly v. Arriba Soft Corporation*, 2003)

But, if a relatively minimal excerpt of defendant's work involves the heart of the in-copyright work that will definitely weigh against him.

Is Google really not exploiting a copyrighted work by scanning it in its entirety and retaining the copy in the database? Google Book's Search first and primary purpose is to be a productive search engine. Books therefore should be copied in whole, in order to be fully searchable, to produce their snippets and to inform users which books contain which words and in which order. Additionally, what makes Google Books Project more useful than any

²² See *Kelly v. Arriba Soft Corporation*, (2003) 336 F. 3Rd811, 821-822. Available at: <http://scholar.google.com/scholar_case?case=13767420941977220880&hl=en&as_sdt=6&as_vis=1&oi=scholar_arr> [Accessed 16 December 2013]. 820-821.

competitive search index is that it allows users to choose freely the keywords they want to search. Therefore Google needs to have in its possession the full text of the copyrighted work, in order to provide such operation. As Laura Quilter of the Brennan Center for Justice and Former Electronic Services Librarian at the University of Illinois points out Google Book Search

“performs the work, interpreting it by recourse to information beyond the text itself (for instance, bibliographic data; retail or location data; or the meta-structures of the work's organization, in paragraphs, sections, chapters, parts, pages) and opening it to dialogue with the audience”²³.

Besides, the existence of a copy of the entire work in Google's Internet-accessible database causes fears that those full copies might accidentally transpire. Google is trying to remove all these fears and engage for its database security.

- THE EFFECT OF THE USE ON THE COPYRIGHT OWNER'S POTENTIAL MARKET

In many judicial decisions, the effect on the potential market for and value of the copyrighted work is deemed the most significant factor. Courts consider

“not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original”²⁴. (*Campbell v. Acuff-Rose Music, Inc.*, 1994).

What do we mean by saying “potential market”? Are the market that copyright holder might develop or offer a license for the exploitation of his work in the future, such as the market for derivative works. Another important subject is, of course, whether the defendant's work is transformative or not. Transformative works are not regarded as danger for the potential market. They do not compete or supersede the originals. Instead, in many cases, they have positive impact on the market of in-copyright works. It is therefore unlikely transformative works to take business away from the copyrighted ones. Google Books is a sufficiently transformative project, as mentioned above, and probably will not have an adverse effect on the downstream relevant market.

²³ Quilter, L., 2005. Lost licensing revenue & Google Print. Derivative Work, [blog] 27 October. Available at: < <http://lquilter.net/blog/archives/2005/10/27/lost-licensing-revenue-google-print> > [Accessed 7 December 2013].

²⁴ See *Campbell v. Acuff-Rose Music, Inc.*, supra note 18.

In this context, it is important to stress that the existence of Google's database will undermine any attempts for the creation of similar online search systems or competitive projects, such as Amazon Pages or HarperCollins. It would be difficult for individual publishing companies or group of publishers to create their own online searchable database, because Google Books will remain the easiest way for users. However, that does not mean that Google prevents the market from evolving in different directions by other enterprises.

With regard to Google Books Project, surveys suggest that book sales have not suffered a drop. On the contrary, the project has increased the market demand by making works searchable. It promotes retailers' and publishers' websites and provides information concerning out-of-print works. Consequently, not only the potential market has not suffered from the appearance of Google Books Project, but also, concerning specific products, the opposite has occurred.

VI. ATTEMPTS TO SETTLE THE LITIGATION

- THE ORIGINAL SETTLEMENT AGREEMENT

On 28 October 2008, because of the difficulty of all the above questions and the highly uncertain outcome of the litigation, the parties reached a settlement agreement. This agreement was a rather confusing document. It created a mechanism which would give default rights to Google. According to it, Google would scan and make searchable the full text of all books published before 5 January 2009. It would expose and sell electronically all commercially unavailable books. In addition, Google would display the full text of public domain books without any permission. The copyright holders either would receive fees from Google Books every prior and future use of their works or could opt-out their books from Google Books database. This proposition was criticized severely. The reason was clear. Google would hold monopoly on book searching, orphan works and commercial digital sales of unavailable books.

- THE AMENDED SETTLEMENT AGREEMENT

Although the court initially approved the original settlement agreement, on 18 September 2009, the United States Department of Justice stated that this should be rejected and the parties should negotiate to modify it as to comply with Rule 23, copyright and

antitrust law. In response to these objections, the parties discussed and reached to the amended settlement agreement (ASA). This was filed on 13 November 2009 requiring the approval by the presiding justice²⁵. The amended settlement agreement focused more on Rule 23 concerns than on competition issues. Nevertheless, in the end, on 22 March of 2011, the presiding judge rejected the agreement, on the grounds that it

*was not fair, adequate and useful*²⁶. (*Author's Guild v. Google Inc.*, 2011).

His primary reason for rejection was based on the fact that the agreement would *release Google (and others) from liability for certain future acts*²⁷. (*Author's Guild v. Google Inc.*, 2011).

The court recognized that the creation of digital libraries and particularly Google Books would improve public welfare. But also, it asserted that the amended settlement agreement would transfer rights to Google Books Project in order to exploit in-copyrights works without their rightsholders license. The presiding Judge Chin also claimed that

*the agreement would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those present in the case.*²⁸ (*Author's Guild v. Google Inc.*, 2011).

Judge Chin strongly rejected Google's opt-out policy and supported firmly an opt-in provision, which would secure copyright holder's consent for further uses. In the end, he maintained that the authority to change copyright law properly lies with Congress and not the judiciary.

After the rejection of the amended settlement agreement, the litigation continued. The case was at trial until July 2012.

²⁵ The court has the authority only to approve or reject the agreement and not to modify it. After a possible rejection of the agreement by the court, the decision has to indicate what modifications would be necessary for the approval. The parties then will decide if they proceed to an appeal of the rejection, acceptance of the proposed modifications, or if they will continue the litigation of the case. The acceptance of the modifications will be regarded as a new settlement agreement.

²⁶ Peters, M., 2011. The Amended Google Book Settlement: Judge Chin's Decision. WIPO magazine, [online] Available at: < http://www.wipo.int/wipo_magazine/en/2011/03/article_0003.html > [Accessed 27 December 2013]

²⁷ *The Authors Guild et al. v. Google Inc.* [2011] 05 Civ. 8136 (DC). Available at: < http://www.copyright.gov/docs/massdigitization/statements/gbs_opinion.pdf > [Accessed 27 December 2013].

²⁸ See *Author's Guild v. Google Inc.* [2011], 669, Id.

VII. US DISTRICT COURT NY DECISION *AUTHORS GUILD V. GOOGLE INC*

On 14 November 2013, after eight years of wrangling, judge Denny Chin of the Manhattan District Court ruled in the case of *Authors Guild v. Google Inc.* US circuit judge Chin alleged that Google's decision of scanning and digitization of more than 20m books from libraries across the world without copyright holder license, constituted fair use under U.S. copyright law.

In his ruling, Judge Chin wrote:

“In my view, Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders”²⁹. (Authors Guild v. Google Inc.,2013).

According to Judge Chin opinion, with regards to the first factor, Google Book's use of the copyrighted work was highly transformative. Google has transformed books into data for purposes of research and not for profit and, in that way, has opened up new fields for research. Under the second fair use factor, Judge Chin concluded that the vast majority of works were non-fiction, published and generally accessible to the public. The application of the fair use doctrine, therefore, was easier and the protection of the works relatively reduced. Regarding the third factor, he deduced at first that copying verbatim expression of books was necessary for the operation of the project and, secondly, that Google was retaining the control of the amount of text, which was exposed in response to searches. In the end, concerning the fourth factor, Judge Chin took the position that scanning a book was something completely different from the book itself and Google Books could only benefit copyright holders and their market.

Authors Guild response to the decision was immediate. Its executive director Paul Aiken in a short statement declared that this mass digitization and exploitation of the copyrighted works far exceeded the bounds of the doctrine and they would appeal. On the contrary, Google declared it was “absolutely delighted” with this outcome. Indeed, Authors Guild appealed federal judge’s decision to the Second Circuit Court on 30 December 2013.

²⁹ See *Authors Guild v. Google Inc.*, supra note 13

VIII. IS CURRENT COPYRIGHT LEGAL REGIME SUFFICIENT?

Having thoroughly analyzed the function of Google Books Project and Authors Guild case, questions arise as to whether copyright legal regime internationally and at European level is sufficient to meet the rapid development of new technologies. Society's expectations for information and knowledge, new technical challenges (especially information) and research into digitization resulted in the development of digital libraries. The current copyright legal framework is not considered sufficient in order to permit the development of those libraries in our world. The protection of literary works on the international stage is provided for by the "Berne Convention for the Protection of Literary and Artistic Works" (1886) and the "World Intellectual Property Organization Copyright Treaty" (1996)³⁰. The Berne Convention is accessed by the United States of America, but not ratified; while some Member States of the European Union have already ratified it (Belgium, France, Germany, Italy, Spain and United Kingdom). Concerning the WIPO Copyright Treaty (WCT), both the United States of America and the European Union have ratified it.

BERNE CONVENTION AND WIPO COPYRIGHT TREATY Under the Berne Convention, all literary and artistic works are protected automatically from the moment of their creation (principle of "automatic" protection). Each of the contracting countries guarantees the same protection to nationals of other members of the union, as the protection it grants to its own nationals. It also establishes exclusive rights of authorization and "moral" rights to copyright holders. The most important exclusive rights are the economic rights, the right of translation and the right for adaptations, the right of performance, the right to broadcast and the right for the creation of reproductions. As "moral" rights, are meant the right to claim authorship of the work and to object to any distortion or modification of it.

Concerning the WIPO Copyright Treaty, only two provisions refer directly to literary works. The first is Article 6 which provides that the transmission and public distribution of such works is permitted with the consent of copyright holders, while the second one is Article

³⁰ The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is also a very important international treaty which provides the protection of computer programs and compilations of data, as well as, the protection of performers and producers of phonograms and broadcasting organizations.

8. According to that, only the copyright owners may permit any communication of their works to the public view in any way.

We therefore note that Berne Convention grants more protection to the rightsholders than the WIPO Copyright Treaty, and at the same time, establishes a rigorous legal framework. For that reason, only a few countries have ratified it.

EUROPEAN UNION DIRECTIVE AND RECOMMENDATION It is essential to stress that on 22 May 2001 the European Union adopted the "Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society"³¹. The purpose of the Directive was to harmonize the scope of exception between the Member States of the Community and to create the basis for the ratification of the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT). Three types of copyright were provided by this Directive, the reproduction right, the right of communication and making available to the public and the distribution right. It was clear also that copyright holders would receive fair compensation for every reproduction of their works and that only libraries and archives would be permitted to perform specific acts of reproduction.

Additionally, in order to strengthen the Europe 2020 strategy for digitization and preservation of its cultural memory, the European Commission decides to issue the "European Commission Recommendation on the Digitization and Online Accessibility of Cultural Material and Digital Preservation"³² (2011). Its primary objective is the preservation of Europe's wealthy cultural heritage, by means of internet. It also expresses serious concerns that other countries or private industries will reap the economic benefits of this digitization, if Europe remains inactive. The Recommendation promotes the idea of private sector contribution to the digitization of literary works through non-exclusive private agreements, only under conditions which ensure that the commercial exploitation of this cultural material will be permitted for a maximum period of seven years. Furthermore, it provides that the cultural material shall remain accessible to the public after its use.

Despite of the existence of those legal initiatives, the complexity of copyright problem under EU legal framework lies in the territoriality of copyright law and the absence of an international licensing system. So, it is important certain provisions/rules to be renegotiated.

³¹ DIRECTIVE 2001/29/EC.

³² COMMISSION RECOMMENDATION 2011/711/EU.

- **MULTI-TERRITORIAL LICENSING**

On 11 July 2012, the European Commission published the first Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market³³. The proposed Directive has as its primary and overarching objective the protection of the interests of copyright holders and at the same time it aims at ensuring the availability of multi-territorial licensing services for online uses within the single EU market. Copyright holders of musical works experience difficulties to acquire licenses for more than one country in the European Union. This situation results in internal market segmentation and decreases the possibilities for venture capital fundraising and investment. Having established the free movement of services between Member States, collecting societies, which represent authors' rights, should be free to exploit their rights in other member countries of the European Union.

According to the proposal, at first, the collective management organizations shall be capable to administer the licenses and to process information needed for that administration³⁴. They have to offer accurate and comprehensive information about the musical works and the rights they represent, as well as, the countries where these collective societies act³⁵. The proposal stresses the importance of fair commercial terms, transparency of procedures and accuracy of financial information of their exploitation of copyrights. Moreover, the collective management organizations will be the only which regulate the online exploitation of the specific rights³⁶ and will be able to sign representation agreements with other organizations in order to license effectively these musical works³⁷.

The development of the global digital market for cultural material is changing the legal basis of copyright. The territorial fragmentation of market for literary works prevents the proper online licensing policy, while at the same time the demand of consumers for innovative services is fast growing. The multi-territorial licensing of literary works for online uses is a provocative but not impossible idea. The development of a legal framework which will monitor those licenses shall be preceded before free online market imposes its own rules. International digital libraries, therefore, like Google Books Project, would be able to obtain legal copyrights in order to exploit literary works for online uses. A European multi-territorial

³³ The Proposal is available at: http://ec.europa.eu/internal_market/copyright/docs/management/com-2012-3722_en.pdf.

³⁴ See Article 22 of the Proposed Directive.

³⁵ See Article 23, Id.

³⁶ See Article 25, Id.

³⁷ See Article 27, Id.

licensing passport for literary works, in the direction of European licensing passport for musical works, would develop the market, facilitate licensing practices and promote the diversity of cultural expression.

IX. EPILOGUE

What has been described in this paper is the recent developments of copyright law in the internet era. The appearance of Google Books Project, a phenomenon I thoroughly applaud, has been at the centre of these changes. Its database is not only powerful and popular, but also extremely useful. The legality of the project under US and EU copyright law, namely, within the two major online markets, is equally essential to the understanding of the phenomenon.

In the United States, where the project was born, its function is deemed lawful and permitted. According to Judge Chin's decision, the four 'fair use' factors advocate the recognition of Google Books existence and the application of the doctrine is reasonably justified. Instead, under EU legal framework, the exploitation of in-copyright works without their rightsholders license violates copyright law, especially after the ratification of WIPO Copyright Treaty (14 December 2009). Google Books Project, therefore, is considered 'fair use' under the US legal regime and simultaneously 'an act of piracy' within the European Union.

Initiatives are needed to overcome the differing judicial traditions, as well as, the legal entry barriers and the legal barriers to cooperation. The commercial movement of literary works can be evolved towards more transnational models of licensing. As multi-territorial licenses will be granted by collective societies for online uses, more individuals by different countries will be able to acquire easier and faster licenses paying less for it. Authors will also see their books used more often by a wider audience than has thus far had access to them. The economic growth of the market and the free flow of ideas will definitely be achieved.

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APPENDIX

I. TITLE 17 OF THE UNITED STATES CODE § SECTION 107

Notwithstanding the provisions of sections 106 and 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 above factors.