



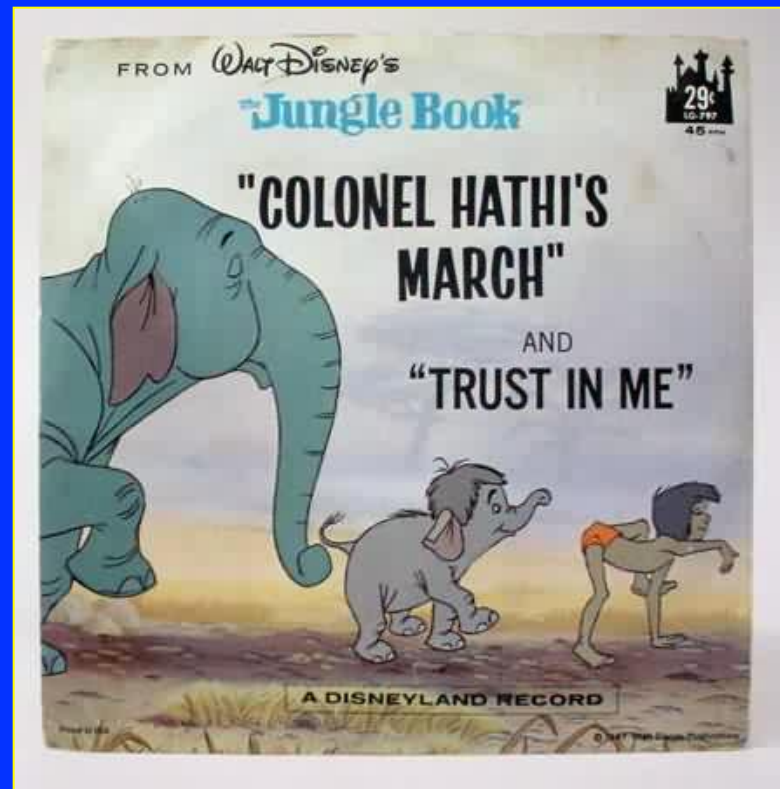
Mammoth Tending: Notes from the Underfoot

HathiTrust 2014 Partners Meeting
October 10, 2014, Washington D.C.

Jack Bernard

The Name

- The meaning behind the name
 - Hathi (hah-tee)--Hindi for elephant
 - Big, strong
 - Never forgets, wise
 - Secure
 - Trustworthy



HT and Google: Quick History

- Pre-2002: Digitization emerges on college campuses
- 2002: Discussions with Google
- 2004: Contracts announced
- 2005: Google Sued by Authors and Publishers
- 2005-2008: Settlement talks (academy on sidelines)
- 2008: HathiTrust Begins
- 2008-2010: Settlement Agreement Ups and Downs for Google and Its Plaintiffs

HT and Google: Quick History

- 2011: Michigan announces orphan works project; Authors Guild sues Michigan, California, Indiana, Wisconsin, and Cornell
- 2012: HathiTrust wins in front of Judge Baer; Google settles with Publishers; Authors Guild appeals HathiTrust case to 2nd Circuit
- 2013: Google has summary judgement hearing in front of Judge Chin; Oral argument in HT case in front of the 2nd Circuit; Judge Chin finds for Google; Authors Guild appeals in Google case.

HT and Google: Quick History

- 2014: 2nd Circuit finds for HathiTrust defendants but remands a small portion of the case; Judge Baer dies, HT case reassigned to Judge Buchwald who has her first meeting with litigants at the end of October; Google's oral argument at 2nd Circuit at the beginning of December.

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Lawsuits

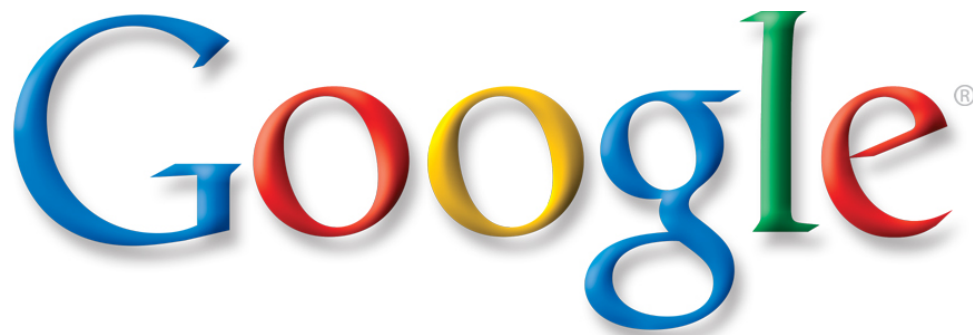
Millions of dollars in attorney fees

Tarnished reputation

Galvanized competitors

Vexed publishers

International tumult



Allegations

Bad Press

Millions of dollars in digitization


Millions of dollars in settlement costs

Irate authors

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By Hamilton Wright Mabie

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Plymouth Labor and Leisure
By James W. Baker

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THE PLYMOUTH COBBAGE BASEBALL TEAM, c. 1914. The company baseball team includes, from left to right, the following (front row) Tony Stroud, Gus Schneider, Arlene Stroud, Carl Young, Monte Cushman, and Henry Wickel; (second row) Sam Shalke, John Pock, Joe Freymuth, John Kaiser, George Hertel, and Earl Robichau.

THE PLYMOUTH COBBAGE BASEBALL TEAM, 1927. A later baseball team poses here.

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27 references to story in this book

Page v

stories; in fact, there are almost as many techniques as there are stories. Furthermore, technique is always inherent in each individual story itself, which makes apparent *the feeling that the author of actual reality*.

Page vi

At the same time realism was making itself felt in America. In 1892 Stephen Crane appeared in New York with the manuscript of a very short novel which was later to

Page xi

... a vigorous, conservative, realistic consciousness of fact and a crude drive and power that are in essence the very temperament of America.

Page xi

Again one may say that the short story has never been

Where's the rest of this book?

Synopsis

With brief bio-bibliographical notices of the authors.

Related information

Web search for reviews of [Modern American and British Short Stories](#)

Other web pages related to [Modern American and British Short Stories](#)

Bibliographic information

Title: Modern American and British Short Stories
Publisher: Harcourt, Brace and company
Editor(s): Leonard Stanley Brown
Publication Date: 1929
Pages: 472

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Snippet View

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A Typical Library Collection

Public Domain

Available in libraries

“The Twilight Zone”

Out of Print
Orphan Works, or simply unclear copyright status

In-Print

Available in a bookstore



*OCLC analysis of the Google Books Library Project <http://www.dlib.org/dlib/september05/lavoie/09lavoie.html>

**O'Reilly Radar: http://radar.oreilly.com/archives/2005/11/oops_only_4_of_titles_are_bein.html

The Original GBS

- Google digitized books
- Google gave a digital copy to libraries
- Libraries could make lawful uses of the digital copies of copyright protected works
 - Including, in Michigan's case, to establish HathiTrust
- Google enabled the books to be searchable online and displayed in one of the three formats

Why would a library do this?

- In addition to the myriad benefits of GBS . . .
- Preserve the collection
- Improve ability to curate
- Make our books accessible to people who have print disabilities
- Make new research and discoveries possible
- Establish partnerships with other libraries (HathiTrust)
- Make the public domain accessible
- Make other lawful uses possible (e.g. §108)
- Open our libraries to the world
- But what made us think we *could* do this?

Finish This Statement:

The purpose of U.S. © law is to:

- A) Reward authors for their creative efforts
- B) Provide an economic incentive to write & publish
- C) Advance public learning
- D) Provide legal remedies for infringement

Finish This Statement:

The purpose of U.S. © law is to:

- A) Reward authors for their creative efforts
- B) Provide an economic incentive to write & publish
- C) Advance public learning (about 3% guess this)
- D) Provide legal remedies for infringement

The purpose of copyright is etched
right into the Constitution.

To promote the progress of science
and useful arts, by securing for
limited times to authors and
inventors the exclusive right to
their respective writings and
discoveries;

--U.S. Const. Art.1 §8 cl. 8

What is the purpose of copyright?

“...copyright law ultimately serves the purpose of enriching the general public through access to creative works...” *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 527 (1994)

“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony v. Universal City Studios*, 464 U.S. 417 (1984)

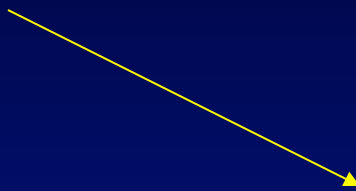
What is the purpose of copyright?

“...it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)

“...monopoly created by copyright thus rewards the individual author in order to benefit the public” *id.* at 546

Means----->Ends

Reward Authors



Provide Incentive



Promote Progress

Provide Legal Remedies



§106 Rights of © Holder to do and authorize ...

- **Reproduction** of the work in whole or in part
- Preparation of **derivative** works
 - e.g., translations, musical arrangements, dramatizations, sound recordings, & second editions
- **Distribution** of copies of the work to the public by sale, gift, rental, loan, or other transfer
- **Public performance** of the work
- **Public display** of the work

Who is the Copyright Holder?

- Default Rule: The creator is the copyright holder
 - If two or more persons jointly create a work, they are joint copyright holders with joint rights
- Exception: “work for hire”
- Independent Contractors
- Who’s the © holder? Start with the author.



The Back Cover



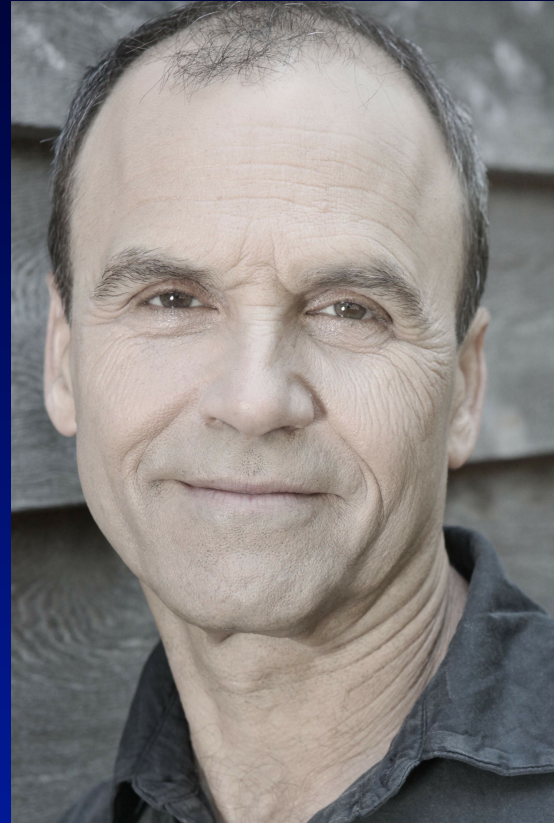
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- **Distribution** of copies of the work to the public by sale, gift, rental, loan, or other transfer
- **Public performance** of the work
- **Public display** of the work

It is not infringement if . . .

- You are the copyright holder
- You have express permission
- The work you are using is uncopyrightable or otherwise in the public domain
- There is a specific statutory limitation
- e.g. What you are doing is “fair use”

Detractors have a lot to say about this.



§106 Exclusive Rights

in Copyrighted Works

Notwithstanding sections 107 through 122, the owner of copyright under this title has the exclusive right to make and to authorize all uses including the following:

§106 Exclusive Rights

in Copyrighted Works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

Compare

Notwithstanding sections 107 through 122, the owner of copyright under this title has the exclusive right to make and to authorize all uses including the following: (false)

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (true)

There is a lot of misinformation
being consumed!!





The unauthorized reproduction or distribution of this copyrighted work is illegal. Criminal copyright infringement including infringement without monetary gain, is investigated by the FBI and is punishable by up to 5 years in federal prison and a fine of \$250,000.



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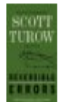
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- Copyright protection “has never accorded the copyright owner complete control over all possible uses of his work. ... All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.” *Sony. v. Universal City Studios*, 464 U.S. 417 (1984)

This Case Was Unnecessary

CONSIDER THE HT USES

- Preservation of the works in great academic libraries
- Search— with no display— over those works
- Access for persons who have print disabilities
- An OWP that never made any uses of even one book

Fair Use -- §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—” . . . the four factors

Fair Use Factors

- Purpose and character of the use
 - personal/educational/transformativ v. commercial use
- Nature of the work being used
 - factual v. creative
- Amount and substantiality of the portion used in relation to the whole
 - small. V. large, both quantitatively and qualitatively
- Effect on the market for the original
 - not of your individual use, but of the type of use

Public Institutions

- All the defendants in the HT case, with the notable exception of Cornell University, are public institutions.
- The Eleventh Amendment of the US Constitution prevents plaintiffs from seeking monetary damages from state institutions in copyright cases.
- Plaintiffs sought injunctive and declaratory relief.

Prima Facie Case of Infringement

Plaintiff must assert and then prove:

- A. It is the copyright holder or beneficial copyright holder of the work(s) at issue *and*
- B. Defendants made
 1. infringing and
 2. substantial (not *de minimis*) use of
 3. a protected portion of plaintiff's work(s)

What's the case about?

- Academic libraries digitized their collections which included copyrighted work, without, in most cases, the permission of copyright holders.
- Copies were made to enable:
 - Preservation of the collections
 - Search and text/data mining
 - Access for people who have print disabilities
- Plaintiffs believe these activities require permission of the copyright holder.
- Can libraries continue their orphan works project⁴²?

Who are the parties?

- Plaintiffs
 - Authors Guild
 - A cadre of named foreign and domestic authors
 - A set of foreign rights organizations
- Defendants
 - HathiTrust
 - University of Michigan, Indian University, Cornell University, University of California, and University of Wisconsin

What plaintiffs asserted

- Libraries copied millions of works
- Libraries distributed millions of works
- Libraries stored millions of works
- Libraries enabled search of millions of works
- Libraries enabled access to millions of works by print disabled
- Libraries intended to make access to copyrighted works through the Orphan Works Project

§106 Exclusive Rights of © Holders

- **Reproduction** of the work in whole or in part
- Preparation of **derivative** works
 - e.g., translations, musical arrangements, dramatizations, sound recordings, & second editions
- **Distribution** of copies of the work to the public by sale, gift, rental, loan, or other transfer
- **Public performance** of the work
- **Public display** of the work

What plaintiffs asserted

- If HT is allowed to continue, HT is putting copyrighted works at risk
- Fair use (§107) is not an available defense because libraries are covered by §108, which they “violated”
- If §107 applies, HT uses are not transformative uses and in any case, not fair uses.
- The OWP violates copyright

What plaintiffs sought

- Injunction that would sequester in a dark archive all the copyrighted works in the corpus
- Injunction that would prevent future digitization of copyrighted works by libraries or via Google
- Declaration that the Orphan Work Project violates the Copyright Act

What HT asserted

- HT may make fair uses without authorization
- The HT uses are all fair uses because they are both transformative uses and classical fair uses
- §108 does not preclude §107
- Michigan is an “authorized entity” under §121 and can make copies for the print disabled
- The OWP is not ripe of adjudication
- Authors Guild does not have standing under §501(b)

What HT sought

- To have plaintiffs stop bringing unnecessary lawsuits
- To defend its right to make fair uses
- To defend its right to act as an authorized entity under §121
- To uphold the law that only copyright holders can bring copyright claims

What the District Court Found

- a. that the defendants did not engage in copyright infringement as plaintiffs alleged;
- b. that the uses defendants made were fair uses (under §107 of the Copyright Act) and/or uses made as an authorized entity (under §121 of the Copyright Act), which means that the libraries acted properly within the scope of rights granted by Congress;
- c. that it was not ripe to adjudicate plaintiffs' claims about the Orphan Works Project, which means that plaintiffs' claims about the OWP were not justiciable; and

What the District Court Found

- d. that, while the U.S. associational plaintiffs have Article III standing (i.e., constitutional standing), they do not have statutory standing under the Copyright Act (§510b) to pursue claims of copyright infringement over works for which they are not a copyright holder. This means that some of the plaintiffs—including the primary plaintiff, the Authors Guild—do not have the right/ability to bring copyright lawsuits about other people’s copyrighted works.

What the District Court found

- Judge Baer summarizes his views by saying, “I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ MDP 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 ADA.”

What the District Court found

- The District Court's decision clarified important aspects of fair use law in ways that are favorable not only to HathiTrust activities, but to many other uses made every day at the postsecondary institutions. In addition, the Court addressed matters of first impression for any court regarding §§108, 121, and 501(b) of the Copyright Act, and it did so in ways that are overwhelmingly favorable to the colleges and educational and scholarly activities in general.

What the District Court found

- A search index, access for the print-disabled, and preservation are fair uses.
- Search indexing and access for those who have print disabilities are transformative uses.
- The libraries aren't making commercial uses, even though they partnered with Google to get the scans.
- §108 limitations for library uses don't limit the scope of fair use, or (other defenses and rights).

Reproductions by libraries and archives — §108

§108(f)(4)

- Nothing in this section . . . in any way affects the right of fair use as provided by section 107 or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections . . .

What the District Court found

- The plaintiffs haven't proven that HathiTrust is creating any security risks.
- There is no market for scanning and print-disabled access, nor is one likely to develop.
- Michigan is required under the ADA to provide equal access to the print-disabled, and is allowed to do so under §121 of the Copyright Act.

What the Second Circuit Found

- Upheld lower court's ruling on standing: U.S. associational plaintiffs lack standing; remaining authors and associations do have standing
- Upheld lower court's ruling on ripeness: no copyrighted works were displayed or distributed under OWP; OWP is indefinitely suspended; claims about OWP are not ripe
- Favorably quotes Judge Baer's "cannot imagine a definition" sentiment.

What the Second Circuit Found

- Digitizing and enabling full-text search is a transformative use and a fair use
 - Consolidates circuit split
 - Underscores infringement must “substitute”
- Print-Disabled access is a traditional fair use, but not a transformative use
- Two approaches to fair use are viable
- Court chose not to address §121; so, at present, the district court’s opinion stands.

What the Second Circuit Found

- Court did not say whether preservation was a fair use
- Before ruling on preservation issues, court **remanded** to the district court to determine whether any remaining plaintiffs had standing.
- Court focused on §108 uses in this context.

A few more thoughts . . .

- Our remand and its implications
- Google's case
- Why our choices matter
- We should dare to dream

Questions and Discussion

