

Dan Cohen's Digital Humanities Blog » Blog Archive » Impact Of Field V. Google On The Google Library Project

I've finally had a chance to read the federal district court ruling in a case, *Field v. Google*, that has not been covered much (except in the technology press), but which has obvious and important implications for the upcoming battle^[1] over the legality of Google's library digitization project^[2]. The case, *Field v. Google*^[3], involved a lawyer who dabbles in some online poetry^[4], and who was annoyed that Google's spider cached a version of his copyrighted ode to delicious tea^[5] ("Many of us must have it iced, some of us take it hot and combined with milk, and others are not satisfied unless they know that only the rarest of spices and ingredients are contained therein..."). Field sued Google for copyright infringement; Google argued fair use. Field lost the case, with most of his points rejected by the court. The Electronic Frontier Foundation has hailed Google's victory as a significant one, and indeed there are some very good aspects of the ruling for the book copying case. But there also seem to be some major differences between Google's wholesale copying of websites and its wholesale copying of books that the court implicitly recognized. The following seem to be the advantages and disadvantages of this ruling for Google, the University of Michigan^[6], and others who wish to see the library project reach completion.

Courts have traditionally used four factors to determine fair use—the purpose of the copying, the nature of the work, the extent of the copying, and the effect on the market of the work.

On **purpose**, the court ruled that Google's cache was not simply a copy of that work, but added substantial value that was important to users of Google's search engine. Users could still read Field's poetry even if his site was down; they could compare Google's cache with the original site to see if any changes had been made; they could see their search terms

highlighted in the page. Furthermore, with a clear banner across the top Google tells its users that this is a copy and provides a link to the original. It also provides methods for website owners to remove their pages from the cache. This emphasis on *opt out* seems critical, since Google has argued that book publishers can simply tell them if they don't want their books digitized. Also, the court ruled that the Google's status as a commercial enterprise doesn't matter here. **Advantage for Google et al.**

On **the nature of the work**, the court looked less at the quality of Field's writing ("Simple flavors, simple aromas, simple preparation...") than at Field's intentions. Since he "sought to make his works available to the widest possible audience for free" by posting his poems on the Internet, and since Field was aware that he could (through the robots.txt file) exclude search engines from indexing his site, the court thought Field's case with respect to this fair use factor was weakened. But book publishers and authors fighting Google will argue that they do not intend this free and wide distribution. **Disadvantage for Google et al.**

One would think that the third factor, **the extent of the copying**, would be a clear loser for Google, since they copy entire web pages as a matter of course. But the Nevada court ruled that because Google's cache serves "multiple transformative and socially valuable purposes...that could not be effectively accomplished by using only portions" of web pages, and because Google points users to the original texts, this wholesale copying was OK. You can see why Google's lawyers are overjoyed by this part of the ruling with respect to the book digitization project. **Big advantage for Google et al.**

Perhaps the cruelest part of the ruling had to do with the fourth factor of fair use, **the effect on the market of the work**. The court determined from its reading of Field's ode to tea that "there is no evidence of any market for Field's works." Ouch. But there is clearly a market for many books that remain in copyright. And since the Google library project has just begun we don't have any economic data about Google Book Search's

impact on the market for hard copies. **No clear winner here.**

In addition, the Nevada court added a critical *fifth* factor for determining fair use in this case: **“Google’s Good Faith.”** By providing ways to include and exclude materials from its cache, by providing a way to complain to the company, and by clearly spelling out its intentions in the display of the cache, the court determined that Google was acting in good faith—it was simply trying to provide a useful service and had no intention to profit from Field’s obsession with tea. Google has a number of features that replicate this sense of good faith in its book program, like providing links to libraries and booksellers, methods for publishers and authors to complain, and techniques for preventing user copies of copyrighted works. **Advantage for Google et al.**

A couple of final points that may work against Google. First, the court made a big deal out of the fact that the cache copying was completely *automated*, which the Google book project is clearly not. Second, the ruling constantly emphasizes the ability of Field to opt out of the program, but upset book publishers and authors believe this should be *opt in*, and it’s quite possible another court could agree with that position, which would weaken many of the points made above.

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References

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3. [^ Field v. Google](#) (www.eff.org)
4. [^ some online poetry](#) (www.blakeswritings.com)
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