



To our
clients
and
colleagues:

Welcome to DSSV's Winter 2014 Newsletter. In this issue, we examine recent significant court decisions in the areas of copyright and employment law.

In November 2013, a federal district court in Manhattan upheld Google's "fair use" defense in a copyright infringement action brought by The Authors Guild and several authors challenging the Google Books project which makes millions of copyrighted works searchable on the internet. In our opening article, DSSV Counsel Cynthia L. Ebbs discusses the court's reasoning and how this decision may impact the public's access to the increasing range of information available on the internet.

New York's highest court recently held that the New York City Human Rights Laws could be construed to require an employer to provide an indefinite leave of absence to a disabled employee as a "reasonable accommodation." DSSV associate Jessica Jablon Rubin discusses this decision, and what it means for employers, in the second article of our Newsletter.

We at DSSV wish our friends, clients and colleagues a happy and prosperous holiday season.

Jerold Dornbush
Partner



Google's Victory in Copyright Challenge to Google Books Project Further Defines Fair Use Doctrine for the Digital Age



By Cynthia L. Ebbs

On November 14, 2013, Judge Denny Chin of the United States District Court for the Southern District of New York dismissed an eight-year old putative class action, brought by The Authors Guild and other plaintiffs, against Google for copyright infringement in connection with its Google Books project. *The Authors Guild, Inc. et al. v. Google, Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y. Nov. 14, 2013).

The Google Books project involves, among other things, the digital scanning of more than 20 million books in the collections of libraries and universities, without obtaining the permission of copyright holders. While Judge Chin's decision upholds the statutory fair use defense, interposed in this instance by a vast commercial

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enterprise, the most notable impact of the decision is to reaffirm and strengthen the public purpose of copyright law – to “promote the progress of science and useful arts.” U.S. Const. Art. I., § 8, cl. 8.

Under the U.S. Copyright Act, the fair use doctrine provides that, even where a copyright may otherwise be violated, if a defendant's use is “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, [it] is not an infringement of copyright.” 17 USCS § 107. In holding that Google's use of the works constitutes “fair use,” the court in *Authors Guild* considered the four statutory factors applicable to the fair use defense: (1) the purpose and character of the use; (2) the nature of the original work; (3) the amount of the work used; and (4) the presence of market harm as a result of the use.

Beginning in 2004, Google partnered with several major research libraries for purposes of scanning and digitally copying millions of books from library collections and made the full text searchable online through its Google Books search engine. While complete digital copies of the books are provided by Google to the libraries, Google does not provide public access to complete texts through its online search engine; online search results are made publicly available only as “snippets” of text. Google has scanned more than 20 million books without obtaining permission from or providing compensation to copyright holders. In 2005, The Authors Guild and several individual authors began a lawsuit against Google in the Southern District of New York for copyright infringement.

In July of this year, the Court of Appeals for the Second Circuit, considering an interlocutory appeal on the issue of class certification, held that the “resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot out analysis of many class certification issues.” The Second Circuit therefore remanded the case to Judge Chin for determination of the fair use issue. 721 F.3d 132, 134, 135 (2d Cir. 2013). Thereafter, the parties cross-moved for summary judgment on the sole issue of “whether Google's use of copyrighted works is ‘fair use’ under the copyright laws.”

In deciding the fair use issue, the district court proceeded through the four fair use factors delineated

in the Copyright Act. Considering the **character** of Google's use of the copyrighted works, the court found that Google's “use of book text to facilitate search through the display of snippets” is “transformative”, or used to create something new, because it “uses words for a different purpose – it uses snippets of text to act as pointers directing users to a broad selection of books.” 05 Civ. 8136 (DC) at 20. The court further stated that “Google Books does not supercede or supplant books because it is not a tool to be used to read books. Instead, it ‘adds value to the original’ and allows for ‘the creation of new information, new aesthetics, new insights and understandings.’” *Id.* at 21. (citations omitted)

As to the **purpose** of the use, The court noted that while Google is a commercial entity and derives some commercial benefit from the Google Books project, the educational purpose of the project outweighs the commercial benefits: “Here, Google does not sell the scans it has made of books for Google Books; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works.” *Id.* at 21-22.

With respect to the **nature** of the original work, the court also weighed this factor in Google's favor, as the works at issue are already available to the public and most, but not all, of the scanned works are works of nonfiction. *Id.* at 22-23. Acknowledging that Google copies the work in its entirety, but displays only snippets of text for each search, Judge Chin found the **amount** of the work used weighed against a finding of fair use. *Id.* at 23-24.

Finally, the court found that the fourth and final factor, the presence of **market harm** resulting from the use, weighed in favor of fair use. The court stressed that the Google Books project is not a “market replacement” for books because Google's technology, which ultimately withholds certain pages and snippets from view, ensures that users cannot obtain a complete copy of any one work. *Id.* at 24. Instead, the court found that Google Books actually “enhances the sale of books to the benefit of copyright holders” and that “there can be no doubt but that Google Books improves book sales.” *Id.* at 25.

The court's analysis may set an important precedent for the fair use defense. Although Judge Chin found that Google “does not engage in direct commercialization

of copyrighted works,” the Google Books project plainly has a commercial aspect by increasing internet traffic to Google websites. *Id.* at 21-22. The decision also applies a broad concept of “transformative” use to include technological innovations such as digitization and search mechanisms, alongside more traditional “transformative” uses like those that alter the copyrighted work using human (as opposed to mechanical) expression or meaning.

Notwithstanding the commercial nature of the Google Books project, Judge Chin’s decision ultimately was driven by his finding that, in providing broad access to information for research, educational and other purposes through the application of new technology, the program sufficiently serves the public interest and qualifies for the fair use defense. As Judge Chin put it, the Google Books project “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.” *Id.* at 27-28. Given the realities of the digital age, where information and data are made broadly available through the networks of private commercial actors, this decision, if it withstands an appeal, may serve as a model for future fair use determinations.



New York Court of Appeals Rules Indefinite Leave Not a Reasonable Accommodation Under New York State Law, But May Be Under New York City Law



By Jessica Jablon Rubin

The New York Court of Appeals recently ruled that while indefinite leave is not a reasonable accommodation for persons with disabilities under the New York State Human Rights Law (“NYSHRL”), it could be considered a reasonable accommodation under the New York City Human Rights Law (“NYCHRL”). See *Romanello v. Intesa Sanpaolo, S.p.A.*, No. 152 (N.Y. Ct. App. Oct. 10, 2013).

By way of background, Romanello, a former executive of Intesa Sanpaolo S.p.A. (“Intesa”), had been on paid

leave from work for almost five months due to a series of disorders, including major depression. Intesa, through its counsel, sent Romanello’s counsel a letter advising him that his protected leave under the Family and Medical Leave Act (“FMLA”) was set to expire, and inquiring whether he intended to return to work or abandon his position. In response, Plaintiff’s counsel stated, in part, that Romanello had no intention of abandoning his position, though his return to work date was “indeterminate.” Intesa responded by terminating Romanello’s employment.



Romanello thereafter filed a lawsuit under state and city laws alleging disability discrimination. The trial court dismissed both causes of action, and the intermediate appellate court affirmed on both counts. On further appeal, in a notable opinion, the New York Court of Appeals affirmed the dismissal of Romanello's disability discrimination claim under NYSHRL, but reinstated his claim under NYCHRL.

In affirming his claim under NYSHRL, New York's highest court held that in order to state a claim under State law, "the complaint and supporting documentation must set forth factual allegations sufficient to show that, upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or her] job." In assessing the facts of the case, the court concluded

that Romanello's request was tantamount to an indefinite leave of absence, which is not a reasonable accommodation under NYSHRL.

Conversely, with respect to Romanello's disability discrimination claim under NYCHRL, the Court of Appeals held that the City law affords broader protection to litigants than does the State law, and that the City law must be construed as broadly as possible in favor of plaintiffs. In particular, the court noted that the NYCHRL defines disability broadly in terms of "impairments" and places the burden on the employer to prove either: (1) that the employee could not, with reasonable accommodation, satisfy the essential requisites of the job or (2) that the accommodation would place an undue hardship on the business. Ultimately,

because Intesa failed to meet its obligation to plead and prove that Romanello could not perform his essential job functions with an accommodation, the Court reinstated the NYCHRL claim.

In light of *Romanello*, employers in New York should continue to be cautious when evaluating leaves of absence based on a disability, giving each request a comprehensive factual analysis before determining whether that request is unreasonable or likely to produce an undue hardship on the business. Additionally, an employer should engage in an interactive dialogue with its employee regarding requested accommodations before coming to any conclusions as to the reasonability of the request.