



**IP Innovations
January 2009**

Private Rights and the Public Interest: Copyright Fair Use and the Google Book Search Litigation

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- *The Author's Guild, et al. v. Google Inc.*
- *McGraw-Hill Companies, Inc.; Pearson Education, Inc.; Penguin Group (USA) Inc.; Simon & Schuster, Inc.; and John Wiley & Sons, Inc. v. Google Inc.*

Creation of GBS Index of Works

GBS Library Project:

- Partnerships with Harvard, Univ. of Mich., New York Public Library, Oxford, Stanford and others.
- Scanning of works in participating libraries.
 - Libraries receive one copy of the scan.
- In- and out-of-copyright works.

GBS Publishers Program:

- Authors and Publishers submit works.
- Determine amount of work available for display.

Four Types of GBS Search Results:

- Full View
 - Public Domain works
 - Full view and downloads
- Limited Preview
 - Publisher Program
 - Full page views, restricted access to entire work
- Snippet View
 - Searchable in-copyright works
 - A few lines of text

(More on this Later)

GBS Litigation

- Publishers & Authors filed copyright infringement actions.
- Google defenses, *inter alia*, FAIR USE.

Fair Use Factors

All fair use assessments must consider each of the following factors. 17 U.S.C. 107.

1. The purpose and character of the use, including whether it is of a commercial nature or for non-profit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

Fair Use: Transformative Use

- Use for purposes such as criticism, comment, news reporting, teaching, scholarship or research are generally favored under the Fair Use Doctrine 17 U.S.C. 107.
- This is especially the case where the allegedly infringing use is “transformative”; and parody is a classic example of “transformative” use. See *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

***SunTrust Bank v. Houghton Mifflin*, 136 F.Supp. 2d 1357 (N.D.Ga. 2001), reversed and remanded 252 F.3d 1166 (11th Cir. 2001) and 268 F.3d 1257 (11th Cir. 2001).**

- “[Author] Randall has fully employed those conscripted elements from GWTW to make war against it” (Birch, J. for the majority).
- “*The Wind Done Gone* is unequivocally parody [the book’s] main aim being to shatter *Gone With the Wind*’s window on life in the antebellum and Civil War South.” (Marcus, J. concurring).

Fair Use: Case Discussion

1. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002)
2. *Bill Graham Archives v. Dorling Kindersley Ltd*, 448 F.3d 605 (2d Cir. 2006)
3. Google Book Search Litigation

***Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002)**

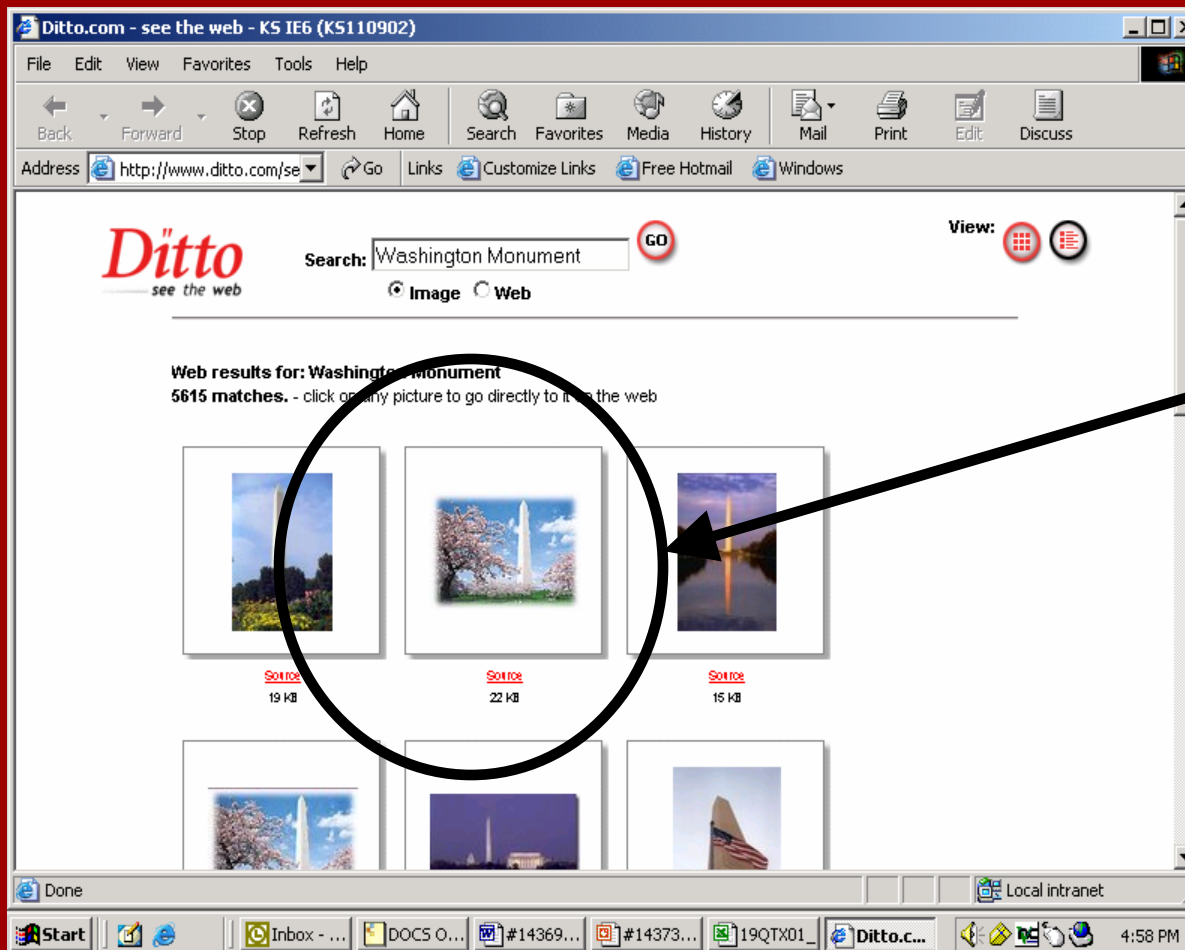
Facts

- Plaintiff, Kelly: photographer
 - Posted images on website.
- Defendant, Arriba Soft: operates visual search engine, *ditto.com*.
 - Search engine “crawls” and indexes images on the Internet.
 - Search results displayed as “thumbnails”– images reduced in size and resolution.

Ditto.com homepage



Ditto.com search results



Thumbnail view
of copyrighted
image

FACTOR 1 - PURPOSE OF USE

Focus on transformative use:

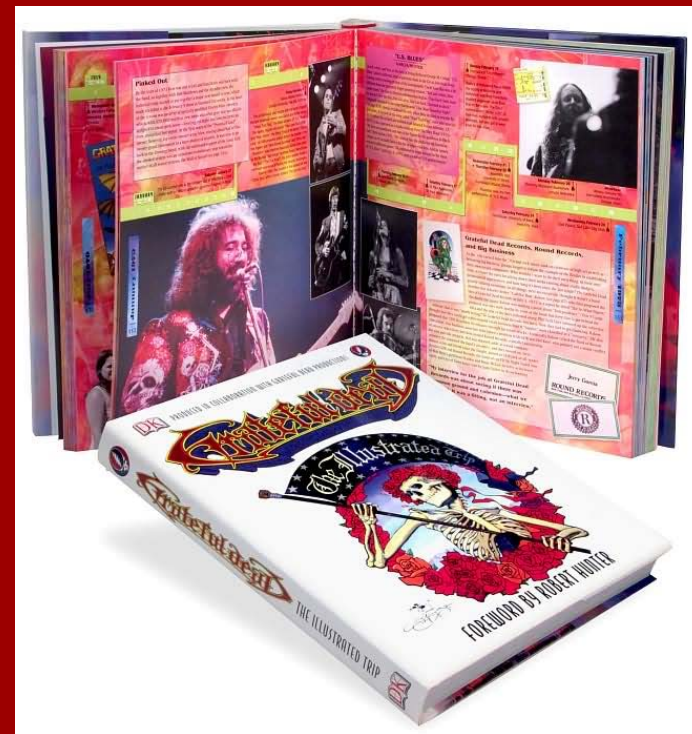
- “The more transformative the new work, the less important the other factors, including commercialism become.” 280 F.3d at 940 (*quoting Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).
- “This case involves more than merely a retransmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression. Furthermore, it would be unlikely that anyone would use Arriba's thumbnails for illustrative or esthetic purposes because enlarging them sacrifices their clarity. Because Arriba's use is not superseding Kelly's use but, rather, has created a different purpose for the images, Arriba's use is transformative.” 280 F.3d at 941-42.

FACTOR 4 – MARKET EFFECT

- Because of their poor resolution, the thumbnails do not supplant any market for Kelly’s photographs.
- “By showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site rather than away from it. Even if users were more interested in the image itself rather than the information on the web page, they would still have to go to Kelly's site to see the full-sized image. The thumbnails would not be a substitute for the full-sized images because when the thumbnails are enlarged, they lose their clarity. If a user wanted to view or download a quality image, he or she would have to visit Kelly's web site.” 280 F.3d at 944.

Bill Graham Archives v. Dorling Kindersley Ltd,
448 F.3d 605 (2d Cir. 2006)

Biographical Work:
“Grateful Dead: The Illustrated Trip”



Facts:

- Defendant reproduced 7 images originally depicted on concert posters and tickets.
- Images displayed in reduced size in connection with an illustrated timeline.
- Images only appear on 7 pages of 480 page book.



FACTOR 1 - PURPOSE AND CHARACTER OF USE

Transformative Use:

“The [original] posters were apparently widely distributed to generate public interest in the Grateful Dead and to convey information to a large number of people about the band’s forthcoming concerts. In contrast, DK used each of BGA’s images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*’s timeline.” 448 F.3d at 609.

FACTOR 2 – NATURE OF COPYRIGHTED WORK

- Creative nature of work typically weighs in favor of the copyright holder.
- Second factor limited, however, where there is transformative use:

“[W]e conclude that DK is using BGA's images for the transformative purpose of enhancing the biographical information provided in *Illustrated Trip*. Accordingly, we hold that even though BGA's images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK's use was to emphasize the images' historical rather than creative value.” 448 F.3d at 612-13.

FACTOR 3 – AMOUNT AND SUBSTANTIALITY

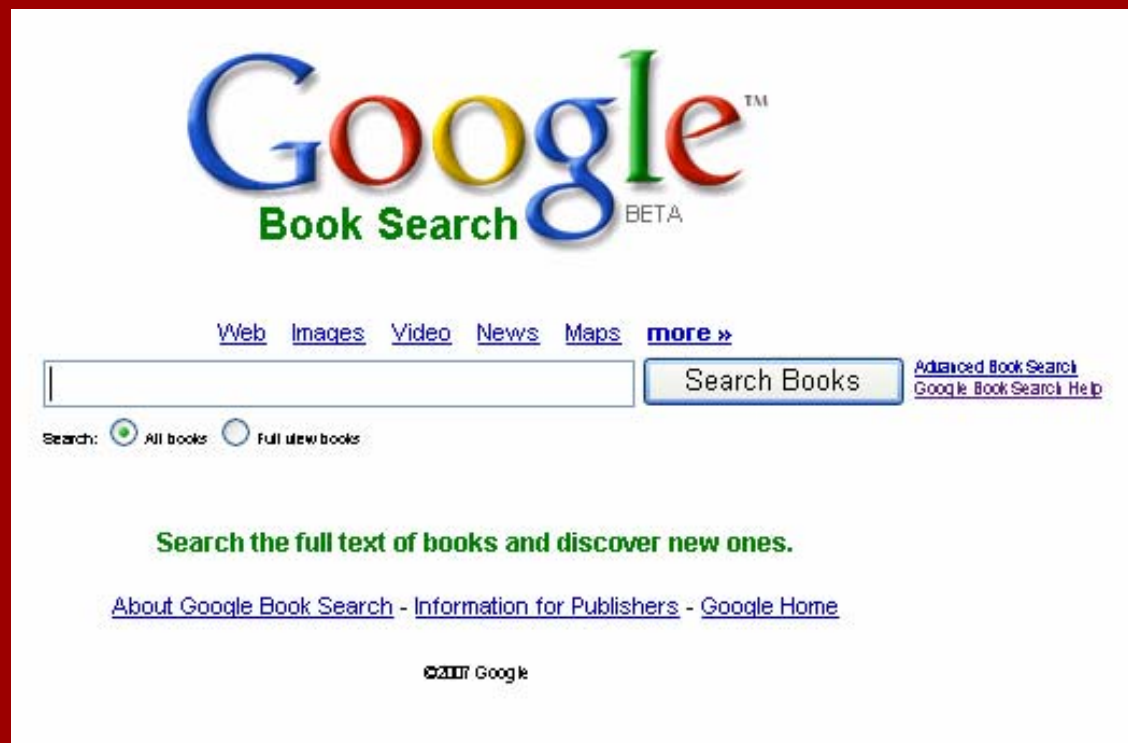
- Copying and use of entire image did not weigh against fair use.
 - “...even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size [S]uch use by DK is tailored to further its transformative purpose because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events.” 448 F.3d at 613.
 - *cf. Suntrust*, 268 F.3d at 1273 (“A use does not necessarily become infringing the moment it does more than simply conjure up another work.”); *Campbell*, 510 U.S. at 586-87.

FACTOR 4 – MARKET EFFECT

- Court examined whether use damaged BGA’s potential for a derivative market.
 - Analysis of “traditional, reasonable, or likely to be developed” derivative markets.
- “Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees.”
 - “In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely ‘by developing or licensing a market for parody, news reporting, educational, or other transformative uses of its own creative work.’” 448 F.3d at 614-15 (quoting *Castle Rock Entm’t, Inc. v. Carol Pub. Group*, 150 F.3d 132, 146 n. 11 (2d Cir. 1998)).

The Author's Guild, et al. v. Google Inc.

McGraw-Hill Companies, Inc.; Pearson Education, Inc.; Penguin Group (USA) Inc.; Simon & Schuster, Inc.; and John Wiley & Sons, Inc. v. Google Inc.



GBS: Full View

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[Category 5: The Story of Camille, Lessons Unlearned from America's Most Violent Hurricane - Page 28](#)

by Judith A. Howard, Ernest Zebrowski - 2005 - 276 pages

Bienville named the place **New Orleans**. It was, in the words of one writer, "an inevitable ... **Hurricanes** and tropical storms continued as they always had, ...

Limited preview - [Table of Contents](#) - [About this book](#)



[Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission... - Page 611](#)

by United States Congress. Senate. Committee on Appropriations - 1972

Fiscal year 1973 funds as budgeted are required to advance construction of the **New Orleans** East Lake Front Levee, the **New Orleans** East Back Levee, the **New ...**

Snippet view - [About this book](#)



[Energy and Water Development Appropriations for 1980: hearings before a Subcommittee of the... - Page 1967](#)

by United States Congress. House. Committee on Appropriations. Subcommittee on Energy and Water Development - 1979

LAKE PONTCHARTRAIN AND VICINITY The Lake Pontchartrain Hurricane Protection project will provide protection from hurricane driven tides for **New Orleans**, ...

Snippet view - [About this book](#)



[Hurricane Andrew: South Florida & Louisiana, August 23-26, 1992: Natural Disaster Survey Report - Page 102](#)

It is estimated that the existing levee system would protect the Greater **New Orleans** area from category 1 and 2 **hurricanes**. The levee system is rated to ...

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Hurricane Andrew: South Florida & Louisiana, August 23-26, 1992: Natural Disaster Survey Report

The Greater **New Orleans** area, which includes **Orleans**, St. Tammany, St. Bernard, Jefferson, St. Charles, St. John the Baptist, and north **Plaquemines** Parishes, has the highest population density along the gulf coast and is one of the most vulnerable. The Greater **New Orleans** area physically sits 5 to 10 feet below sea level and is protected by a network of levees. It is estimated that the existing levee system would protect the Greater **New Orleans** area from category 1 and 2 **hurricanes**. The levee system is rated to survive most category 3 storms and some select category 4 storms but no category 5 storms. Areas outside of the levee system are easily flooded. The degree of inundation is dependent on storm strength and landfall approach. Most evacuees are anticipated in evacuation plans to go to destinations within their own parish, to a northern adjacent parish, or, time permitting, to a parish well north of the endangered area.

Evacuation plans anticipate that a third or fewer of the evacuees will leave the region, going to points north or inland. Doing so requires that most evacuees use either US 61, I-10, or I-55, all multilane, limited access highways. Transportation models indicate that congestion will be extreme on both US 61 and I-55, exiting north from the Greater **New Orleans** area. Areas west would use I-49, US 171, or US 165, also multilane highways. Clearance times required to evacuate residents and seasonal visitors safely are listed in Table 4, Southeast Louisiana Regional Clearance Times. These longer evacuation clearance times reflect the limited number of evacuation routes from the Greater **New Orleans** area and the need for many coastal residents to evacuate through **New Orleans**. Despite the fact that **New Orleans** was within the warning area, its evacuation response was poor considering the potential threat for loss of life.

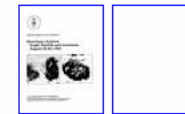
Ideally, emergency management officials attempt to have all evacuation requirements completed prior to the arrival of gale-force winds and the flooding of roadways. Therefore, the initiation of evacuation must reflect not only the clearance time but also the number of hours which tropical storm-force winds precede the arrival of the hurricane's eye. The average additional time required is about 6 hours. **Recommendation IJ.E.4: FEMA, in concert with the NWS, should ensure the completion of local evacuation studies and integrate them into a comprehensive regional evacuation plan.** It is hoped that the results of such a regional study would provide local officials with new response options that would reduce overall evacuation clearance times.

Evacuation Actions by Local Emergency Management

The state, parish, and city governments have the authority to order evacuation in response to any imminent threat. Failure to comply, however, carries no penalty.

Over the past 20 years, the State of Louisiana has worked slowly toward the development of an effective hurricane preparedness program. Their progress was very evident in Andrew. The Adjutant General for the State of Louisiana oversees the state's DEM. The Adjutant General's staff has been overseeing the DEM for slightly more than a year prior to Andrew. Despite this short tenure, the General's staff was aware of the pending situation, in part due to the excellent on-going working relationship between NWS and DEM officials. As part of a coordinated effort between the DEM and the NWS, Adjutant General Stroud called a meeting of NWS, parish, and state officials well before Andrew's entry into the gulf—a full

Summary



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Summary



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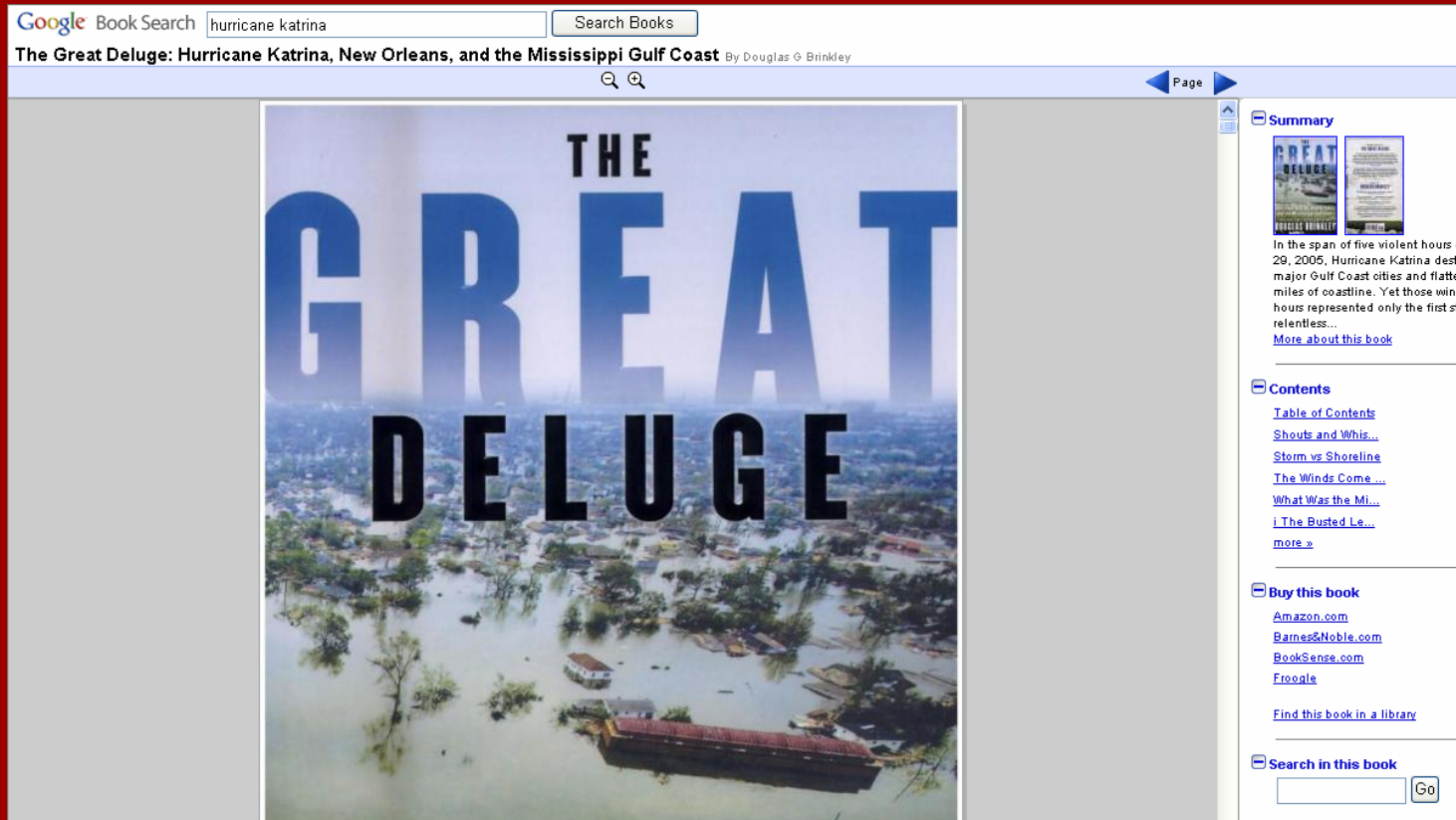
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Google Book Search hurricane katrina Search Books

The Great Deluge: Hurricane Katrina, New Orleans, and the Mississippi Gulf Coast By Douglas G. Brinkley

THE
GREAT
DELUGE

Summary

In the span of five violent hours on 29, 2005, Hurricane Katrina destroyed major Gulf Coast cities and flattened miles of coastline. Yet those wind-torn hours represented only the first stage of a relentless...

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IN WASHINGTON, D.C., MICHAEL D. BROWN, the director of the Federal Emergency Management Agency, received a briefing on Saturday from the National Hurricane Center on the severity of Hurricane Katrina and the likelihood that it would indeed make a direct hit on New Orleans. Like Nagin, Brown responded by letting the day pass. He didn't send emergency-response management teams to the region, normally a reflex action for a FEMA director in the face of potential problems. He didn't send hundreds of buses to the periphery of the Gulf Coast, within easy post-storm striking distance. He sent two public affairs officials and waited to see what would happen. "When FEMA finally did show up, everybody was angry because all they had was a Web site and a flyer," Senator Mark Pryor (D-Arkansas) told the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. "They didn't have any real resources that they could give."

Summary



In the span of five violent hours on August 29, 2005, Hurricane Katrina destroyed major Gulf Coast cities and flattened 150 miles of coastline. Yet those wind-torn hours represented only the first stage of the relentless...
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GBS: Snippet View

- Parallel to card catalog
- Bibliographic information
- "snippets" – a few sentences to display search terms in context

Google Book Search "hurricane katrina" Search Books Sign in

The Impact of Hurricane Katrina on the Aviation Industry: Hearing Before the Subcommittee on... By United States Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Aviation

Summary

By United States Congress. Senate. Committee on Commerce, Science, and Transportation. Subcommittee on Aviation

Contributor United States, Congress Senate Committee on Commerce, Science, and Transportation Subcommittee on Aviation Staff

Published 2006
For sale by the Supt. of Docs., U.S. G.P.O.

36 pages

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Search in this book

"hurricane katrina" Search

2 pages matching "hurricane katrina" in this book

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PREPARED STATEMENT OF DR. HOWARD K. GRUENSPECHT, DEPUTY ADMINISTRATOR,
U.S. ENERGY INFORMATION ADMINISTRATION

Mr. Chairman and Members of the Committee:
I appreciate the opportunity to appear before you today to discuss recent develop-

Page 6

In the immediate aftermath of hurricane Katrina, with the extent of actual damage still largely unknown, crude oil prices rose briefly over \$70 per barrel, up more than \$4 in less than 48 hours, but in less than a week had fallen below their pre-storm levels. The impact on crude oil prices was undoubtedly lessened by the relatively robust inventory levels before the storm, and by quick assurance that refiners unable to obtain adequate crude oil supplies would be able to borrow by way of time exchanges from the Strategic Petroleum Reserve even before the securi-

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Done Internet

Summary



By United States
Congress, Senate,
Committee on Commerce,
Science, and
Transportation,
Subcommittee on Aviation

Contributor United
States, Congress Senate
Committee on Commerce,
Science, and
Transportation
Subcommittee on
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Published 2006
For sale by the Supt. of
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36 pages

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Societe des Auteurs des Arts Visuels et de l'Image Fixe v. Google Inc.

- French plaintiffs sued Google claiming Google Book Search and Google Image Search infringed their copyrights.
- French court agreed with Google that U.S. law applied.
- Five experts testified that Google's use was a fair use because it was transformative.
- In the Image Search case, the French court concluded that Google's use was a fair use.

Societe des Auteurs des Arts Visuels et de l'Image Fixe v. Google Inc.



Google™
Recherche d'images



Google™
Recherche de livres BÊTA

Fair Use Analysis

FACTOR 1 – PURPOSE OF USE

- Providing a book search engine that enables users to find books is transformatively different than the books' original purpose of entertaining and informing.
- Google Book Search cannot act as a substitute for the original works because only a snippet is displayed and security measures prevent users from acquiring an entire work.

FACTOR 2 – NATURE OF COPYRIGHTED WORK

- All the books are published, and a majority are non-fiction and out-of-print.

FACTOR 3 – AMOUNT OF COPYRIGHTED WORK USED

- As in *Kelly* and *Perfect 10*, an entire copy is necessary to operate the search engine.

FACTOR 4 – MARKET EFFECT

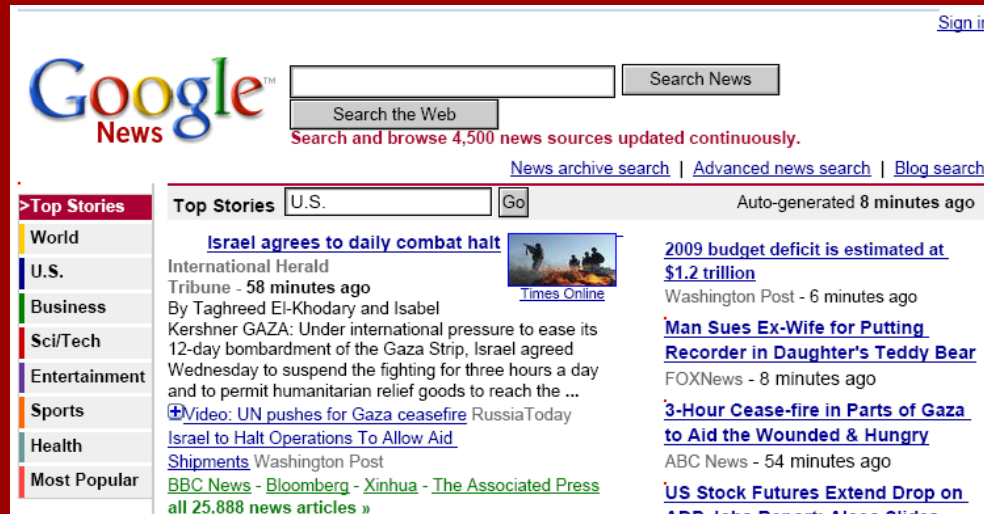
- The rights holders cannot preempt a transformative market for indexing snippets by licensing other transformative uses.

Copiepresse SCRL v. Google Inc.

The screenshot shows the Google News Belgium homepage. At the top right is a link for 'Aanmelden'. The main search area features the Google logo with 'Nieuws België BETA' below it. There are two search boxes: one for general web searches ('Het web doorzoeken') and one for news searches ('Nieuws zoeken'). Below the search boxes is the text 'Zoek en blader in 400 continu bijgewerkte nieuwsbronnen.' Navigation links include 'Geavanceerd zoeken naar nieuws', 'Standaardnieuws', and 'Tekstversie'. A sidebar on the left lists categories: 'Voorpagina', 'Buitenland', 'België', 'Economie', 'Wetenschap', 'Sport', 'Entertainment', 'Gezondheid', and 'Meest gelezen'. The main content area shows a 'Voorpagina' section for 'België' with an 'Uitvoeren' button and a timestamp '3 minuten geleden automatisch gegenereerd'. The featured article is titled 'Rusland stopt gasleveringen via Oekraïne' with a sub-headline 'NRC Handelsblad - 30 minuten geleden Rotterdam, 7 jan. De toelevering van Russisch gas via Oekraïne naar Europa is vanmorgen volledig stil komen te liggen. Daarmee is de gasruzie tussen beide landen net als drie jaar geleden geëscaleerd in een conflict met Europa. ...'. It includes a small image of a building at night and a 'Trouw' logo. Below the article are several related news links from various sources like 'Nederland spint mogelijk garen bij gasruzie Trouw', 'EU waarschuwt Moskou om gastekort NOS.nl', and 'Reformatorisch Dagblad - Algemeen Dagblad - NU.nl - De Tijd'. On the right side, there are more news snippets: 'Deceuninck wil 50 miljoen euro ophalen' (De Tijd), 'Radiant Silvergun naar Xbox Live Arcade?' (XGN Entertainment), 'Nieuwe systeem whereabouts drijft Steegmans tot uiterste' (Het Laatste Nieuws), and 'Verslag van een MnM-dag' (Knack).

Copiepresse SCRL v. Google Inc.

- Organization of Belgian publishers claimed that
 - Google News infringed their copyrights and the moral rights of the news articles' authors, and
 - The cache display function in Google's web search infringed their copyrights.
- Google argues that, as in the French case, U.S. law applies.



The screenshot shows the Google News interface. At the top right is a "Sign in" link. Below it are two search bars: "Search News" and "Search the Web". A red banner below the search bars states "Search and browse 4,500 news sources updated continuously." Below this are links for "News archive search", "Advanced news search", and "Blog search". A "Top Stories" section is visible, with a dropdown menu set to "U.S." and a "Go" button. The "Auto-generated 8 minutes ago" timestamp is also present. The main content area displays several news items, including "Israel agrees to daily combat halt" from the International Herald Tribune (58 minutes ago), "2009 budget deficit is estimated at \$1.2 trillion" from the Washington Post (6 minutes ago), "Man Sues Ex-Wife for Putting Recorder in Daughter's Teddy Bear" from FOXNews (8 minutes ago), "3-Hour Cease-fire in Parts of Gaza to Aid the Wounded & Hungry" from ABC News (54 minutes ago), and "US Stock Futures Extend Drop on ADP Jobs Report; Alcoa Slides". A sidebar on the left lists various categories: Top Stories, World, U.S., Business, Sci/Tech, Entertainment, Sports, Health, and Most Popular.

Copiepresse SCRL v. Google Inc.

- Five experts testified that, under U.S. law,
 - Google News
 - Is a use the plaintiffs expressly, or impliedly, licensed; and
 - Is a fair use because it is transformative.
 - Google Web Search’s cache display function
 - Lacks the volition required to constitute copyright infringement;
 - Is a use the plaintiffs expressly, or impliedly, licensed; and
 - Is a fair use.
- Joseph M. Beck submitted expert testimony that, under U.S. law, plaintiffs’ moral rights claims
 - Would be preempted by the Copyright Act under the Supremacy Clause, and
 - Would run afoul the First Amendment.

Google News Fair Use Analysis

FACTOR 1—PURPOSE OF USE

- Indexing and improving access to news articles published on the internet is transformatively different than informing and reporting on the news.
- Google News cannot act as a substitute for the original works because only the headlines, snippet, and low-resolution thumbnail photographs are displayed.

FACTOR 2—NATURE OF COPYRIGHTED WORK

- Published and typically factual rather than imaginative

FACTOR 3—AMOUNT OF COPYRIGHTED WORK USED

- As in *Kelly* and *Perfect 10*, reproduction and storage of an entire copy is necessary to operate the search engine
- Unlike in *Kelly* and *Perfect 10*, Google News displays only snippets.

FACTOR 4—MARKET EFFECT

- There is no evidence of a nontransformative market for headlines, snippets or low-resolution thumbnails
- Exploitation of transformative markets may not be preempted by the copyright owner.

License Analysis

EXPRESS LICENSE

- Google News
 - /robots.txt files, meta-tags—and in one case, an email—affirmatively invited Google to crawl and index the pages
- Web Search Cache Display Function
 - Plaintiffs used tools affirmatively to invite the Googlebot to crawl and index but simultaneously chose not to utilize similar tools to prevent “Cached” links

IMPLIED LICENSE

- Google reasonably interpreted plaintiffs’ communications as a grant of a license.

Moral Rights

U.S. FEDERAL MORAL RIGHTS

- No attribution claims under Lanham Act § 43(a) after *Dastar*.
- VARA provides moral rights only for specified works of visual art.

SUPREMACY CLAUSE

- A state attribution claim would create a “mutant copyright” with no fair use or idea/expression dichotomy defense.
- A party making a highly transformative use would be forced to choose between liability for failure to attribute and liability for falsely attributing the transformative work.

FIRST AMENDMENT

- Public display of a altered reproduction *not* attributed to the original work’s creator is protected speech. *Wojnarowicz v. American Family Association*, 745 F. Supp. 130 (S.D.N.Y. 1990).
- Forcing a choice between liability for failure to attribute and liability for false attribution would impermissibly chill speech.