

Authors Guild, Inc. v. HathiTrust

No. 12-4547 (2nd Cir. 2014)

Before WALKER, CABRANES, and PARKER, Circuit Judges.

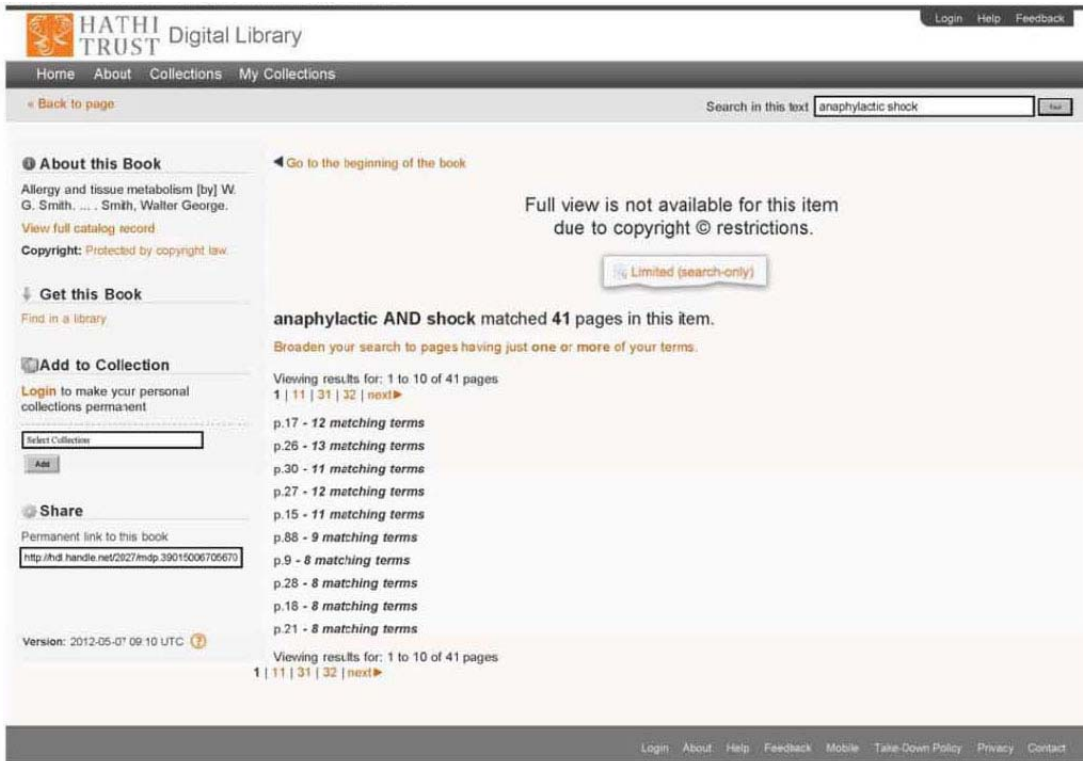
Beginning in 2004, several research universities including the University of Michigan, the University of California at Berkeley, Cornell University, and the University of Indiana agreed to allow Google to electronically scan the books in their collections. In October 2008, thirteen universities announced plans to create a repository for the digital copies and founded an organization called HathiTrust to set up and operate the HathiTrust Digital Library (or “HDL”). Colleges, universities, and other nonprofit institutions became members of HathiTrust and made the books in their collections available for inclusion in the HDL. HathiTrust currently has 80 member institutions and the HDL contains digital copies of more than ten million works, published over many centuries, written in a multitude of languages, covering almost every subject imaginable. This appeal requires us to decide whether the HDL's use of copyrighted material is protected against a claim of copyright infringement under the doctrine of fair use. See 18 U.S.C. §107.

BACKGROUND

A. The HathiTrust Digital Library

HathiTrust permits three uses of the copyrighted works in the HDL repository. First, HathiTrust allows the general public to search for particular terms across all digital copies in the repository. Unless the copyright holder authorizes broader use, the search results show only the page numbers on which the search term is found within the work and the number of times the term appears on each page. The HDL does not display to the user any text from the underlying copyrighted work (either in “snippet” form or otherwise). Consequently, the user is not able to view either the page on which the term appears or any other portion of the book.

Below is an example of the results a user might see after running an HDL full-text search:



[http://babel.hathitrust.org/cgi/pt/search?id=mdp:39015006705670;view=image;sqz=7;q1=anaphylactic%20shock;start=1;size=10;page=search;orient=0\[6/13/2012 1:07:19 PM\]](http://babel.hathitrust.org/cgi/pt/search?id=mdp:39015006705670;view=image;sqz=7;q1=anaphylactic%20shock;start=1;size=10;page=search;orient=0[6/13/2012 1:07:19 PM])

J.A. 681 ¶ 80 (Wilkin Decl.).

Second, the HDL allows member libraries to provide patrons with certified print disabilities access to the full text of copyrighted works. A “print disability” is any disability that prevents a person from effectively reading printed material. Blindness is one example, but print disabilities also include those that prevent a person from physically holding a book or turning pages. To use this service, a patron must obtain certification of his disability from a qualified expert. Through the HDL, a print-disabled user can obtain access to the contents of works in the digital library using adaptive technologies such as software that converts the text into spoken words, or that magnifies the text. Currently, the University of Michigan's library is the only HDL member that permits such access, although other member libraries intend to provide it in the future.

Third, by preserving the copyrighted books in digital form, the HDL permits members to create a replacement copy of the work, if the member already owned an original copy, the member's original copy is lost, destroyed, or stolen, and a replacement copy is unobtainable at a “fair” price elsewhere.

The HDL stores digital copies of the works in four different locations. One copy is stored on its primary server in Michigan, one on its secondary server in Indiana, and two on separate backup tapes at the University of Michigan.¹ Each copy contains the full text of the work, in a machine readable format, as well as the images of each page in the work as they appear in the print version.

B. The Orphan Works Project

¹ Separate from the HDL, one copy is also kept by Google. Google's use of its copy is the subject of a separate lawsuit currently pending in this Court. See *Authors Guild, Inc. v. Google, Inc.*, 721 F.3d 132 (2d Cir.2013), on remand, 954 F.Supp.2d 282 (S.D.N.Y.2013), appeal docketed, No. 13–4829 (2d Cir. Dec. 23, 2013).

Separate and apart from the HDL, in May 2011, the University of Michigan developed a project known as the Orphan Works Project (or “OWP”). An “orphan work” is an out-of-print work that is still in copyright, but whose copyright holder cannot be readily identified or located. See U.S. Copyright Office, Notice of Inquiry, Orphan Works and Mass Digitization, 77 Fed.Reg. 64555 (Oct. 22, 2012).

The University of Michigan conceived of the OWP in two stages: First, the project would attempt to identify out-of-print works, try to find their copyright holders, and, if no copyright holder could be found, publish a list of orphan works candidates to enable the copyright holders to come forward or be otherwise located. If no copyright holder came forward, the work was to be designated as an orphan work. Second, those works identified as orphan works would be made accessible in digital format to the OWP's library patrons (with simultaneous viewers limited to the number of hard copies owned by the library).

The University evidently became concerned that its screening process was not adequately distinguishing between orphan works (which were to be included in the OWP) and in-print works (which were not). As a result, before the OWP was brought online, but after the complaint was filed in this case, the University indefinitely suspended the project. No copyrighted work has been distributed or displayed through the project and it remains suspended as of this writing.

C. Proceedings in the District Court

This case began when twenty authors and authors' associations (collectively, the “Authors”) sued HathiTrust, one of its member universities, and the presidents of four other member universities (collectively, the “Libraries”) for copyright infringement seeking declaratory and injunctive relief. The National Federation of the Blind and three print-disabled students (the “Intervenors”) were permitted to intervene to defend their ability to continue using the HDL.

The Libraries initially moved for partial judgment on the pleadings on the ground that the authors' associations lacked standing to assert claims on behalf of their members and that the claims related to the OWP were not ripe. See Fed.R.Civ.P. 12(c). The Libraries then moved for summary judgment on the remaining claims on the ground that their uses of copyrighted material were protected by the doctrine of fair use, see 17 U.S.C. §107, and also by the Chafee Amendment, see *id.* §121. The Intervenors moved for summary judgment on substantially the same grounds as the Libraries and, finally, the Authors cross-moved for summary judgment.

D. The District Court's Opinion

The district court granted the Libraries' and Intervenors' motions for summary judgment on the infringement claims on the basis that the three uses permitted by the HDL were fair uses. * * * * * The court entered judgment against the Authors, and this appeal followed.

DISCUSSION

We review *de novo* under well-established standards the district court's decisions granting summary judgment and judgment on the pleadings. See Maraschiello v. City of Buffalo Police Dep't, 709 F.3d 87, 92 (2d Cir.2013) (summary judgment); LaFaro v. N.Y. Cardiothoracic Grp., PLLC, 570 F.3d 471, 475 (2d Cir.2009) (judgment on the pleadings).

As a threshold matter, we consider whether the authors' associations have standing to assert infringement claims on behalf of their members. * * * * *

I. Fair Use²

A.

As the Supreme Court has explained, the overriding purpose of copyright is “[t]o promote the Progress of Science and useful Arts . . .” Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569, 574 (1994) (quoting U.S. Const. art. I, § 8, cl. 8); see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). This goal has animated copyright law in Anglo–American history, beginning with the first copyright statute, the Statute of Anne of 1709, which declared itself to be “[a]n Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors . . . during the Times therein mentioned.” Act for the Encouragement of Learning, 8 Anne, ch. 19. In short, our law recognizes that copyright is “not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L.Rev. 1105, 1107 (1990).

The Copyright Act furthers this core purpose by granting authors a limited monopoly over (and thus the opportunity to profit from) the dissemination of their original works of authorship. See 17 U.S.C. §§102, 106, 302–305. The Copyright Act confers upon authors certain enumerated exclusive rights over their works during the term of the copyright, including the rights to reproduce the copyrighted work and to distribute those copies to the public. *Id.* §106(1), (3). The Act also gives authors the exclusive right to prepare certain new works—called “derivative works”—that are based upon the copyrighted work. *Id.* § 106(2). Paradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or a play, or the recasting of a novel as an e-book or an audiobook. See *id.* §101. As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years. *Id.* §302.

At the same time, there are important limits to an author's rights to control original and derivative works. One such limit is the doctrine of “fair use,” which allows the public to draw upon copyrighted materials without the permission of the copyright holder in certain circumstances. See *id.* §107 (“[T]he fair use of a copyrighted work . . . is not an infringement of copyright.”). “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and useful Arts.’” Campbell, 510 U.S. at 574.

Under the fair-use doctrine, a book reviewer may, for example, quote from an original work in order to illustrate a point and substantiate criticisms, see Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D.Mass.1841) (No. 4901), and a biographer may quote from unpublished journals and letters for similar purposes, see Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir.1991). An artist may employ copyrighted photographs

² Plaintiffs argue that the fair use defense is inapplicable to the activities at issue here, because the Copyright Act includes another section, 108, which governs “Reproduction [of copyrighted works] by Libraries . . .” 17 U.S.C. §108. However, section 108 also includes a “savings clause,” which states, “Nothing in this section in any way affects the right of fair use as provided by section 107.” §108(f)(4). Thus, we do not construe § 108 as foreclosing our analysis of the Libraries' activities under fair use, and we proceed with that analysis.

in a new work that uses a fundamentally different artistic approach, aesthetic, and character from the original. See Cariou v. Prince, 714 F.3d 694, 706 (2d Cir.2013). An internet search engine can display low-resolution versions of copyrighted images in order to direct the user to the website where the original could be found. See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir.2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–22 (9th Cir.2002). A newspaper can publish a copyrighted photograph 18 (taken for a modeling portfolio) in order to inform and entertain the newspaper's readership about a news story. See Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir.2000). A viewer can create a recording of a broadcast television show in order to view it at a later time. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447–450 (1984). And a competitor may create copies of copyrighted software for the purpose of analyzing that software and discovering how it functions (a process called “reverse engineering”). See Sony Comp. Entertainment, Inc. v. Connectix Corp., 203 F.3d 596, 599–601 (9th Cir.2000).

The doctrine is generally subject to an important proviso: A fair use must not excessively damage the market for the original by providing the public with a substitute for that original work. Thus, a book review may fairly quote a copyrighted book “for the purposes of fair and reasonable criticism,” Folsom, 9 F. Cas. at 344, but the review may not quote extensively from the “heart” of a forthcoming memoir in a manner that usurps the right of first publication and serves as a substitute for purchasing the memoir, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

In 1976, as part of a wholesale revision of the Copyright Act, Congress codified the judicially created fair-use doctrine at 17 U.S.C. §107. See Copyright Act of 1976, Pub.L. No. 94–553, § 107, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. §107). Section 107 requires a court to consider four nonexclusive factors which are to be weighed together to assess whether a particular use is fair:

- (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.

17 U.S.C. §107.

An important focus of the first factor is whether the use is “transformative.” * * * * *

The second factor considers whether the copyrighted work is “of the creative or instructive type that the copyright laws value and seek to foster.” Leval, 103 Harv. L.Rev.. at 1117; see also Folsom, 9 F. Cas. at 348 (“[W]e must often ... look to the nature and objects of the selections made.”). For example, the law of fair use “recognizes a greater need to disseminate factual works than works of fiction or fantasy.” Harper & Row, 471 U.S. at 563.

The third factor asks whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor. Campbell, 510 U.S. at 586–87. In weighing this factor, we assess the quantity and value of the materials used and whether the amount copied is reasonable in relation to the purported justifications for the use under the first factor. Leval, 103 Harv. L.Rev.. at 1123.

Finally, the fourth factor requires us to assess the impact of the use on the traditional market for the copyrighted work. This is the “single most important element of fair use.” Harper & Row, U.S. at 566. To defeat a claim of fair use, the copyright holder must point to market harm that results because the secondary use serves as a substitute for the original work. See Campbell, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”); see also NXIVM Corp. v. Ross Inst., 364 F.3d 471, 481–82 (2d Cir.2004).

B.

As discussed above, the Libraries permit three uses of the digital copies deposited in the HDL. We now consider whether these uses are “fair” within the meaning of our copyright law.

1. Full-Text Search

It is not disputed that, in order to perform a full-text search of books, the Libraries must first create digital copies of the entire books. Importantly, as we have seen, the HDL does not allow users to view any portion of the books they are searching. Consequently, in providing this service, the HDL does not add into circulation any new, human-readable copies of any books. Instead, the HDL simply permits users to “word search”—that is, to locate where specific words or phrases appear in the digitized books. Applying the relevant factors, we conclude that this use is a fair use.

i.

Turning to the first factor, we conclude that the creation of a full-text searchable database is a quintessentially transformative use. As the example on page 7, *supra*, demonstrates, the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the HDL full-text search.

There is no evidence that the Authors write with the purpose of enabling text searches of their books. Consequently, the full-text search function does not “supersede[] the objects [or purposes] of the original creation,” Campbell, 510 U.S. at 579 (internal quotation marks omitted). The HDL does not “merely repackage[] or republish[] the original[s],” Leval, 103 Harv. L.Rev.. at 1111, or merely recast “an original work into a new mode of presentation,” Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143 (2d Cir.1998). Instead, by enabling full-text search, the HDL adds to the original something new with a different purpose and a different character.

Full-text search adds a great deal more to the copyrighted works at issue than did the transformative uses we approved in several other cases. For example, in Cariou v. Prince, we found that certain photograph collages were transformative, even though the collages were cast in the same medium as the copyrighted photographs. 714 F.3d at 706. Similarly, in Bill Graham Archives v. Dorling Kindersley Ltd., we held that it was a transformative use to include in a biography copyrighted concert photos, even though the photos were unaltered (except for being reduced in size). 448 F.3d 605, 609–11 (2d Cir.2006); see also Blanch v. Koons, 467 F.3d 244, 252–53 (2d Cir.2006) (transformative use of copyrighted photographs in collage painting); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114 (2d Cir.1998) (transformative use of copyrighted photograph in advertisement).

Cases from other Circuits reinforce this conclusion. In Perfect 10, Inc., the Ninth Circuit held that the use of copyrighted thumbnail images in internet search results was transformative because the thumbnail copies served a different function from the original copyrighted images. 508 F.3d at 1165; accord Arriba Soft Corp., 336 F.3d at 819. And in A.V. ex rel. Vanderhye v. iParadigms, LLC, a company created electronic copies of unaltered student papers for use in connection with a computer program that detects plagiarism. Even though the electronic copies made no “substantive alteration to” the copyrighted student essays, the Fourth Circuit held that plagiarism detection constituted a transformative use of the copyrighted works. 562 F.3d 630, 639–40.

ii.

The second fair-use factor—the nature of the copyrighted work—is not dispositive. The HDL permits the full-text search of every type of work imaginable. Consequently, there is no dispute that the works at issue are of the type that the copyright laws value and seek to protect. However, “this factor ‘may be of limited usefulness where,’ as here, ‘the creative work ... is being used for a transformative purpose.” Cariou, 714 F.3d at 710 (quoting Bill Graham Archives, 448 F.3d at 612). Accordingly, our fair-use analysis hinges on the other three factors.

iii.

The third factor asks whether the copying used more of the copyrighted work than necessary and whether the copying was excessive. As we have noted, “[t]here are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.” Maxtone–Graham v. Burtchaeil, 803 F.2d 1253, 1263 (2d Cir.1986). “[T]he extent of permissible copying varies with the purpose and character of the use.” Campbell, 510 U.S. at 586–87. The crux of the inquiry is whether “no more was taken than necessary.” *Id.* at 589. For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use. See Bill Graham Archives, 448 F.3d at 613 (entire image copied); Arriba Soft, 336 F.3d at 821 (“If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.”).

In order to enable the full-text search function, the Libraries, as we have seen, created digital copies of all the books in their collections.³ Because it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.

The Authors also contend that the copying is excessive because the HDL creates and maintains copies of the works at four different locations Appellants' Br. 27–28. But the record demonstrates that these copies are also reasonably necessary in order to facilitate the HDL's legitimate uses. In particular, the HDL's services are offered to patrons through two servers, one at the University of Michigan (the primary server) and an identical one at the University of Indiana (the “mirror” server). Both servers contain copies of the digital works at issue. According to the HDL executive director, the “existence of a[n] [i]dential] mirror site allows for balancing the load of user web traffic to avoid overburdening a single site, and each site acts as a back-up of the HDL collection in the event that one site were to cease

The HDL also creates digital copies of the images of each page of the books. As the Libraries acknowledge, the HDL does not need to retain these copies to enable the full-text search use. We discuss the fair-use justification for these copies in the context of the disability-access use, see *infra* pp. 29–30.³

operation (for example, due to failure caused by a disaster, or even as a result of routine maintenance).” J.A. 682–83 ¶ 88–89 (Wilkin Decl.). To further guard against the risk of data loss, the HDL stores copies of the works on two encrypted backup tapes, which are disconnected from the internet and are placed in separate secure locations on the University of Michigan campus. Id. at 683 ¶ 90. The HDL creates these backup tapes so that the data could be restored in “the event of a disaster causing large-scale data loss” to the primary and mirror servers. Id.

We have no reason to think that these copies are excessive or unreasonable in relation to the purposes identified by the Libraries and permitted by the law of copyright. In sum, even viewing the evidence in the light most favorable to the Authors, the record demonstrates that these copies are reasonably necessary to facilitate the services HDL provides to the public and to mitigate the risk of disaster or data loss. Accordingly, we conclude that this factor favors the Libraries.

iv.

The fourth factor requires us to consider “the effect of the use upon the potential market for or value of the copyrighted work,” 17 U.S.C. §107(4), and, in particular, whether the secondary use “usurps the market of the original work,” NXIVM Corp., 364 F.3d at 482.

The Libraries contend that the full-text-search use poses no harm to any existing or potential traditional market and point to the fact that, in discovery, the Authors admitted that they were unable to identify “any specific, quantifiable past harm, or any documents relating to any such past harm,” resulting from any of the Libraries' uses of their works (including full-text search). Defs.-Appellees' Br. 38 (citing Pls.' Resps. to Interrogs.). The district court agreed with this contention, as do we.

At the outset, it is important to recall that the Factor Four analysis is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work. See Campbell, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”). In other words, under Factor Four, any economic “harm” caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work. See Bill Graham Archives, 448 F.3d at 614.

To illustrate why this is so, consider how copyright law treats book reviews. Book reviews often contain quotations of copyrighted material to illustrate the reviewer's points and substantiate his criticisms; this is a paradigmatic fair use. And a negative book review can cause a degree of economic injury to the author by dissuading readers from purchasing copies of her book, even when the review does not serve as a substitute for the original. But, obviously, in that case, the author has no cause for complaint under Factor Four: The only market harms that count are the ones that are caused because the secondary use serves as a substitute for the original, not when the secondary use is transformative (as in quotations in a book review). See Campbell, 510 U.S. at 591–92 (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”).

The Authors assert two reasons why the full-text-search function harms their traditional markets. The first is a “lost sale” theory which posits that a market for licensing books for digital search could possibly develop in the future, and the HDL impairs the emergence of such a market because it allows patrons to search books without any need for a license. Thus, according to the Authors, every copy employed by the HDL in generating full-text searches represents a lost opportunity to license the book for search. Appellants' Br. 43.

This theory of market harm does not work under Factor Four, because the full-text search function does not serve as a substitute for the books that are being searched. See Campbell, 510 U.S. at 591–92; Bill Graham Archives, 448 F.3d at 614. Thus, it is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.

Next, the Authors assert that the HDL creates the risk of a security breach which might impose irreparable damage on the Authors and their works. In particular, the Authors speculate that, if hackers were able to obtain unauthorized access to the books stored at the HDL, the full text of these tens of millions of books might be distributed worldwide without restriction, “decimat[ing]” the traditional market for those works. Appellants’ Br. 40.

The record before us documents the extensive security measures the Libraries have undertaken to safeguard against the risk of a data breach. * * * * * This showing of the security measures taken by the Libraries is essentially un rebutted. Consequently, we see no basis in the record on which to conclude that a security breach is likely to occur, much less one that would result in the public release of the specific copyrighted works belonging to any of the plaintiffs in this case. Cf. Clapper v. Amnesty Int’l USA, —U.S. —, —, 133 S.Ct. 1138, 1143, 1149 (2013) (risk of future harm must be “certainly impending,” rather than merely “conjectural” or “hypothetical,” to constitute a cognizable injury-in-fact); Sony Corp., 464 U.S. at 453–54 (concluding that time-shifting using a Betamax is fair use because the copyright owners’ “prediction that live television or movie audiences will decrease” was merely “speculative”). Factor Four thus favors a finding of fair use.

Without foreclosing a future claim based on circumstances not now predictable, and based on a different record, we hold that the balance of relevant factors in this case favors the Libraries. In sum, we conclude that the doctrine of fair use allows the Libraries to digitize copyrighted works for the purpose of permitting full-text searches.

2. Access to the Print–Disabled

The HDL also provides print-disabled patrons with versions of all of the works contained in its digital archive in formats accessible to them. In order to obtain access to the works, a patron must submit documentation from a qualified expert verifying that the disability prevents him or her from reading printed materials, and the patron must be affiliated with an HDL member that has opted-into the program. Currently, the University of Michigan is the only HDL member institution that has opted-in. We conclude that this use is also protected by the doctrine of fair use. * * * * *

Weighing the factors together, we conclude that the doctrine of fair use allows the Libraries to provide full digital access to copyrighted works to their print-disabled patrons.⁴

3. Preservation

⁴ In light of our holding, we need not consider whether the disability-access use is protected under the Chafee Amendment, 17 U.S.C. § 121.

By storing digital copies of the books, the HDL preserves them for generations to come, and ensures that they will still exist when their copyright terms lapse. Under certain circumstances, the HDL also proposes to make one additional use of the digitized works while they remain under copyright: The HDL will permit member libraries to create a replacement copy of a book, to be read and consumed by patrons, if (1) the member already owned an original copy, (2) the member's original copy is lost, destroyed, or stolen, and (3) a replacement copy is unobtainable at a fair price. The Authors claim that this use infringes their copyrights.

* * * * * [T]his concern does not present a live controversy for adjudication. See *Clapper*, — U.S. at —, 133 S.Ct. at 1147; *Jennifer Matthew Nursing & Rehab. Ctr. v. U.S. Dep't of Health & Human Servs.*, 607 F.3d 951, 955 (2d Cir.2010) (noting that we have an “independent obligation” to evaluate subject matter jurisdiction, including whether there is “a live controversy”). Accordingly, we vacate the district court's judgment insofar as it adjudicated this issue without first considering whether plaintiffs have standing to challenge the preservation use of the HDL, and we remand for the district court to so determine.

II. Ripeness of Claims Relating to the Orphan Works Project

The district court also held that the infringement claims asserted in connection with the OWP were not ripe for adjudication because the project has been abandoned and the record contained no information about whether the program will be revived and, if so, what it would look like or whom it would affect. *HathiTrust*, 902 F.Supp.2d at 455–56. We agree. * * * * *

CONCLUSION

The judgment of the district court is **AFFIRMED**, in part, insofar as the district court concluded that certain plaintiffs-appellants lack associational standing; that the doctrine of “fair use” allows defendants-appellees to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities; and that claims predicated upon the Orphan Works Project are not ripe for adjudication. We **VACATE** the judgment, in part, insofar as it rests on the district court's holding related to the claim of infringement predicated upon defendants-appellees' preservation of copyrighted works, and we **REMAND** for further proceedings consistent with this opinion.