

Defending the Fair Use Ruling in HathiTrust

by [Andrew McDiarmid](#) [1]
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Technology can help liberate books from the relative obscurity of deep library stacks, preserve rare and deteriorating volumes, and make innumerable texts available for the first time to persons with print disabilities. But to make any of that possible, books first need to be scanned and digitized on a large scale. With help from the Internet Archive, Microsoft, and Google, library scanning projects are well underway, but some copyright holders have cried foul, most famously in the ongoing Google Books litigation. This week CDT joined EFF and Public Knowledge on a brief urging an appeals court in another case to confirm that mass digitization projects can qualify as lawful fair use rather than copyright infringement.

The case in question concerns the [HathiTrust Digital Library](#) [2], a collaboration of over 60 research libraries to digitize and improve the accessibility of their collections. At issue in the case are HathiTrust's full-text index, which enables faster and richer search across the collection, and tools to create accessible versions of texts for people with print disabilities. The Authors Guild and others sued HathiTrust over the project's scanning and indexing of books, and HathiTrust won [an important victory](#) [3] at the district court in 2012. That decision is now on appeal, and CDT and its allies are urging the appeals court to uphold the earlier ruling.

Our [brief](#) [4] argues that fair use has a strong history of enabling technological innovations—such as VCRs and search engines—that advance the purposes of copyright, namely the creation and dissemination of creative works. Fair use should not therefore be limited, [as some others suggest](#) [5], to only those uses, such as criticism or parody, that layer new expressive material on top of existing works. The searchable book index created by HathiTrust uses copyrighted works for an entirely different purpose, without undercutting any market for the originals, and should be considered a fair use.

Our brief was one of several filed in support of HathiTrust, including by [library associations](#) [6], [disability rights advocates](#) [7], and [providers of accessible e-books and audiobooks](#) [8].

It's worth noting that while fair use and other exceptions (such as the rights granted to libraries) are necessary ingredients for mass digitization, they may not allow all the benefits these projects could offer. It remains unclear, for example, how full-text access to orphan and out-of-print works, would fare under fair use alone. Consequently, the Copyright Office is developing [broader recommendations](#) [9] and has encouraged Congress once again to take up the issue. CDT offered comments on that process in March, which you can find [here](#) [10].

First things first, though. HathiTrust's fair-use win should be upheld.

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- [orphan works](#)
- [mass digitization](#)
- [HathiTrust](#)
- [google books](#)

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