

THE FUTURE OF GOOGLE BOOKS: INFRINGEMENT, FAIR USE, AND NEW POSSIBILITIES

Google Books is an invaluable resource, but the program that once appeared to be the model for ebooks will probably not redefine the landscape of digital access to books. How did we get there? And what might be next?

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Through the last several years, the relationship between copyright law and the expanding demand for digital books has fluctuated rapidly and has grown less certain and more contentious. The litigation against Google over the scanning of millions of books has persisted through those years, finding no sure foothold in the law. The effort to settle failed, and the scope of copyright protection and fair use remains far from clear. Meanwhile, the ambitious program that once appeared to be the model for ebooks will likely remain a vast research trove, but it will probably not redefine the landscape of digital access to books.

An invaluable resource

For librarians and researchers, Google Books is an invaluable resource, and they have much at stake in the litigation and settlement negotiations that lie ahead. Both the Google project and the court case were at one time relatively straightforward—although highly ambitious. The story began in 2004 with an experiment by Google Inc that would brazenly test the boundaries of copyright law. Google was preparing to build a universal digital library of books. With the cooperation of leading research libraries, most based in the United States, Google was borrowing, scanning, and uploading for search thousands and later millions of books—many still within copyright protection.¹

The plan had all basic ingredients of copyright infringement. The law gives copyright owners a bundle of rights, including the right to reproduce, distribute, and publicly display protected works. By scanning, uploading, transmitting, and allowing users to see the books, Google was treading on multiple rights of the legal owners. Yet Google was not acting recklessly. At least inside the United States, Google had the safety net of “fair use.”²

Fair use is the most important copyright exception in American law. A “fair use” is not infringement. Google had a good claim of fair use; although digitizing full books, Google was allowing users

to see only “snippets” or a few relevant lines. If a researcher needed more, then the local library or bookseller could provide the full book. Google Books might actually generate greater sales, and some authors permitted larger portions of their books to be available openly.

Libraries and publishers – pros and cons

Many libraries also supported the project from the outset, allowing Google to scan their rich collections. Not everyone was so sanguine. From the perspective of many authors and publishers, Google Books was hardly fair use. It was instead an assault on their ability to decide when and how their books should be made available to the public. Many publishers simply did not want Google to make, keep, and control the database of their books in perpetuity. Copyright owners filed a lawsuit in 2005.

In 2008 the parties announced a proposed settlement of the litigation. The Authors Guild and the Association of American Publishers launched the original litigation, and their representatives met with Google lawyers through a year or more to craft the settlement details. The main document filled more than 150 pages, and supplemental materials added as much. Under the proposal, Google would not merely build a collection; the settlement was a business model, making Google an instant leader in marketing of digital books to consumers and full database collections to libraries.

As a settlement of a “class action,” the proposal could have affected the rightsholders of millions of scanned books, often without their knowledge. It encompassed nearly a century’s worth of copyrighted books from nearly every country in the world.³ Unless a rightsholder opted out by a fairly quick deadline, the agreement would have been binding on all members of the “class.”

Objections

Critics made objections big and small. In the words of Brewster Kahle of the Internet Archive, the settlement would create a “digital bookstore.” Kahle warned: “In essence, Google will be privatizing our libraries.”⁴ According to Robert Darnton of Harvard University, “As an unintended consequence, Google will enjoy what can only be called a monopoly—a monopoly of a new kind, not of railroads or steel but of access to information. Google has no serious competitors.”⁵

Perhaps most influential, the U.S. Department of Justice weighed in, arguing that the settlement would make Google a powerful force in the market for digital books. The settlement would give Google

rights when no claimant objected—which would include the millions of “orphan works” that have been the object of legal wrangling around the world and that no one else could use. A revised proposal in November 2009 did little to assuage concerns, although it was narrow to books that had been registered with the U.S. Copyright Office, along with books originally published in the United Kingdom, Canada, and Australia.

Mixed Blessing

The federal court in New York City, where the case was filed, held a hearing in February 2010 on the question of the fairness of the settlement for the members of the class. In March 2011 the court rejected it, citing the objections from authors, other rightsholders, and government agencies.⁶ The court laid out a schedule for trial, effectively putting the parties on notice that the case would head to trial if an acceptable settlement were not possible. In May 2012, the court applied more pressure by certifying the lawsuit as a class action encompassing millions of rightsholders.⁷

Google now faces the potential of billions or even trillions of dollars of liability. The plaintiffs have to front the enormous costs of litigation and notices in newspapers and other outlets throughout the world in an effort to reach the publishers, authors, heirs, and others who are part of the vast multinational class. The judge’s rulings suggest that he is not prepared to give Google any favors, but he also is not eager to shut down the digital books project in the meantime. The rulings seem aimed at encouraging settlement.

What might be next?

Settlement is often compelling, but after years of expensive litigation the parties have much at stake. They need to enable Google Books to survive as a research tool, but with limits and with a payout that authors and publishers find reasonable. The judge will question whether the result is fair to the millions of rightsholders not present in the courtroom, while the Justice Department will scrutinize whether Google gains an unfair advantage, especially over orphan works. The court would likely accept a plan with rightsholders opting individually to permit greater access. Copyright owners would still retain rights and control, but the orphan works conundrum would remain a serious dilemma for courts and legislatures to resolve another day.

Such a result could be good for Google and researchers, and it could be good for most authors and publishers as well. It would offer limited access to content, yet Google Books would remain vital for discovering new sources for information and study. It would also be good for many of the foreign parties who objected to earlier settlements. Most European rightsholders were left out of the 2009 settlement because they wanted out. Future resolutions could apply to books from all countries, strengthening the research corpus.

Such a vision of Google Books may yield benefits for E.U. copyright owners, encouraging rightsholders in Europe to



enter voluntary negotiations, as many French publishers already have done. A tempered resolution also can allow Europeana and other initiatives simultaneously to expand and foster full access on terms more in keeping with vision and objectives rooted in European heritage and law. ●

Notes

1 The project is commonly known as “Google Books,” but it has been known over the years by other titles, such as: Google Print Library Project, Google Book Search Library Project, Google Library Project, and Google Book Search. For information about the origins and fundamentals of the project, see Emily Anne Proskine, “Google’s Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project,” *Berkeley Technology Law Journal*, 21 (2006): 213-239.

2 Fair use is codified at: U.S. Copyright Act, 17 U.S.C. § 107 (2012).

3 For a detailed examination of the litigation and the proposed settlements, see Jonathan Band, “The Long and Winding Road to the Google Books Settlement,” *John Marshall Review of Intellectual Property Law*, 9 (Winter 2010): 227-329.

4 Brewster Kahle, “How Google Threatens Books,” *Washington Post*, May 19, 2009.

5 Robert Darnton, “Google & the Future of Books,” *The New York Review of Books*, February 12, 2009.

6 *Authors Guild v. Google Inc.*, 770 F.Supp.2d 666 (S.D.N.Y. 2011).

7 *Authors Guild v. Google Inc.*, F.Supp.2d (S.D.N.Y. 2012).