

Looking Ahead

Shoot First, Get Copyright Later

Publishers and authors were far from thrilled when Google in 2004 unveiled the project now known as Google Books. This searchable online database of millions of books includes not just works in the public domain but also many still under copyright—and it was compiled without obtaining the permission of copyright holders. In 2005, the Authors Guild and the Association of American Publishers each sued, alleging copyright infringement. Google claimed that its project was covered under the copyright exception carved out for “fair use”—and thus began a protracted legal back-and-forth that is still unresolved.

The lawsuits were combined in court, and the parties have gone through two rounds of settlement agreements. Under the latest draft agreement, submitted to a judge for review in November 2009, portions of copyrighted works would be available for free; universities and other institutions could purchase subscriptions to the entire database of complete works; public libraries would each be granted a single computer terminal with free access; and individuals could purchase access to specific books. A majority of the revenue derived from subscriptions and other sources would go to authors and publishers. Copyright holders would be able to claim their works and revenue, and to “opt out” of their inclusion in the collection.

A further set of concerns has arisen from Google’s publishing online and profiting from so-called “orphan works”—books that are still technically under copyright, but for which the copyright holders can’t be found. Under the proposed settlement, an independent trustee would hold revenue generated from these works, giving it to literacy charities if the holders are not eventually located. The trustee would also be able to grant licenses for the books to companies other than Google.

This case raises many contentious and befuddling questions. In filing the class-action settlement, the plaintiffs claim to represent the class of all authors and publishers holding copyrights, but are these two groups of a few thousand members truly representative? How much of a book can Google make available for free under the fair use doctrine? Is it legal for Google to excerpt millions of copyrighted works unless their holders step forward and “opt out,” or must holders give explicit permission for works to be included? Does the proposed settlement grant Google a *de facto* monopoly over orphan works?

Even in its nascent form, Google Books is already an enormously useful research tool. But the legal criticisms of the project from authors, publishers, public interest groups, and competitors to Google (both present and potential) deserve serious consideration. The judge in the case, who is expected to rule on the settlement in the next few months, should heed these concerns and return it to the parties for further revision.