

Benchmark, stepping stone or cement boots: the *Google* Copyright Case (*2005-†2009?)

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Introduction

'Hi Francois, won't you write us an article on The Google Case?' My pleasure; sounds like fun. But all is not what it seems: this particular case has been dragging along since 2005 when authors and publishers filed a class action lawsuit against the online search engine Google for violation of copyrights. And, despite a settlement involving Megabucks (yes, with a capital 'M'), the last shot has not yet been fired. As for this article, it had to be put on hold from March 2009 to January 2010 because the so-called Final Fairness Hearing that granted final approval for the eventual settlement had to be awaited - it was postponed to 7 October 2009. On the home front things were not made easier by gremlins in the very contraptions that we not only 'write' these days, but also seem to threaten the very existence of our beloved companions: books.

Background

According to Biebie van der Merwe of the Naspers subsidiary On the Dot - they only digitise on express order from publishers - the crux of the problem is the clash in priorities that exists between libraries wanting to provide a free service on the one hand and writers, editors, and now Internet tycoons, who want to generate revenue from creative work. Obviously there is more to it, but this is basically how the row started: Google, the definitive leader in search and advertising on the Internet, developed a process called Book Search (starting in 2004) which entails making digital versions of fragile (mostly old) books which will eventually lead millions of readers to millions of books. There is supposed to be up to 100 million different books in existence today and Book Search makes it possible to locate a title on any given topic and to read a small portion - most of us have come across these sometimes enticing, if not frustratingly bewildering (if you are looking

for references) titbits popping up on our screens. If the book is not protected by copyright, users can download it entirely or, if they crave the real thing (heavy, dusty, smelly: nice and booky) they can use Book Search to find copies to buy or borrow.

Since 2004 more than a million rare or fragile books have been digitised through the partnership between the University of Michigan and Google, with about six million to go. And this is just one library! However, while Book Search has the support of many publishers, authors and librarians - do not forget neither the concern nor the involvement of the last mentioned in the unfolding saga - a number of publishers and authors have sued Google, claiming the service violates their copyrights. Google countered that Book Search is legal because web surfers can retrieve only snippets of copyright material through the service. Indeed: try to print those and a blank page matches your blank stare.

Brewster Kahle, founder and digital librarian (yes, there are those in civilised countries) of the Internet archive at the Open Content Alliance, said Google might be trying to 'lock up the public domain' by making proprietary copies of works whose copyrights have expired, and this includes the

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vast majority of the world's books. According to Kahle, Book Search had a core value in preserving material indefinitely and providing broad access to it. But he, and many others, question whether Google would share these works with other search engines - no one should hog the market as opposed to open access to anyone, anywhere, anytime. JP Wilkin, Michigan's associate university librarian, retorted that all their volumes are 'entirely open in the sense that people can find them, read them, use them ...' but what may be the case at one institution now may not in the future be the case elsewhere. The question remains: who knows what Google will do with all this if they have exclusive rights?

Suing their pants off

Well, not really - the eventual settlement between Google, the Authors Guild and the Association of American Publishers (APA) has been described as '... the product of many years' hard work ... a great American solution'. APA stated that the agreement will expand access to out-of-print books online for millions of American readers, allow rights holders, should they want to, to include in-print books, and will create a mechanism for payments to authors and publishers.

On 28 October 2008 the abovementioned parties announced that they had reached an agreement to settle the two court cases which were started three years ago. This was regarding the copyright infringement committed when scanning in-copyright books from libraries and making lines of text (so-called snippets) of these works available to all users of the Book Search programme. According to this agreement Google could digitise all books published by 5 January 2009, with the risk of legal action against them to (only) rights holders (publishers, authors, et cetera) who chose to opt out of the settlement.

So, the American solution to everything - if possible to make a buck, sue - perhaps did have a happy ending this time. Maybe for the Land of the Free and the American dream, but not in the country that so loves its culture that it spawned the concept 'chauvinism': French authors and publishers rebelled against what they see as American arrogance - not everything in the literary world is covered by the English language or American copyright - and thus they did what the Yanks did, and for better or worse, another court case ensued. And in December 2009 a French court ruled that Google has to put its money where its mouth is - an infringement on French copyrights was cited: Google has to pay 300 000 Euros (\$430 000) to French publisher Martiniere on interest of damages, as well as 10 000 Euros per day until it has removed French books from its online database. Indeed, episode two of the copyright wars will be forthcoming. Maybe when *Avatar II* reaches our shores?

Impact of the settlement

Worldwide it means that the class action brought on behalf of the authors and publishers by the American Authors

Guild will automatically impact on all publishers and authors whose books (or text inserts) were published and / or distributed on or before the Notice Commencement Date (5 January 2009), and whose works have been digitised for the Book Search programme.

This includes owners of copyright works published outside the United States who have copyright relations with the United

States of America or are nationals of such a country.

Not everybody shares the elation of APA. Harvard University, for instance, has expressed its disappointment, while, as mentioned, some European stakeholders are irritated with the status quo. As for South African publishers, each publisher had to decide on a course of action. The Publishers' Association of South Africa (PASA) set out steps for members to follow: each publisher had to log on to Google's searchable database and check which titles have been scanned. They had to decide whether to opt out (initially by 5 May 2009, eventually on 4 September 2009). If they decided to participate, they had to decide on the status of each individual title in terms of the settlement. In this case the onus is on the publisher to notify Google regarding each individual title that is not part of the settlement. If not opting out, publishers will receive \$60 per scanned title.

Nicol Faasen, publishing manager at Nasou Via Afrika believes that, if managed correctly, the settlement could have significant advantages for publishers and authors - publishers should in the short term benefit

from revenues and publicity. It is the long term impact that remains unclear at this stage. Many stakeholders are anxiously waiting to see if patterns will emerge which can be utilised to predict the future of the marriage between Digital and Traditional. As Faasen rightly says, the way in which Google set out about this project did not create trust among publishers and

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authors. The eventual settlement is significant because Google has been forced to recognise copyright, and therefore publishers and artists (remember, illustrators are sometimes also involved)

can claim a moral victory. At least temporarily ...

A negative implication is the fact that a title has to be registered in the United States of America to have copyright acknowledged. Apart from the time and cost involved, there is the factor of indifference and ignorance from the authors - artists are notorious for their need to produce rather than procure or to work in isolation rather than to wheel and deal. However, copyright laws differ from one country to another. In South Africa copyright exists in a work as soon as it is created. Another cause for concern for our American colleagues is that Google also has a loophole in as far as they can determine whether a title is commercially available in the US or not, and that affects the uses Google can put to such a title.

PASA welcomes the settlement in the sense that even the almighty Google had to recognise copyright principles, and now realises that a healthy respect for copyright is indispensable. From the almost insignificant to the most famous of authors, in fact any rights holder, in effect, enforces respect, and according to Faasen, this is the 'most important outcome to the long term future of publishing'. Amen to that.

Summary

So, Google may, on a non-exclusive basis, digitise nearly every book ever published before 5 January 2009. What that entails exactly, time will tell. Google also has to pay out a total of \$125 million. This includes \$34.5 million to fund and establish a Book Rights Registry, a non-profit entity established to create and maintain a database of copyright owners and their works, locate and distribute payments to copyright owners and their works, assist disputes between rights holders, and represent the interests of rights holders with respect to the settlement and other commercial arrangements. Moreover, Google must pay out a minimum of \$45 million to the Registry to fund cash payments to eligible rights holders, or at least \$60 per book digitised by Google by 5 May 2009. Rights holders were obliged to file claims by 5 January 2010. If they opted out, they get nothing. Now

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From the authors' viewpoint the settlement enables Google to index their work, display up to 20% of their work, display short excerpts of their work, display bibliographic content and allow printing, copying and pasting, and make annotations of their work - at a fee. All of this is subject to varying limitations. Through the Book Rights Registry, Google will pay copyright owners 63% of all revenues earned for specific commercial uses. A special claim form is used for this process, which is digitally available.

Google can sell subscriptions to the digital library to institutions such as tertiary institutions of learning, sell online access to books to individual consumers, sell advertising on pages from books, and make other uses or create new revenue models, like the so-called print-on-demand service. For authors a new distribution channel is available, as well as extra income. Google will also provide free public access to the digital library to libraries, colleges, et cetera, on a restricted basis, and allow works to be used for non-consumptive research, also with certain limitations.

For those who opt out of the settlement a deadline (5 April 2011) has been set. This means that authors will retain control over their works and will have the right to sue Google for any infringement of their copyrights. These authors may still participate in Google's Book Search program through Google's Publisher Partner programme.

Books not covered by the settlement are the abovementioned, those not registered as of 5 January 2009, and works in the public domain, US government publications, pictorial works (including photographs), illustrations (except those in children's books), and maps and paintings displayed in books. And, as mentioned, if the books are published after 5 January 2009.

This then, is what the Great Google Copyright Case is all about. In a nutshell. So far:

Sources

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