

**INSIDE THIS ISSUE:**

GOOGLE BOOKS SETTLEMENT	1-6
COPYRIGHT AND THE DVD DILEMMA	6
AIME ATTORNEY ANSWERS YOUR QUESTIONS	7
WELCOME MEMBERS	8

**GOOGLE BOOKS SETTLEMENT:  
THE GREATEST BOOK DEAL OF ALL TIME?**

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The world of print is now following down the same digital path as movies and music have gone before it. In a time where the demand for online content is increasing and the future of print publishing is fading, the issues raised in the debate over the Google Books project have never been more relevant.

Google Books Search (a.k.a. "Google Books"), part of the Google Books Library Project, has been a hotly contested issue among authors, publishers, libraries and scholars alike since Google first announced its plans for the project in 2004. At the time, Google teamed up with several major libraries (including Harvard, Stanford and New York Public Library) to create digital archives of their book collections and create a database of the works online that would be searchable by Internet users. However, the project immediately raised questions of copyright infringement, fair use, orphan works, anti-competition, and these issues are still up for debate today.



**SPECIAL POINTS  
OF INTEREST:**

- Do the Public Benefits Outweigh the Implications to Copyright Law?
- Is the Digitization of Copyrighted Books Fair Use?
- Is the Google Books Settlement Anti-Competitive?
- What Happens to Orphan Works?

**I. Google Books Settlement: The Basics – Part I**

Soon after Google announced its plan to start scanning and digitizing library book collections, two lawsuits were filed accusing Google of "massive copyright infringement." The suits were brought by the Authors Guild and the Association of American Publishers, as well as individual authors and publishers, claiming that the Google Books project infringed the plaintiffs' copyright by reproducing digital copies of their works without permission and by allowing the public to search and access digital copies of the plaintiffs' works in violation of their rights under the Copyright Act. The cases were designated "class action" lawsuits, meaning that the Plaintiffs were held to represent all persons in the affected class, namely those who own U.S. copyright interests in printed books (the definition of

"book" does not include periodicals or pictorial matter within books, unless a photograph or illustration in a book is owned by the same person who owns copyright in the book, or if the illustration is in a children's book).

In October 2008, a groundbreaking settlement was reached between the parties, leaving many disappointed that the court would not reach the merits of this potentially historic copyright case. Under the Settlement, Google would be allowed to scan copyright protected books into the search database and users would still be able to search the full content of the scanned books. In turn, Google would pay \$125 million to authors and publishers, including \$45 million to copyright holders whose works were digitized without permission.

In addition, the Settlement would establish a Books Rights Registry, an independent, non-profit organization that would work to locate and register copyright owners. The Registry would also collect revenues from Google and distribute payment to copyright holders. Google would generate revenue through advertising, charging users a fee to access the full text of most works, and by selling institutional subscriptions to universities, libraries and other organizations in order to make the electronic books database available to their members. Google would retain 37% of the revenue it generates and the other 63% would go to the Books Rights Registry for distribution to copyright holders.

## II. Google Books Settlement: The Basics – Part II

As you might imagine, many objections were raised to this original Settlement Agreement, most prominently by the U.S. Department of Justice and by copyright holders. In response, the parties submitted an amended Settlement Agreement to the court in November 2009, which was recently granted preliminary approval. One major change to the Settlement is that most books published outside of the United States are now excluded from the agreement (only those books published in the U.S., Britain, Australia or Canada will be included). Another interesting addition to the Settlement is that copyright owners could now specify the use of a Creative Commons license for a work which would allow the use of some works for free. The amended Settlement Agreement would only go into effect if the Court determines at a hearing on February 18, 2010, that it is fair, adequate and reasonable.

## III. Implications of the Google Books Settlement to Consider

The Settlement has been hailed as a victory for authors and publishers, who would be more effectively compensated for Google's use of their works than previously, and who would now reap the benefit of having their works made available in digital form -



Only books published in the U.S., Britain, Australia or Canada will be included in the Settlement.

all at Google's expense. The Settlement may also be seen as a wake-up call to Google, which cannot simply assert its right to scan (copy) millions of copyrighted works without permission, even if done in the name of progress. However, under the terms of the Settlement, Google would still be allowed to copy and display millions of works without prior permission from the copyright owner.

At the end of the day the Settlement leaves many questions unanswered and raises many new ones:

#### ***A. Do the Public Benefits Outweigh the Implications to Copyright Law?***

No one can argue that the digitization of printed books is an important and perhaps necessary task in a digital age, one that will preserve library collections for the ages. Google Books intends to provide the public with online access to millions of copyrighted books from the collections of major U.S. libraries, which otherwise could only be reached by visiting the institution. In this way, Google Books will benefit students, researchers and readers by creating access to out of print or hard to find books. It will also afford authors and publishers a new marketplace to distribute their works, because with access, the public will have the ability to search, preview and buy books online. In addition, as part of the Settlement Google would provide free Public Access Service terminals to public libraries at which users can search, read and in some cases, print out pages from books in the Google Books database.

However, these societal benefits come at a price. The Copyright Act provides copyright owners with the exclusive right to copy, reproduce, distribute, display and create derivative works based on their works. Under law, only copyright owners can grant permission for others to do the same. The Settlement is fundamentally at odds with this basic tenet of federal copyright law in that copyright owners must take proactive steps to "opt out" of the Settlement or otherwise "remove" or "exclude" their works, if they do not want them included in the database.

Google claims that for books whose owners have not come forward, it will provide reasonable default pricing and access policies, but the terms of the Settlement Agreement radically shifts the burden of use – copyright owners must come forward and assert their rights, rather than requiring the user to search them out and obtain rights. In the meantime, Google would continue to copy works without permission unless told otherwise.

#### ***B. Is the Digitization of Copyrighted Books Fair Use?***

One of the main questions raised in the lawsuit that would be left unresolved by the Settlement is whether Google's use of copyright works in the Google Books project falls within the fair use defense of the Copyright Act. In response to the copyright infringe-



The Settlement is fundamentally at odds with the basic tenet of federal copyright law....

ment claims, Google maintained that its actions qualified as fair use because the Google Books search only displays snippets of text of copyrighted works, the project serves an educational purpose of providing students and scholars access to out of print or commercially inaccessible works, and the creation of a comprehensive book index is transformative.

However, to achieve these ends, Google still must first scan and copy full works to create the database itself, and full text copying is rarely deemed a fair use practice. Absent the agreement, Google might need permission from the copyright owner to reproduce the copyrighted works in digital form. If a court issued a ruling on the fair use question, it would more likely hold that the use of copyrighted works as allowed under the terms of the Settlement goes beyond the scope of what would be allowable under fair use. It is dubious that a court would find forcing copyright owners to "opt out" is part of a fair use determination. Nevertheless, since a settlement was reached, the court will not address the issue and many are left disappointed that the question of whether the digitization of a work, in whole or in part, qualifies as fair use remains unanswered at this time.

### ***C. Is the Google Books Settlement Anti-Competitive?***

Some argue that the Settlement would grant Google a monopoly in digitalized books. Technically, the rights granted to Google under the Settlement are "non-exclusive," and copyright holders are free to enter into similar agreements with any of Google's competitors. In other words, nothing in the Settlement would preclude Yahoo! or Microsoft from entering into similar agreements with the same libraries, authors and publishers and pursuing similar digitization projects. However, the Settlement sets the bar for Google's competitors, who must now pay a high price both to digitize and to pay compensatory royalties in order to compete. Further, because Google is settling with class action plaintiffs who represent *all* copyright registered authors, duplicating that universe is more complicated for non-participants like Yahoo! and Microsoft. So the settlement becomes a legal asset of Google's in the on-going Internet search engine competition.

Arguably, if the Google and the authors' representatives failed to achieve settlement and the Court was required to rule on the issue of fair use, and if the ruling held in Google's favor, Google's competitors would be in a better position to take advantage of that ruling. If the Settlement is approved, they would arguably have to meet the same terms and conditions in the Settlement agreement in order to secure authors' and publishers' permissions to allow similar use of their works.



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#### ***D. What Happens to Orphan Works?***

Others argue that the Settlement gives Google a potential monopoly over orphan books – i.e. works that are copyright protected but have no identifiable owner. The problem with orphan works is that since it is virtually impossible to locate the appropriate copyright holder to obtain permission to use the work, a user of an orphan work runs the risk of copyright infringement. Congress has been working on legislation to make it safer to use orphan works, but the legislation has yet to pass.

In the meantime, Google has gone ahead and resolved the orphan works issue for itself by drafting the Settlement to include orphan works. As a result of the Plaintiffs' representing the entire class of copyright book owners and the Settlement requirement that copyright owners formally "opt out" of the Google use and payment agreement, qualified orphan works are "in" the group of works Google could use. In other words, the Settlement circumvents the orphan works problem by automatically including all U.S. copyrighted books, including orphan books, in the deal unless and until the owner steps forward to expressly request that the book be removed or excluded. Thus, Google would be allowed to copy, distribute and sell orphan books, until they are told otherwise.

Further, Google argues that the establishment of the Book Rights Registry would sufficiently address the orphan works problem, since the Registry will be tasked to locate and register the owners of the orphan books. Over time, Google argues, the authors of orphan books or their heirs would come forward to claim their compensation and thus, many previously "orphaned" books would be identified. Also, the Registry would make all information available to the public so others who wish to use orphan books would know whether or not an owner has come forward.

In this respect, the Settlement may actually help to reduce the number of orphan works, since it would create a financial incentive for unreachable owners to come forward and claim their fair share. The Settlement could also either be a spur to the Orphan Works Bill by showing Congress the way to protect copyright interests of orphan works authors, or it could be viewed as a marketplace solution that obviates the need for further legislation. The latter would be a misreading of the public need, as the orphan works issue is greater than Google's digital needs. Moreover, the Settlement only covers books registered with the Copyright Office, so there are still potentially millions of orphan works (films, photographs, graphic and art works) that would not be identified through this program. In the meantime, if the Settlement is approved, Google would benefit from the use and revenue from these orphan books, whereas without the Settlement they would not otherwise be able to use them.



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Office....

#### IV. Conclusion

Even though it was Google's initiative that brought many of the issues in the case to a head, the implications of the copyright solutions go beyond a single search engine's entitlements. For example, Google's ability to digitize and profit from the use of orphan works where others face uncertain liability poses broad policy questions that are better resolved globally by legislation, rather than narrowly by private settlement. Understandably, Google Books is an enormously important project in advancing public access to information and promises great benefits to society. For skeptics, it is just another example of Google's growing domination of the search market, and the Settlement is a red flag that leaves unresolved important policy questions. That noted, the Settlement is in the court's hands now, so as always, we urge you to STAY TUNED.

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## COPYRIGHT AND THE DVD DILEMMA

"Is it legal to copy a DVD onto my school district's server?" That's the question Judith Koss addresses in a recent article in *School Library Journal* (10/1/09). In the discussion, Judith cites several resources that may be of interest.

The Educational Fair Use Guidelines: Distance Learning:  
[www.utsystem.edu/ogc/intellectualproperty/distguid.htm](http://www.utsystem.edu/ogc/intellectualproperty/distguid.htm)

Fair Use Guidelines for Educational Multimedia:  
[www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm](http://www.utsystem.edu/OGC/IntellectualProperty/ccmcguid.htm)

The Code of Best Practices in Fair Use for Media Literacy Education:  
[www.centerforsocialmedia.org/files/pdf/Media\\_literacy\\_txt.pdf](http://www.centerforsocialmedia.org/files/pdf/Media_literacy_txt.pdf)

The TEACH Act requirements:  
[www.copyright.gov/title17/92chap1.html#110](http://www.copyright.gov/title17/92chap1.html#110)

Judith Koss is the vice president of legal and business affairs for Library Video Company, SAFARI Montage, and Schlessinger Media. Her article concludes with, "That's why it's so important for media specialists to stay on top of copyright issues and to take the lead in crafting clear, well-informed policies." As AIME members know, AIME provides the resources needed to stay informed in this arena! For Judith's complete article, see <http://www.schoollibraryjournal.com/article/CA6699100.html?q=upload+or+not+to+upload>

AIME has provided copyright information to members for over 23 years.