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The Google Book Settlement is the latest development in an ongoing case which illustrates how Google must now ask permission to scan materials that are under registered copyright, but they still do not have to ask for permission to use unregistered, out of print and orphan works. Orphan works can be defined as works “for which copyright owners cannot be identified or contacted to obtain permission for use¹” This settlement has been under debate for some time, and many organizations support it, as well as, resent it. Issues concerning the Google Book Settlement on both sides are the following: visibility of resources, accounting for orphan works, and fair use arguments. The Google Book Settlement is still being disputed today.

The Amended Google Book Settlement, created from the lawsuit of The Authors Guild and The Association of American Publishers against Google on the basis of copyright infringement, focuses on copyright holders from the United States, contrary to the previous settlement, which focused on the world. The amended settlement also allows the members of The Authors Guild to have the final say in the use of their copyrighted materials because of The Books Rights Registry. The Books Rights Registry was created to make sure that any action Google performs concerning The Amended Google book Settlement is in accordance with the copyright terms. This amended settlement also allows for institutional subscriptions for libraries, including terminals for access to the contents of the Google Books Settlement².

The visibility of materials is an important concern for the Google Book Settlement because scanned materials may have suffered disuse and neglect over the years. The Google Book Search allows the scanning of published and out of print materials, and may have provided visibility to decaying masses of under read materials. The concept of visibility is still a matter of debate, and some organizations would like more visibility of their copyrighted work, while some are in opposition to it.

¹ Christine L. Borgman. *Scholarship in the digital age: information, infrastructure, and the Internet* (Cambridge, MA: The MIT Press, 2007)

² The Authors Guild and the Association for American Publishers v Google, Inc. No.05 CV 8136-DC Amended Settlement Agreement (South District New York, 2009).

The American Library Association (ALA) along with the subsidiaries under it believes that the settlement is good for libraries that have underused materials³. Enhanced digitization of resources would allow the public to access library materials via a digital interface.⁴ They also believe that digitization will increase the visibility of library materials. The ALA acknowledges, however that the extra access to the materials may be diminished if Google increases institutional subscription fees.

Another major stakeholder, the U.S. Copyright Office administrator, Mary Beth Peters argues that the Google Book Settlement as it stands does not take into account copyrighted works, and this is dangerous to copyright owners. The administrator states that the Google Books Settlement only covers works that are still being published in successive editions, Google could scan works that are no longer in print even if the copyright is still in effect⁵. Peters and the U.S. Copyright Office believe that Google should obtain permission from copyright owners, regardless of the publication status. Copyright owners of unpublished works should receive compensation for their efforts. If compensation is not received then copyright owners, who fall outside of the Google Book Settlement, will not benefit from the visibility of their works.

The idea of orphan works is also an issue in the Google Book Settlement. Orphan works are not protected under the Google Book Settlement because many of them remain out of print and are thus free to scan. Some organizations support Google in its endeavors to scan orphan works, but other organizations cringe at the notion that Google could scan orphan works without contacting the copyright owners. The ways, in which orphan works are treated, could be controversial when the Google Book Settlement is involved.

A major stakeholder, The Authors Guild and executive director, Paul Aiken do not believe that works, especially books, will be unaccounted for as long as they are copyrighted and registered. Orphan works may only be an issue in the Google Book Settlement when photographs are concerned because photographers are often disconnected from the works that

³ *The Chicago Manual of Style*. 16th ed. (Chicago: University of Chicago Press, 2003). I used this style manual to change the American Library Association to the abbreviated form ALA.

⁴ *The Authors Guild, Inc., and The Association of American Publishers v. Google, Inc.* No. 05 CV 8136- DC Library Association Comments on the Proposed Settlement (South District New York, 2009).

⁵ Communications on the Judiciary House of Representatives Statement of Marybeth Peters: The Register of Copyright Before the Committee on the Judiciary (111th Congress 1st Session, 2009)

they produce⁶. Aiken argues that authors do not have anything to fear from the absence of orphan works in the Google Book Settlement.

Another major stakeholder, the Open Book Alliance believes that Google will have a monopoly on the orphan works and they cannot allow this to occur. The members of this group believe that because of the settlement Google is free to scan orphan works, as well as, books that are out of print⁷. They fear that Google will gain a monopoly by scanning unregistered books and other materials.

The fair use doctrine defined as “a legal doctrine” where people, who are not owners of a certain copyrighted work are allowed to make use of this work under certain conditions⁸. In order to qualify for fair use, a person’s use of a copyrighted work must not interfere with the financial gains of the copyright owner. Uses of copyrighted works are more likely to fall under fair use if they are non-commercial, factual, and possess a limited amount of content from the original copyrighted work.

Many organizations feel that Google through its Google Book Settlement has violated fair use while others feel that Google is in the boundaries of fair use as it is imposed by the U.S. Copyright law. Some organizations see Google as blindly scanning copyrighted work, as well as charging for their uses and thus hurting the market for books. While numerous organizations see the Google Book Search as a commercial entity strengthened by the Google Book Settlement, others see Google as an advocate of the fair use doctrine.

Among the stakeholders, Michael Lesk, a member of the Institute of Electrical and Electronics Engineers regards the Google Book Settlement as an agreement that takes fair use into account⁹. Lesk sees Google Book settlement as fair use and they continue to focus on cases related to the fair use doctrine. Lesk sees Google as a for profit company that relies on the fair use doctrine by prohibiting the downloading of materials, and relaying viewers to distribution sites owned by different companies. Lesk is a member of the Institute of Electrical and Electronics Engineers, an organization that was created in order to implement policies for technological uses in an effort to advance societal influence.

An organization that remains in opposition to Google Book Settlement, citing that the Google Book Settlement is not fair use, is The Association of American University Presses. Givler, as well as, the rest of The Association of American University Presses sees the Google

⁶ Communications on the Judiciary House of Representatives Statement of Paul Aiken on the Google Book Settlement. No. 05 CV 8136- DC (South District New York, 2009).

⁷ The Authors Guild, Inc., et al. v Google, Inc No. 05 CV 8136- DC Memorandum of Amicus Curiae Open Book Alliance In Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., Et al., and Google Inc (South District, New York, 2009).

⁸ “Copyright -Fair use,” U.S. Copyright Office, last updated September 2010, <http://www.copyright.gov/fls/fl102.html>.

⁹ Michael Lesk, “Should Indexing Be Fair Use: The Battle Over the Google Book Search,” *IEEE Security and Privacy*, 4 no. 2 (2006): doi: 10.1109/MSP.2006.52

Company as a commercial entity, which does not apply the fair use doctrine when it scans copyrighted works without permission¹⁰.

I personally take the side of the publishers in the Google Book Settlement because I could see how Google could benefit financially from copyrighted content, especially out of print and orphan works. While the visibility of these works will be enhanced when they are digitized, the original copyright owners will not be able to extract monetary value from these works. Because the copyright owners of out of print and orphan works will not be able to profit from visibility, the enhanced visibility of their works is meaningless.

The Department of Justice (DOJ) even released a statement of September 18, 2009¹¹. In this statement John Clopper, Preet Bharara, and William F. Cavanaugh had explains how unregistered copyrighted works will not be protected and these included orphan works and non-print works. Clopper and the rest of the DOJ saw and continue to see Google as a commercial entity that plucks unregistered copyrighted works from its respected copyright owners in order to benefit “its registered rights holders,” who will “benefit at the expense of every rights holder, who fails to come forward and claim profits from Google’s commercial use of its work¹².” Google’s clear commercial use of copyrighted works is a use that does not correspond with the fair use doctrine. Google’s use also does not help visibility, because unregistered copyright owners are not paid.

In all, the details of The Google Book Settlement could hurt some copyright owners of orphan works and unregistered copyright. While it promotes increased visibility to lesser known works, the unrestricted copyright owners do not obtain any revenue. The Google Book Settlement also borders the line between fair use and copyright infringement where Google is a commercial entity. There are numerous reasons for opposition to this settlement because Google maintains complete access to unrestricted works at the cost to the rights of the copyright owners.

¹⁰ Peter Givler. “Google and the book Publishers: Testing the Limits of Fair use in the Digital Environment.” *NYBSA Bright Ideas*, 14, no. 2 (2005):
<http://www.aaupnet.org/aboutup/issues/pgbrightideas.pdf>

¹¹ *The Chicago Manual of Style*. 16th ed. (Chicago: University of Chicago Press, 2003). I used this style manual to abbreviate Department of Justice to DOJ.

¹² *The Authors Guild, Inc., et al. v Google, Inc. No.05 Civ 8136(DC) The Department of Justice Statement of Interest of the United States of America Regarding Proposed Class Settlement.* (South District, New York, 2009).