05-CV-8881

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28 March 2009

Office of the Clerk, J. Michael McMahon
U.S. District Court for the Southern District of New York
500 Pearl Street
New York, New York 10007

Dear Mr. McMahon:

As an author whose works appear in the Google Book Search database, I am writing to object to some of the provisions in the proposed Google Books Settlement. The concerns that motivate my objections came to me as I was navigating the settlement website, and broadly speaking, my objections fall into two categories. The first consists of defects in the settlement that seem to be caused by a mismatch between legal thinking, which is abstract and precise, and the diffuse and sometimes sloppy way that information is actually managed online. I've grouped these objections below under the heading "Practical objections." The second category is caused by the disparity between author's rights as legally defined and the influence and persuasive power practically available to authors heretofore. I've grouped these under the heading "Moral rights." There's some overlap between the two categories.

A. Practical objections.

1. **I object to the restriction of the settlement to books registered with the U.S. Copyright Office.**

According to the Google Books Settlement list of Frequently Asked Questions, "The requirement that United States works must be registered with the U.S. Copyright Office in order to be covered by the Settlement was included in the Settlement in order to comply with a decision of a U.S. court." Perhaps, then, it's a provision that the two parties felt they needed to comply with, but that your court will be able to set aside. I hope so. Until this settlement was proposed, it was unnecessary to register one's work with the U.S. Copyright Office in order to own copyright in it. If a copyright was infringed, an author could sue provided he was able to prove that the work in question was his and that he had not sold the rights to it. As a preliminary to a suit, an author did have to file a copyright claim with the Copyright Office, but it was not necessary to file this claim upon publication or for unpublished works in order to deter infringement. If approved, therefore, this settlement would have the

practical effect of retroactively adding a bureaucratic requirement in order to secure ownership of copyright.

A personal example might explain the dilemma. Searching the Google Books database, I found a citation of a thesis I wrote as an undergraduate and deposited, as a requirement for my degree, in my college library. I never registered my thesis with the U.S. Copyright Office, because I never expected it to be published. Nonetheless I believed I had copyright in it and would have the power to decide whether it was to be published. As far as I can tell, Google has not yet digitized it, but by the terms of this settlement, the company is only restrained from digitizing it by its wish to maintain good will in the marketplace. By a common-sense definition, my undergraduate thesis is a "book"—it is bound, there are multiple copies (though only two, I'm pretty sure, in all the world), and it is publicly available (to anyone willing to trek to my college library).

Legal precedent would require me to register my undergraduate thesis with the Copyright Office in order to protect it. But I would argue that the sheer volume of Google's proposed encroachments ought to shift such a bureaucratic burden away from authors and onto Google. In other words, I believe that as a practical matter the courts should waive the formal requirement of copyright registration and offer the protections in the settlement to any book that Google finds on a library shelf.

2. **I object to the lack of guidance in the instructions on the settlement website as to how authors should claim a book or an insert that appears several times in Google's database.**

By digitizing the holdings of many libraries, Google has inadvertently scanned a number of works several times. Sometimes the Google database treats the multiple digitizations as belonging to the same underlying work; sometimes it doesn't. (It almost never knows when an insert has been reprinted.) Should an author claim every version of his work, so as to be sure that he protects his rights in every instance? Or should he only claim one version of each work, so as to avoid seeming to ask for settlement payments he doesn't deserve? As it stands, there is no way for an author to inform Google that it has digitized multiple copies of one work and that the author wants to make a single claim covering all such copies.

This is not merely a bureaucratic flaw. Under some of the ways that Google proposes to make money off of digitized books, different digital versions of a work would correspond to different revenue streams. If I were to get a share of the revenue only from one of several digitized versions of my work, I would be short-changed. I think this is a problem that could be easily remedied if Google were to modify its online claim form.

3. **I object to the failure to share future revenue streams with the authors of inserts.**

Google has offered to make one-time cash payments to authors of books and inserts for the infringements of copyright it has made by digitizing works and for the right to sell digitizations of their works to institutional subscribers. However, it also proposes to make money off of these digitizations in other ways—perhaps by placing advertisements next to search results or by selling downloads of digitized books. Google proposes to share these alternative revenues with the authors of whole books, but according to schedule C of the settlement agreement, it is *not* planning to share these profits with the authors of inserts. I object to this as grossly unfair. Why

should the author of a novel be entitled to a class of compensation that an author of short stories is denied? In the case of an anthology, a book consists entirely of inserts, and Google would apparently be entitled to keep for itself all such revenues.

Though this seems to me a matter of simple fairness, I have classed it as a practical matter because I think it's the sort of problem whose resolution looks cumbersome to a legal mind but that would in practice be quite easy to remedy with a modification of the database procedures.

4. **I object to the failure of the agreement to cover periodicals.**

Again this seems to me a matter of simple fairness, but I'm classing it as a practical objection because it seems to me that the distinction between a book and a magazine is much more perspicuous to a lawyer than it is to the scanners in operation at Google. As a practical matter, the Google Books Database does not often distinguish between periodicals and books, especially with older periodicals that are no longer publishing. As researchers who use the Google Books database know to their dismay, periodicals are the database's Achilles heel; in many cases, older volumes of a bound periodical are treated as if they were a series of books with the same title, and volume numbers and year of publication are rarely included in the metadata.

But my concern here is not as a researcher but as an author to maintain his rights. I have written much more for magazines than for books, and over a much longer period of time, and Google seems to have digitized a number of these works, sometimes for magazines that are defunct and no longer around for Google to negotiate with. I feel that I ought to be able to assert control over and be compensated for Google's use of all these writings, and if they are excluded from the settlement, it will be an opportunity missed.

B. Moral rights

The idea of moral rights is an attempt to address the fact that works of art are not like, say, eggs or lumps of coal. The creator of a work of art cares about what happens to it, even after he's sold the right to publish it or display it or even own it, in a way that a keeper of chickens does not care about the fate of eggs, or a miner about the fate of coal. Unlike monetary rights, the moral rights in a work of art cannot be transferred. I understand that American law does not protect authors' moral rights, However, in the community of American publishing, these rights have nonetheless been to some extent respected, because a publisher who fails to respect them is considered scurrilous and loses the good will of the community of authors.

Google has introduced itself into the publishing world in a new way. Unlike other publishers, it is not in the business of signing up new authors but is exclusively in the business of repackaging works that have been published by others. It is therefore less subject to direct moral suasion by authors, and this settlement may be one of the few occasions when authors have the power to exercise their moral force with Google. I believe it would be appropriate for authors to insist that Google recognize explicitly some of authors' moral rights.

1. **I object to the failure of the settlement to allow an author to restrict display and redistribution of creative work even if he signed a "work-for-hire" contract with his original publisher**.

In the case of a poem, a work of fiction, or a memoir, I believe that an author retains effective control over republication of a work, even if he originally signed a work-for-hire contract.

Again, a personal example may clarify the issues. A decade ago, a short story of mine was published in an anthology now out of print. I'm happy it's out of print, and I'd like to keep it that way, but when I searched for my name in the Google Books database, a "snippet view" of the story popped up and panicked me. I could not remember whether I had signed a work-for-hire contract for it. After subsequent research, I discovered that I had *not* signed a work-for-hire contract and that I *do* retain all legal control over the copyright. But what if I had signed one? Would I really have no control over my short story? Before the advent of Google Books, a traditional publisher might have been able to buy the legal right to reprint my story but I doubt that very many publishers would dare republish it over my objections. If any tried to, I would call foul, alerting my friends in the community of authors and asking my agent to apply pressure. Please note that I'm not claiming that I could win money for a reprinting even if I'd signed a work-for-hire contract. I'm claiming that over creative work, I retain an effective veto over republication, especially if the work has subsequently fallen out of print, no matter what kind of contract I originally signed. I believe the settlement should make some kind of provision for a veto based on moral rights, to respect an author's wish to decide which of his works he would like to be judged by in the future.

A side matter: On the settlement website as it is operational today, 28 March 2009, when an author views the details of an Insert that he has claimed, the "Display Uses Authorized" button stays clicked when he saves his changes, but the "Display Uses Not Authorized" button does not. The anomaly needs to be fixed.

2. **I object to the failure of the settlement to treat the creator of a "work-for-hire" as the copyright holder when the purchaser of the work-for-hire is defunct and no subsequent owner of the rights comes forward.**

Publishers go out of business, and sometimes they take their rights with them. The Google Books Settlement exists to remedy exactly this problem. I believe that if a publisher doesn't sell his copyrights before expiring, the rights effectively revert to the creator, even if that creator signed a work-for-hire contract. This may be more a matter of jeopardy than of strict accounting. In other words, if a traditional publisher were to try to republish such a work without compensating the original creator, he'd be risking a lawsuit. The Google Books Settlement, however, excludes books written as works-for-hire and therefore does not make Google accountable to such creators. As a practical matter, such books will probably be treated by Google as if they were non-work-for-hire books whose rights holders had not come forward.

My personal concern here is with translation. Most of my translation work was done as work-for-hire, and in at least one case, the publisher is now extinct. Who now owns the rights to those translations? I'd argue that I have a stronger claim on them than Google does. (Of course, if it transpires that the publisher before closing shop donated the rights elsewhere, then the donee has a stronger claim than either of us.) I suggest that Google modify its claim form to allow translators and other work-for-hire creators to state the nature of their contribution in a work and that Google compensate them (though perhaps not at the same rate as full-on authors) if no other claimants come forward.

I hope these objections are useful to you in deciding a final settlement, and I appreciate your attention to them.

Respectfully submitted,

Caleb Crain

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