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Advantage Google

By LEWIS HYDE

Three hundred years ago, Daniel Defoe offered a memorable image for the relationship between authors and their work: “A Book is the Author’s Property, ’tis the Child of his Inventions, the Brat of his Brain.”

The line comes from an essay Defoe wrote in support of the first-ever copyright act, the 1710 Statute of Anne. That law, one of the great inventions of human civilization, managed to do two good things at once: it gave writers ownership of their work, thus freeing them from patronage, and it limited the term of ownership to 28 years, thus giving the rest of us a public domain, a world of print we all may enter because no one owns it.

Defoe’s metaphor nicely points toward copyright’s public ends: both books and brats grow up; their relationship to those who bore them changes over time. Like a farmer’s children, books must help their author make hay until they come of age, whereupon they are free to leave home and participate in the larger community.

This history has been on my mind recently because it is about to reappear in a courtroom where Judge [Denny Chin](#) of the Federal District Court for the Southern District of New York will very likely hold a hearing later this fall on the proposed settlement of the lawsuit brought by authors and publishers against Google, after Google made digital copies of millions of in-copyright books. The settlement is currently being revised in the wake of objections raised by the Department of Justice and other parties. But whatever form it takes, before he approves it Judge Chin will have to deal with the ghost of Defoe’s parental metaphor, come now to pose a riddle Defoe never had to consider: What shall we do with the orphans?

Orphan works are all those Brats whose copyrights are still active but whose parents cannot be found. There are millions of them out there, and they are gumming up the world of publishing. Suppose a publisher wants to print an anthology of 1930s magazine fiction. Copyright now lasts so long (a century in many cases) that the publisher must assume that there are rights holders for all those stories. Suppose that half the owners can’t be found. What should the publisher do? Its lawyers will advise abandoning the anthology: statutory damages for copyright infringement now stand between \$750 and \$150,000 per instance.

Less hypothetically, when [Carnegie Mellon University](#) tried to digitize a collection of out-of-print books, one of every five turned out to be orphaned. When [Cornell](#) tried to post a collection of agricultural monographs online, half were orphans. The United States Holocaust Museum owns millions of pages of archival documents that it can neither publish nor digitize.

Of more than seven million works scanned by Google so far, four to five million appear to be orphaned. If Judge Chin approves the settlement in something close to its current form, the authors and publishers will

let Google commercialize these works — sell them, display them online with ads, charge libraries for their use, and more. A portion of the money thus earned will go to Google outright; the rest will go to a new Book Rights Registry, where it will regularly be set aside for five years waiting for absent owners to claim it. At the end of each five-year period, all unclaimed funds will be distributed to the authors and publishers whose works the registry represents.

This is a smart way to untangle the orphan works mess, but it has some serious problems, the most obvious being that it treats orphans as if they were Brats who can be set to work for families who had no hand in their creation. Nothing in the history of copyright can possibly allow for such indenture. In an essay written late in life, James Madison explained that copyright is best viewed as “a compensation for a benefit actually gained to the community.” There were good reasons, he wrote, to give authors a “temporary monopoly” over their work, “but it ought to be temporary” because the long-term goal is to enrich public knowledge, not private persons.

Madison honors the same beneficiaries found in the Statute of Anne, the writer and the rest of us. In no case are third parties meant to profit, as the Google settlement would allow. To let them do so would be like letting an executor drain an estate whose rightful heirs cannot be found.

Surely there are better ways to dispose of orphan income. The Department of Justice in fact suggested one two weeks ago, when it issued a critique of the proposed settlement saying, among other things, that the court might do as we do with actual orphans: appoint a guardian to look out for them until they come of age. In this case, I believe, such a guardian would have to be charged with service to both the rights holders and the public good. He would have to try to find lost owners and pay them their due; should no owners be found, he would have to devise a way to release these works to the public domain. (He could simply require that users who’ve been charged for orphans get their money back, or that the fees Google charges libraries be lowered in proportion to revenue collected in error.)

The idea of a guardian obliged finally to serve public ends suggests a second way to expand Defoe’s metaphor. The Brat of the Brain has never been thought of the way that European nobility once thought of their land, as something to be handed down generation after generation. A copyright may be inherited, yes, but not in perpetuity. At this nation’s founding, “perpetuities” were understood to be one of the devices by which aristocracy maintained its power, and the founders therefore looked on forms of long-term ownership with a skeptical eye.

Jefferson especially believed that no generation had a right to bind those that followed. “The earth belongs . . . to the living,” he wrote to Madison in 1789; “the dead have neither powers nor right over it.” That being the case, “perpetual monopolies” in arts “ought expressly to be forbidden,” Jefferson’s own suggestion being that copyright run no more than 19 years.

Such time-limited ownership relocates inheritance to serve democratic rather than aristocratic ends. Where Europeans had shaped inheritance to serve powerful families, Americans would shape it so that something new under the sun — “the people” — might receive the legacy of all their forebears had created. The founders valued “civic virtue,” the honor that private citizens acquire by acting for the public good. By insisting that copyright exist only for “limited times” (as the Constitution says), they suggested a way that law itself might engender virtue, transforming the fruits of human imagination from private into common

wealth by the mere passage of time.

The point here, of course, is that the parties to the Google settlement are asking the judge to let them be orphan guardians but without any necessary obligation to the public side of the copyright bargain. Quite the opposite: if Judge Chin grants them a pass to profit from orphan works, he will also be granting them a private monopoly in digital books.

Why? Because the Google case is a class-action lawsuit structured such that it will bind all rights holders unless they opted out by a deadline that passed last month. The missing owners of orphan works could not do that, of course; by definition they don't even know this litigation concerns them. Now, included by default in the proposed settlement, their Brats are being readied for trade.

That does free the orphans from copyright limbo, but here's the catch: They will effectively belong only to Google and the other settling parties. It will be almost impossible for any other online player to get the same right to use them. The only way a potential competitor could avoid the threat of statutory damages would be to do what Google did: scan lots of books, attract plaintiffs willing to form a class with an "opt out" feature, negotiate a settlement and get it approved by a judge. Even for those with time and money to spare, that promises to be an insurmountable barrier to entry.

Thus does the settlement portend Google's unlimited dominion over electronic books. By aggregating the monopoly power latent in each orphan, the proposed agreement doesn't just get the Brats to work on Google's farm; it secures for Google a lasting monopoly in this newest of book trades. Talk about making hay!

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