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# How to protect authors after Google Books wins its 'fair use' case, again

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5-6 minutes

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Google's efforts to scan millions of books for an online library have passed another legal hurdle with the United States appeal court [agreeing](#) earlier this month that the search-giant's [Google Books](#) project does not violate copyright law.

The appeal judges' ruling supports an [earlier district court ruling](#) two years ago. The case was brought by the Authors Guild, which argued that Google's initiative constituted copyright infringement and could deprive authors of revenue.

But Google has successfully argued that its efforts could actually boost sales by making the text of books searchable, making it easier for people to find published works.

This latest outcome came without much surprise in the US, and the ruling is consistent with the earlier court rulings on fair use. The Authors Guild [plans to appeal](#) the case before the US Supreme Court but it is unlikely that it would succeed.

## Google Books and Australia

The Google Books decision is based on a so called "[fair use](#)" doctrine which means that everyone can use copyrighted works free as long as the use falls under a particular definition of "fair",

including for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”. But such broad and flexible doctrine does not exist in Australia or in most other countries, including Europe.

Instead, Australian copyright law contains narrower and more specific “[fair dealing](#)” exceptions as well as a few even more narrowly defined specific copyright exceptions.

It is unlikely that the Google Books project would fall under any of these exceptions. This means that if Google is sued in Australia for the same Google Books project, it is likely to lose the battle. Due to much stricter European copyright laws, a few years ago Google lost a case on [Google Books in France](#).

On the other hand, Australian laws are more flexible than French ones and Australian courts may be as well able to find in favour Google. In short: the legal situation of Google Book still remains uncertain in Australia.

## **How Google Books works**

It is worth clarifying here that not everything that can be found on Google Books website was digitised and made accessible by Google for free and without the permission from the copyright holders.

If you can access chapters from a book, it means that Google has got permission from the publisher of the book to do so (and maybe agreed to remunerate the publisher – hence the author(s) – for this too).

It is only when Google does not have an agreement with the publisher, it takes a risk to digitise the book but then only show snippets of the text. This can be a few lines or a short paragraph where the search terms can be seen.

The US appeal court's decision on Google Books confirmed that the use of snippets (but not chapters or full books) is fair use.

Google Books is an innovative and useful service but the question is whether Google should pay authors and publishers for its use of their work.

The Australian Law Reform Commission (ALRC) [proposed](#) last year that Australia follow the US and introduces a fair use doctrine.

Accepting fair use in Australia would mean that Google is free to digitise all Australian books for free, put the text in its search engine and allow users to view at least snippets from the books.

But Australian [authors and publishers opposed strongly](#).

Australian authors argue that fair use would further worsen their financial situation that is [already rather miserable](#). As a result, government has not shown any signs in taking up this proposal.

It is true that fair use doctrine has its own risks. For many it looks open, flexible and seems to welcome innovative services such as Google Books. On the other hand, it creates even more uncertainty for those who want to rely on it.

What use is fair? Each particular case needs to be checked in court, but Australian courts do not have years of experience in applying fair use, as US courts do.

## **Alternatives to fair use**

If fair use is not a perfect solution, what could be a compromise? This is a question with no easy answer.

Instead of fair use, European academics [suggest](#) reviewing the existing copyright exceptions and adding one broader exception that could apply in "emergency" situations such as Google

Books case.

The ALRC also suggested, in its [report last year](#), an alternative to fair use; the consolidation and expansion of existing fair dealing exceptions. Maybe this could be a starting point for a discussion?

One of the problems Google Books faced was the difficulty in finding all the copyright holders of a work and signing a contract with each of them. The Google Book Settlement was meant to ensure that all copyright holders whose books were used in Google Books were remunerated.

This was proposed by Google but eventually [rejected by the US court](#).

Wouldn't it make sense to create licensing solutions that would make it easier for such projects as Google Books to get licenses and pay fees for millions of authors and publishers? Authors would then get paid and the global service would stay running for all to use.