

**GOOGLE, THE GUILDS, AND THE READING PUBLIC:
SETTLEMENT IS CODE IS LAW?**

by

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In fall 2008, the Authors Guild and Google submitted an initial version,¹ and a year later (on Nov. 13, 2009) an amended version,² of a spectacular settlement to the Southern District of New York federal court. According to the deal, Google, in exchange for \$125 million and 63% of future revenues earned from the Book Search Project, would receive a default compulsory copyright license to scan books and market the scans. The bulk license would cover all U.S. copyrighted books registered with the U.S. Copyright Office (or published in Canada, UK or Australia) by January 5, 2009,³ except for circumstances when a rights holder exercised the right to withdraw from the scheme before March 9, 2012 at the latest.⁴ The deal does not only provide damages for past infringements, it also determines how Google can commercialize the books in the future. The settlement would allow Google to turn the Google Book Search into a gigantic e-bookstore. It unites previous adversaries, and turns a legal squabble into a promising joint venture with Google agreeing to pay \$34.5 million to set up a middleman

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¹ Settlement Agreement, In Authors Guild, et al. v. Google, No. 05 CV 8136-JES. (S.D.N.Y. Oct. 28, 2008) (hereinafter: Settlement 2008).

² Available at <http://www.googlebooksettlement.com/> (hereinafter: Settlement 2009 or Settlement).

³ *Id.* at § 1.19.

⁴ *Id.* at § 3.5(a).

collective society of the rights-holders, the Book Rights Registry, thereby representing rights holders in their future relationships with Google.⁵

In assessing the Settlement, this paper is broken into five sections. Section One highlights the main advantages of the Settlement. Section Two addresses the most commonly raised arguments against the Settlement: copyright and antitrust. Section Three focuses the Settlement's impact on libraries, researchers and the reading public. Sections Four and Five expand the perspective of Section Three into the contractual arrangements between Google and the libraries participating in the Google Library Project.

I THE SETTLEMENT IS GREAT

When the mechanism for determining the default contracting position for millions of authors and publishers, typically a legislative matter, is instead determined by a negotiation of less than a dozen of lawyers, suspicions are raised. But by creating a formula, the Google Books Settlement achieves an extremely desirable social effect—it eliminates a large share of the enormous transaction costs plaguing the copyright system.⁶ As a result, this Settlement opens up an entirely new way of making books available online, which arguably benefits both the copyright holders and the readers. An increase in book purchases would positively influence what economists call “dynamic efficiencies”: the prospect of enhanced innovation and creativity in the future.⁷ A higher

⁵ *Id.* at § 2.1(c).

⁶ The Settlement may look like a manifestation of what Siva Vaidhyanathan calls a “public failure”: “[t]he phenomenon in which a private firm steps into a vacuum created by incompetent or gutted public institutions. It's the opposite of 'market failure'”. Posting of Siva Vaidhyanathan to The Googlization of Everything, http://www.googlizationofeverything.com/2009/01/baiducom_accused_of_rigging_se.php (Jan. 6, 2009, 14:26 EST) (citing Chi-Chu Tschang, *The Squeeze at China's Baidu*, BUSINESSWEEK, Dec. 31, 2008, available at http://www.businessweek.com/magazine/content/09_02/b4115021710265.htm). In fact, however, the Settlement is a remedy to this “public failure,” not a manifestation of it.

⁷ “Purchase,” the term used in the Settlement, is very imprecise, because in fact Google would not sell copies of e-books. It would (only) enable perpetual online display of the items subscribed from the Google database.

rate of book purchases would incentivize authors to write more and for Google to create new, even more innovative, products and services.

In addition, the deal introduces Google as a new player to the market of commercially available paper and electronic books, thus strengthening competitive pressure and promising enhanced consumer welfare.⁸ The interests of readers and writers seem to converge in the Settlement: the more digitized books are available for purchase, the more readers purchase, the more writers earn and therefore the more they write. Google profits by creating and proliferating a system that benefits everyone.⁹ Considering all these benefits, the Settlement should indeed be called “a huge, quantum leap in our ability to find information.”¹⁰

⁸ Substitutability of paper books/e-books for the Google “cloud reading” product is, however, significantly reduced by several factors. For many readers paper enhances both the usefulness of a book and the pleasure of reading it (a factor which refers to e-books and books in the Google database alike). Moreover, the “cloud reading” makes the Google product much less attractive to readers than e-books. First, it disables the first sale doctrine because no copy is sold by Google. *See* 17 U.S.C. 109(a) (“the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”). This feature significantly limits the entitlements of the subscription purchasers since Google retains the right to decide whether/how books can be copied or printed. Second, as no copies are reproduced on the user’s device, the reader must be online when accessing the book, and therefore cannot use the service in all the locations. Third, if for any reason Google quits its service, users would be permanently cut off from the books they have purchased. All this makes the Google access a rather poor substitute for both paper books and e-books.

⁹ Everyone profits, except for other intermediaries, mainly sellers of printed and e-books, for whom the new the Settlement, if successful, will pose a serious risk for their primary revenue models.

¹⁰ Juan Carlos Perez, *In Google Book Settlement, Business Trumps Ideals*, PCWORLD.COM, Oct. 30, 2008, http://www.pcworld.com/businesscenter/article/153085/in_google_book_settlement_business_trumps_ideals.html (quoting Eric Goldman, associate professor at Santa Clara University School of Law and Director of its High Tech Law Institute).

II THE SETTLEMENT GETS PUZZLING

The deal is more curious in regard to commercially unavailable books.¹¹ Commentators have pointed out that many of the commercially unavailable books are orphans: protected works with rights holders who are difficult or impossible to track down.¹² It is unlikely that an orphan work's rights holder would even be aware of the Settlement, and thereby unable to either grant or refuse a license. Still, Google would market the book and profit from it.

Under the Settlement, all royalties are to be paid into the Registry. According to the Settlement 2008, the Registry would deduce 10-20% as an administrative fee, and then either would transfer the remaining part to the rights holder(s) or, if no rights holder came forward, the Registry would redistribute the royalties between active rights-holders of other books in the database.¹³ This arrangement, however, would pose several questions: Should Google and the Registry profit from orphan works? Should unclaimed royalties go to authors and publishers of unrelated works? Should there be any royalties from orphan works at all? These are all legitimate dilemmas made visible by the Settlement 2008, though not created by it. Orphan works are engendered by the copyright system that over-protects intellectual property. This system excludes those works from the public domain even if a rights holder does not take basic steps to demonstrate her willingness to protect what legislation has defined as her "sphere of interest." The Settlement 2008 alleviated these problems in two respects. First, all an orphan work would need to be read is a reader, which the Settlement provides. The deal, therefore, would restore

¹¹ Out-of-print copyrightable works comprise a lion's share of the "Google Library Project" on which the Google Book Search is built. In November 2008, when the settlement was announced, five out of every six copyrighted books scanned by Google belonged to this category.

¹² See, e.g., P. Samuelson, *Legally Speaking: The Dead Souls of the Google Booksearch Settlement*, 52 Comm. of the ACM Jul. 2009; Posting of Peter Hirtle to LibraryLaw Blog, <http://blog.librarylaw.com/librarylaw/2009/04/google-book-settlement-orphan-works-and-foreign-works.html>; (Apr. 21, 2009); Miguel Helft, *Google's Plan for Out-of-Print Books Is Challenged*, N.Y. Times, Apr. 3, 2009, at A1, available at http://www.nytimes.com/2009/04/04/technology/internet/04books.html?_r=1.

¹³ Settlement Agreement 2008, *supra* note 1, at § 6.3(a)(i)(1).

these works to the reading public, an achievement impossible without a default license and without remunerating Google. Second, the redistribution mechanism of unclaimed royalties essentially boils down to inactive rights-holders, heirs of writers passed away or successors of publishers wounded up, in the first place, supporting newer writers for whom royalties play a role as an incentive for future creativity.

The Settlement 2009, however, fundamentally modifies this mode of incentivizing future creators. The new rules rearrange the scheme entirely, stating that no other creator but the rights holder should benefit from revenues received by the Registry.¹⁴ If a book scanned by Google has not been claimed for five years since the Settlement's court approval, then up to 25% of the unclaimed funds may be devoted to locating the rights holder(s).¹⁵ If this attempt proves futile during the subsequent five years, unclaimed funds will be transferred to governments of the respective states covered by the Settlement, and "distributed to literacy-based charities in each such country that directly or indirectly benefit the Rightsholders and the reading public."¹⁶

This shift seems commendable: if copyright is a sort of a property, and it (almost) is, then no one but the rights holder should benefit from the royalties. This scheme should facilitate it, and prevent Google from authorizing redistribution of the revenues to people unrelated to the rights holder. The current version of the Settlement, therefore, is more congruent with the logics of the extant copyright system. But this has its price, also derived for the intrinsic logics of the copyright system - high transaction costs. On the one hand the Settlement 2009 limits them by eliminating administrative fees, which were to be charged by the Register pursuant to the earlier version of the deal. But, on the other hand, the fees dedicated to locating the author, and the sums deducted from unclaimed resources on the way between the Register and a final beneficiary of the literacy-based charity will be substantial. Therefore, even though the Internet is commonly appreciated for eliminating intermediaries and thus reducing transaction costs, the Settlement, to strictly follow requirements of the copyright system, operates in a precisely obverse manner.

¹⁴ Settlement Agreement 2009, *supra* note 2, at § 6.3(a)(i)(1).

¹⁵ *Id.* at § 6.3(a)(i)(2).

¹⁶ *Id.* at § 6.3(a)(i)(3).

A more legitimate apprehension regarding commercially unavailable books is the antitrust concern, which involves the non-existence of imminent mechanisms to restrain prices for the Google scans. To oversimplify, “Amazon would not have the book.” Yahoo and Microsoft would not have an easy access to it either. The Settlement erects entry barriers to magnify the first mover advantage for Google. In order to strike a similar deal with the Registry, one of Google’s competitors would first have to be sued by the Registry and have settlement terms granting the competitor a similar default license. However, the Registry will not be interested in granting similar default licenses. Google pays for establishing the Registry. It is hard to imagine that, even though Google does not have a say on the Registry’s Board of Directors,¹⁷ Google’s interests will not be sincerely taken into account by the Registry. By failing to settle with Google’s competitor, the Registry would preempt entry to the market created by the Settlement.

The Settlement 2008 further exacerbated this competitive hurdle by providing that even if the Registry did sign a similar deal with one of Google’s competitors, the latter would nonetheless not be able to compete because the Settlement protects Google against such a possibility with a one-way most favored nation clause. The clause clearly stated: “The Registry ... will extend economic and other terms to Google that, when taken as a whole, do not disfavor or disadvantage Google as compared to any other substantially similar authorizations granted to third parties.”¹⁸ Consequently, potential competitors would be severely discouraged from trying to break into the market formed by the Settlement.

To escape the competitive deadlock produced by such a situation, some commentators suggested that the Most Favored Nation (“MFN”) clause should be struck out of the Settlement, and possibly replaced by

¹⁷ *Id.* at § 6.2(b)(ii) (“The Registry will have equal representation of the Author Sub-Class and the Publisher Sub-Class on its Board of Directors, with each act of the Board requiring a majority of the directors, with such majority including at least one director who is a representative of the Author Sub-Class and one director who is a representative of the Publisher Sub-Class.”).

¹⁸ Settlement Agreement 2008, *supra* note 1, at § 3.8(a) (the clause was to apply for 10 years from the extended Notice Commencement date).

an obligation of non-discrimination.¹⁹ Arguably, this would level the playing field and enhance competition—both very desirable effects. At a second glance, however, the non-discrimination requirement is not as compelling and it would lead to serious practical complications: What should non-discrimination mean if Google solely pays for setting up the Registry and then the revenues of potential competitors are impossible to calculate upfront? How would such a regulatory structure be enforced, and by whom? And how can the regulatory structure avoid high costs and limited efficiency, two constant features of US economic regulation?

In the Settlement 2009 the explicit requirement of non-discrimination was not upheld, but the postulate to delete the MFN clause was accepted. In other words, Google's competitors would not be barred from concluding a more lucrative settlement with the Registry than Google achieved.

This amendment sounds like an important step towards eliminating serious competitive concerns the Settlement 2008 raised. But were they really so serious? Even under the heavily criticized MFN clause, no competitor of Google would have to strike a deal with the Registry (or the plaintiffs to the case against Google) to enter the market on the same or even more favorable conditions than Google did. The default license Google would receive is non-exclusive,²⁰ thus the rights holders can authorize anyone else to scan their books as well. In such a situation certainly none of Google's competitors would have access to its scans, and no claim solely on this ground seems tenable.²¹ Yet any of Google's competitors could be sued by other organizations representing rights-holders, in order to settle the case and obtain a similar compulsory default license, perhaps even on conditions more favorable to readers and/or rights-holders. In such a scenario the rights-holders who have not opted-out of the Google system, or a "clone" set up by a Google competitor, would, by default, be bound by multiple licenses.

Certainly being sued as an enabler for market entry sounds very bizarre. Yet it is merely the bizarreness of a river meandering between obstacles set by the copyright system, filling up a channel created by the institutions of class actions and a default copyright license. Most importantly for the antitrust matters, such a maneuver would obliterate the arguments of a digital cartel allegedly created by the Settlement or by the MFN clause of the Settlement 2008.

¹⁹ Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* 23 (John M. Olin Law & Economics, Working Paper No. 462, 2009); J. Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 *JOURNAL OF INTERNET LAW* 10, 15 (2009).

²⁰ Settlement Agreement 2008, *supra* note 1, and Settlement Agreement 2009, *supra* note 2, at § 2.4.

²¹ Some may argue that the Google's database of scanned books is an "essential facility," because it cannot be reasonably duplicated by either its existing or potential competitors. Yet, even regardless of the fact that the essential facilities doctrine was rejected by the Supreme Court in *Verizon Comm Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), the argument would be tantamount to authorizing less creative firms to free-ride on the efforts of Google. Besides this, it may be predicted that in few years either the technology used and/or the business model of the Google Books Search will not be as efficient as they seem to be now, entirely cleaving the argument of non-duplicability.

III WHAT THE SETTLEMENT MEANS FOR LIBRARIES, RESEARCHERS AND THE READING PUBLIC

The preceding discussion confirms that the Settlement, just as the parties boast in its preamble, “will be of great benefit to copyright owners (including authors and publishers).”²² Yet the same sentence promises equally “great benefits” to “libraries, researchers, and the reading public.” The Settlement, however, leaves this promise unfulfilled for any of these categories: for libraries, researchers, and the part of the “reading public” understood literally, as those who read books through libraries without buying them, presumably students on the majority.

Books are an essential aspect to our society: no other medium transmits and disseminates knowledge better than books. Advanced societies are built and thrive on knowledge found in books. Even if the indirect social benefits of education and knowledge derived from books, positive externalities as the economists call them, are impossible to estimate, they exist. Education, and the progress it engenders, are a function of how widely books are read and how easily available books are. This is why Article I of the U.S. Constitution explicitly links the “exclusive Right to their Writings and Discoveries of Authors and Inventors” with “promoting the Progress of Science and useful Arts.”²³ The very institution of the library system, and the role it plays in America, is an expression of this commitment and the understanding of the educational function of books. This function and its core benefits are seriously diminished when the interests of the reading public are disregarded.

A. What the Reading Public Contributes

According to the Settlement, libraries, by allowing Google to scan their books, may either have the status of Fully Participating (“FP”) or Cooperating Libraries.²⁴ Cooperating Libraries give their books to Google for digitization, expecting literally nothing from it, while FP libraries may receive digital copies in return. As envisioned by the Settlement, the expectation of the FP libraries is pretty tenuous. Based solely on Google’s discretion,²⁵ FP libraries may receive scans, referred to in the Settlement as Library Digital Copies (“LDC”), of the items from its collection that Google decides to digitize.²⁶ Alternatively, an FP library may also receive scans of the remaining books from its collection (i.e. the books Google already had in its database but did not want to duplicate by scanning the same book from another collection), on the condition that the

²² Settlement Agreement 2009, *supra* note 2, at 1.

²³ U.S. Const. Article I, §8, cl. 8.

²⁴ Settlement Agreement 2009, *supra* note 2, at §§ 1.39, 7.2(a).

²⁵ *Id.* at § 7.2(a)(i) (“Google may” is used in this context).

²⁶ *Id.*

collection is valuable enough for Google to scan more than one-third of the library.²⁷ This mechanism clearly puts richer libraries and those more willing to cooperate with Google at an advantage.

After approval from the Registry, Google may host the digitized collections of FP libraries.²⁸ It also, quite predictably, restricts for itself free searching services, and may freely limit those services to 85% of the collections.²⁹ Essentially, no FP library may receive from Google a LDC of a title it does not have in its paper collection.³⁰

The abovementioned relationship between the digital copies and the library collections demonstrates the meaning of “full participation.” There are some more details here, though. The LDCs may be used to preserve the collection. In particular, the libraries are authorized to use the digital copies in order to create “a print format replacement copy of a Book solely for the purpose of replacing a copy of such Book that is damaged, destroyed, deteriorating, lost, or stolen, or if the existing format in which the Book is stored has become obsolete.”³¹ This right, however, is triggered only if the library “has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.”³² Moreover, while the authorization for Google to use the digital books is very broad,³³ and covers both Display Uses and Non-Display Uses, the ability of the FP libraries to do research on the LDCs is extremely narrow. Only a category of researchers called “qualified users,” upon notice to the Registry, may conduct what the Settlement calls “non-consumptive” (and non-competitive³⁴) research on the digital copies. “Qualified users” are roughly comparable to researchers, affiliated with institutions that manage various libraries, who have positively passed a cumbersome authorization process and act primarily on non-commercial basis.³⁵ The “non-consumptive research,” on the other hand, is “computational analysis ... performed on one or more Books, but

²⁷ *Id.* at § 7.2(a)(ii) (the method is similar, but more complicated, regarding Institutional Consortia. *See Id.* at § 7.2(a)(iii)).

²⁸ *Id.* at § 7.2 (d)(ii).

²⁹ *Id.* at § 7.2 (e)(i) (the libraries may seek another provider of search services only if Google fails to provide the searching services in five years from the extended Notice Commencement Date *See Id.* at § 7.2(e)(ii)).

³⁰ *Id.* at §§ 7.2 (a)(ii)-(iii).

³¹ *Id.* at §7.2(b)(iii)(1).

³² *Id.*

³³ *Id.* at §2.2.

³⁴ *Id.* at §7.2(d)(ix) (“Use of data extracted from specific Books within the Research Corpus to provide services to the public or a third party that compete with services offered by the Rights holder of those Books or by Google is prohibited.”).

³⁵ *See Id.* at § 1.123 (full definitional category); *see also, Id.* at §§ 7.2(d)(xi)(2)-(3) (regarding the research agenda).

not research in which a researcher reads or displays substantial portions of a Book to understand the intellectual content presented within the Book.”³⁶

It is like analyzing pieces of a mosaic without looking at the picture they represent. Linguistic analysis and automated translation are two of examples here.³⁷ Finally, researchers of the higher education institutions hosting the library may receive access to the digital copies and read them, print, download, or use otherwise for “Personal Scholarly Use and Classroom Use.”³⁸ But the boundaries of such a right are extremely tight again. First, the use is restricted to five pages of a given book. Second, commercially available books are excluded. And third, the right covers only “(1) personal scholarly use (for each Book, no more than once per person per term) and (2) classroom use in such Higher Education Institution that is limited to the instructors and students in the class and for the term in which the class is offered.”³⁹ Certainly no university (or equivalent) library would ever disable access to its collection for teachers and researchers to any comparable degree.

B. More on What the Reading Public Gets in Return

The Settlement allows for three so-called “Access Uses” — transactional models of making the whole books available to readers: Consumer Purchase, Institutional Subscriptions and Public Access Service.⁴⁰

Institutional Subscriptions are to achieve “revenue at market rates for each Book and license,” on the one hand, and “the realization of broad access to the Books by the public, including institutions of higher education,” on the other.⁴¹ A closer look at the Settlement’s more detailed provisions, however, makes it clear that only the first of the two principles is to be taken seriously. For one thing, the fees are based on (what the Settlement calls a “parameter” of) “pricing of similar products and services available

³⁶ *Id.* at §1.93.

³⁷ As the Settlement stipulates, “No Person may, in the course of conducting, reviewing or challenging the results of, Non-Consumptive Research use Protected material through the Research Corpus for purposes that involve reading portions of a Book to understand the intellectual content presented within a Book; It is permissible, however, for Qualified Users to read Protected material within the Research Corpus as reasonably necessary to carry out Non-Consumptive Research, and for reviewers or challengers of the results of Non-Consumptive Research to read Protected material as reasonably necessary to analyze or verify such results.” *Id.* at §7.2(d)(vi) (1)-(2).

³⁸ *Id.* at §7.2(b)(vii).

³⁹ *Id.*

⁴⁰ *Id.* at §1.1. Other uses: Snippet Displays, Front Matter Displays, and Previews, while also covered by the Settlement, are less useful to readers, and are therefore of much lower commercial value to parties to the Settlement.

⁴¹ *Id.* at §4.1(a)(i).

from third parties.”⁴² Moreover, when determining the (first) pricing strategy, Google must only take into account “then-current prices for comparable products and services, surveys of potential subscribers, and other methods for collecting data and market assessment.”⁴³ It is impossible to conclude from the Settlement which “products and services” are comparable. It is unlikely that databases of professional periodicals are contemplated, since periodicals (excluded from the Settlement) are not very similar “products” to books. A much better candidate for setting the “then-current prices for comparable products and services” is the aggregated value of all books in the Google database, minus costs of printing and paper, plus costs of scanning. Subscriptions based on such a criterion would be obviously unbearable for any library, and Google would have to moderate it in order to launch the service from the ground. But the only ceiling predictable on the basis of the Settlement alone are financial capabilities of the libraries, not a “broad access” principle. The Settlement envisions no practical mechanism for realizing the latter. Moreover, none of the parties to the Settlement have an incentive to follow the principle of the “broad access.” Subscribers do not have a say on the pricing strategy at all either.⁴⁴ Because of these considerations, subscription fees would practically follow the logics determining prices for individual “Consumer Purchases,” of maximizing profits instead of balancing those profits with the principle of providing broad access to the books. In the context of the “Consumer Purchases,” the Settlement empowers Google to design a “reasonable”⁴⁵ mechanism (an algorithm) for setting prices for this service. To achieve the reasonableness Google is to “find the optimal ... price for each such Book in order to maximize revenues for the Rightsholder.”⁴⁶ The “reasonableness” of the algorithm is to be validated by the Registry’s experts only, outside external scrutiny or any publicity.⁴⁷

On these financial terms the reading public would be entitled to a very restricted scope of use rights. Overall, one of the least vexatious limitations is that books may be incomplete.⁴⁸ Others are more annoying. To understand fully how, we have to

⁴² *Id.* at §4.1(a)(ii). The other three “parameters” are: “the scope of Books available, the quality of the scan and the features offered as part of the Institutional Subscription” *Id.* at § 4.1(a)(ii). None of these three, however, have a significant bearing on the principles of maximizing/minimizing the fees.

⁴³ *Id.* at §41.(a)(vii).

⁴⁴ Pricing strategies are to be proposed by Google and approved by the Registry. *Id.* at 4.1(a)(vi).

⁴⁵ “Google will develop the Pricing Algorithm and analyze sales data to ensure the reasonableness of the Pricing Algorithm” *Id.* at 4.2(c)(ii)(2).

⁴⁶ *Id.* at §4.2(b)(i)(2). This wording is used in the context of a “controlled price,” one of two mechanisms to set prices for consumer purchases (the other one is a “specified price” determined by the rights-holders).

⁴⁷ *Id.* at §4.2(c)(ii)(3).

⁴⁸ As the American Library Association (ALA) remarked in its comment on the proposed settlement, “Because the Settlement allows the rights-holder of a work contained within another rights-holder’s book to exercise his rights under the Settlement independently, a book in the ISD may lack important parts of the printed book. A book in the ISD might be missing an essay, poem, short story, foreword, chart or table that appears in the printed version. Similarly, because the Settlement does not apply to pictorial works, Google will black out photographs and illustrations with a different rights-holder from the book’s rights-holder.”

recapitulate what has been said up to this point about the relationship between the libraries and the parties to the Settlement.

The deal empowers Google to scan library books, but the libraries are, essentially, refused the right to use the scans unless they decide to buy the scans back through subscription fees. To be more specific: “A Fully Participating Library may not read, print, download or otherwise use a Book or Insert ... if such use is available through the Institutional Subscription and the Institutional Subscription service is offered or is available to the Fully Participating Library.”⁴⁹ But even after buying the subscription the library cannot offer the reading public what even the most restrictive proprietary commercial databases do: the ability of unencumbered viewing, copying/pasting and printing pages in accordance with Fair Use. The Settlement makes it clear that “the user will not be able to select, copy and paste more than four (4) pages of the content of a Display Book with a single copy/paste command. Printing will be on a page-by-page basis or a page range basis, but the user will not be able to select a page range that is greater than twenty (20) pages with one print command for printing.”⁵⁰ The same exceptional restrictions apply to consumer purchases.⁵¹

These curtailments of Fair Use reformulate Lessig’s idea that “code is law.” Under the Settlement Agreement, “settlement is code is law.” Yet the mechanism remains the same: use of the Digital Rights Management Systems (DRMs) to reengineer the architecture of rights as devised by the legislation.⁵² In particular, through the provisions quoted above, the Settlement essentially disables Fair Use “for nonprofit educational purposes,” as otherwise allowed by 17 U.S.C. 107.⁵³

Library Association Comments on the Proposed Settlement at 4, *The Authors Guild*, No. 05-8136 (S.D.N.Y. Sept. 20, 2005) available at <http://www.scribd.com/doc/14955716/ALA-ACRL-ARL-Google-Book-Settlement-Brief>.

⁴⁹ Settlement Agreement 2009, *supra* note 2, at §7.2(b)(vii).

⁵⁰ *Id.* at §4.1(d).

⁵¹ *Id.* at §4.2(a).

⁵² As in any other context when they are applied, the DRMs raise serious privacy issues both when it comes to libraries (which are to limit access to “appropriate individuals within the subscriber institution” Settlement Agreement 2009, *supra* note 2, at § 4.1(e), and to consumer purchasers, Settlement Agreement 2009, *supra* note 2, at § 4.2(a), Attachment D § 3. See also, Library Association Comments on the Proposed Settlement, 11-14, *The Authors Guild*, No. 05-8136 (S.D.N.Y. Sept. 20, 2005) available at <http://www.scribd.com/doc/14955716/ALA-ACRL-ARL-Google-Book-Settlement-Brief>; Peter Brantley Posting to UC Berkley Library Blog, <http://blogs.lib.berkeley.edu/shimenawa.php/2009/04/15/everyone-a-user-account> (April 15, 2009).

⁵³ This Fair Use provision provides:

§107. Limitations on Exclusive Rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

The third type of the Access Use provided for by the Settlement, along with Consumer Purchase and Institutional Subscriptions, is called “Public Access Service,” which grants the public free access to the Google database through libraries.⁵⁴ It sounds good, but suspicions about the details are on the point here. The “Public Access Service” is generally to be restricted to one computer terminal in a public library,⁵⁵ one computer terminal for every four thousand full-time students in not-for-profit higher education institutions that qualify as Associate’s Colleges pursuant to the Carnegie Classification, and one computer terminal for every ten thousand full-time students in not-for-profit higher education institutions that do not qualify as Associate’s Colleges.⁵⁶ It is therefore a marketing trick—“the first one for free”—to encourage libraries to buy the Institutional Subscription, as the demand will most likely seriously surpass what the one terminal can deliver. This is because readers would not be able to copy or paste the books. Therefore, enabling one person to read the whole book would be tantamount to disabling the terminal for anyone else for one, two, or more days, depending on how fast the person reads and how long the book is. This problem may be alleviated, but for a price. Parties to the Settlement have made it clear that they want to profit from printing in the “Public Access Service” model: it is required that a per-page fee printing would be the only mode available, with revenues going to the parties of the Settlement.⁵⁷

IV TWO SCENARIOS

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work

(3) the amount and substantiability of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2009).

⁵⁴ If Google feels like being so generous, this remains at Google’s discretion. Settlement Agreement 2009, *supra* note 2, at §4.8(a)(i). Furthermore, “[t]he Registry and Google may agree that Google may make available the Public Access Service to one or more Public Libraries or not-for-profit Higher Education Institutions either for free or for an annual fee, in addition to the Public Access Service.” *Id.* at §4.8(a)(iii).

⁵⁵ Yet, according to the Settlement 2009, “the Registry may authorize one or more additional terminals.” *Id.* at §4.8(a)(i)(3).

⁵⁶ *Id.* at §4.8(a)(i).

⁵⁷ *Id.* at §4.8(a)(ii). The same provision proclaims that the fee is to be reasonable, yet the Registry is to be the only body whose perspective is to determine what “reasonable” means in this context. It is hardly predictable that the meaning would be any different than patently subjective.

When Google first started its library project,⁵⁸ the scheme seemed to produce no losers, although no party significantly benefited, either. Libraries were having their collections digitized (almost) without incurring concomitant costs; Google was connecting readers with book vendors, and profited from advertisement revenues; readers and rights holders benefited from easier access to books.

On one point the Settlement makes it even better. Its brilliant idea of the “default license” brings back to readers books that would not be (so easily) available otherwise. On the other hand, libraries, researchers, and the reading public, none of which negotiated the deal itself, are required to piggyback Google and the rights holders.

The question, though, is to what extent the Settlement can force the libraries to assume this role. As the Settlement acknowledges reluctantly, libraries should not, as third parties, be bound by any of the abovementioned obligations and restrictions.⁵⁹ But some of them may feel obliged to follow the Settlement if it is confirmed by the judge, assuming that the direct attempt of the parties to impose obligations (curtailments of rights) on third parties becomes validated when judicially acknowledged. This assumption, though, would be as rational as it should be erroneous.

Certainly the libraries receiving access to the Google database (those at the end of “What the Reading Public receives”) will be bound by Google’s offers, whether or not expressed in the Settlement. With or without the Settlement, economic asymmetries seriously hinder the position of libraries in purchasing negotiations. It would be no stronger than it is in negotiations with Elsevier.⁶⁰

But the picture is different regarding the libraries contributing their collections to the Google Library Project. On the day it was submitted it to the New York court, the Settlement clearly deviated from the contracts Google had signed with those libraries. The agreement between Google and the University of Michigan, in force until mid-May 2009, makes this difference clear.⁶¹ The deal allowed Google to use scanned Michigan books for searching services only.⁶² In other words, it did not cover selling access to the digital copies at all. Moreover, it was explicitly required that Google would make the

⁵⁸ See generally, Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling*, N.Y. TIMES, Oct 8, 2004, available at <http://www.nytimes.com/2004/10/08/technology/08book.html?scp=14&sq=edward+wyatt&st=nyt>; John Markoff and Edward Wyatt, *Google Is Adding Major Libraries to Its Database*, N.Y. TIMES, Dec 14, 2004, available at <http://www.nytimes.com/2004/12/14/technology/14google.html?scp=7&sq=edward+wyatt&st=nyt>.

⁵⁹ Settlement Agreement 2009, *supra* note 2, at §7.6 (“Notwithstanding anything to the contrary in this Settlement Agreement, no Fully Participating Library, Cooperating Library or Public Domain Library is bound by any provision of this Settlement Agreement.”)

⁶⁰ See generally Elsevier, <http://www.elsevier.com>.

⁶¹ UM-Google-Cooperative-Agreement (June 15, 2005), <http://www.lib.umich.edu/mdp/um-google-cooperative-agreement.pdf>.

⁶² UM-Google-Cooperative-Agreement, *supra* note 61, at 4.5.1 in conj. with 1.20.

digitized works available “to the University of Michigan for preservation, archival or other purposes of its choosing.”⁶³ These latter provisions obviously diverge from the limitations of the library use and Fair Use devised by the Settlement for Fully Participating Libraries (Michigan is a leading FP Library). They also clearly differ from the copyright compliant environment preferred by the Authors Guild, et al. Yet, by not suing the University of Michigan, the Guild acknowledged that the library, abiding by its previous agreement with Google, did not breach copyrights the plaintiffs decided to stand up for when suing Google.

Because the previous agreements between participating libraries and Google did not cover the scheme now embraced by the Settlement, they must have been renegotiated. In this process, the Settlement was considered an opening offer from Google, whose position was crippled by the substantial bargaining power of the libraries. It was up to them to decide whether the “Giant from Mountain View” would be allowed to use millions of books already scanned for any purpose other than search services. Exercising their power, the libraries could have pressed toward one of two extreme scenarios. The first was to pursue individual interests at the expense of other libraries, while the other was to protect the interests of other libraries and the broad reading public alike.

Quite naturally, the first of these two scenarios was favored by the Settlement and the rights-holders, and the one that Google pursued. Dan Clancy, the engineering manager of Google Book Search, sketched the Google’s position in this respect emphatically. Clancy, responding to a blog post that described, with acute precision, what the Settlement had for libraries,⁶⁴ wrote:

“For our partners where we are scanning a large portion of the library, the subsidy is such that these institutions will likely receive a free version of the institutional subscription. This means that for some universities, Google is absorbing the cost of digitizing their entire collection or a large portion of their collection, and in return their students, faculty, staff, visitors and other members of their community will be able to obtain broad electronic access to a large majority of these books as well as access to books scanned from other libraries. ... Perhaps if libraries were for-profit corporations a different deal might have been desirable: one which put money into their pockets and did less public good.”⁶⁵

⁶³ *Id.* at §4 (outlining Google’s obligations generally); *Id.* at §§4.4.1, 4.4.2 (detailing more specifically Google’s obligations).

⁶⁴ *See*, Posting on Open Content Alliance, <http://www.opencontentalliance.org/2008/12/06/a-raw-deal-for-libraries/> (Dec. 6, 2008, 09:09 EST) (Clancy’s response was apparently provoked by the following piece of the post: “Given that Google Book Search could not have gotten off the ground without the cooperation of various university libraries, it is particularly disheartening that the proposed settlement treats them with such an iron fist at the same time as it expects them to foot much of the bill through subscriptions. It will be interesting to see how many libraries continue as partners, given Google’s bait-and-switch.”).

⁶⁵ Indeed, “the Registry and Google may agree that Google may make available the Public Access Service to one or more Public Libraries or not-for-profit Higher Education Institutions either for free or for an annual fee, in addition to the Public Access Service” (Settlement Agreement 2009, *supra* note 2, §4.8(a) (iii)).

What Clancy did not mention is that, contrary to the initial agreement between the University of Michigan and Google, the Settlement reserves all the rights for one party, and all the obligations for the other. The subsidy is, therefore, a sweetener on an otherwise bitter pill. To paraphrase Clancy, it is a little money put into pockets of some chosen libraries for making their books available to Google, at the expense of other libraries bearing the full subscription costs. A serious confusion between “Google’s good” and the public good seems to determine this rhetoric.

“Google’s good” is driven by a different conception than the public good. To achieve it, participating libraries would have to require free access to the Google Library system through all (non-for-profit) libraries and educational institutions and insist on unrestricted Fair Use of the Google Database by patrons.

It should be noted that rights-holders would not suffer from such a scheme. To realize why, it is enough to think of what a library would do with a dollar saved on access to the Google database. Certainly, because it is a library, it would spend it on books.⁶⁶ Simply, with or without free access to the Google system, libraries would still spend roughly the same amounts to buy books.⁶⁷ However, while the libraries would likely buy new books in the first place, the Settlement targets books published before September 2009. The difference is that in the latter scenario many less books would be available to patrons.

After these adjustments, the rights-holders and Google would capitalize on consumer purchases. For those who can afford it, reading a book from home after paying few dollars would be a much more attractive option than spending time on a trip to the nearest public library. Libraries would remain more attractive for those who cannot afford buying digital or paper books. Undoubtedly, students and researchers would benefit the most from the free library access, and therefore the tremendous negative educational externalities produced by the Settlement would be eliminated. Google would certainly earn less, but it would fulfill its ambitious corporate mission of organizing the world's information and make it universally accessible and useful.

This move would attract foreign libraries as well, such as the French *Bibliothèque Nationale*, and others who are interested in contributing their collections to the project on fair and just terms.⁶⁸ Google would also be able to respond appropriately to those who,

⁶⁶ After discounting the growing costs of subscriptions for professional periodicals.

⁶⁷ Not necessarily the same books, though. The libraries would buy new books in the first place, while the Settlement targets books published before September 2009.

⁶⁸ The matter is obviously much more complex. First, copyright systems have been poorly harmonized internationally. In particular, the vehicle of the default license cannot be used in other jurisdictions. European law, for example, does not allow to circumvent the author’s “exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form” (quotation from Art. 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10). Second, resistance of local booksellers, the obvious category of losers in the deal between Google

like the Federation of European Publishers, remind it that “freedom of publication in our society is in fact limited if books are not made available to the largest possible public through the widest possible means of distribution.”⁶⁹

This scenario requires hard negotiations from the contributing libraries. But first of all, it necessitates firm commitment to the promotion of “the Progress of Science and useful Arts” and to what Robert Darnton calls “the twenty-first-century equivalent of the Library of Alexandria.”⁷⁰ It also requires understanding that, as Peter Brantely states, “this is not an economic matter; it is a social foundation. A library is a refuge; you can provide solace in that refuge, and a promise for a different and better kind of future. It is morally incumbent upon you to do so.”⁷¹

V

AMENDED LIBRARY AGREEMENTS AND THE SETTLEMENT

Quite predictably, the first of the Amended Agreements between the Regents of the University of Michigan and Google, signed on May 19, 2009, is located somewhere between the two scenarios sketched in the previous section.⁷² As promised by Clancy, the University of Michigan can enjoy (with some further restrictions) a gratuitous version of the Institutional Subscription for 25 years after Google launches its service commercially.⁷³ Additionally, the library will receive access to improved digital copies of the titles from its collection once Google digitizes a better-preserved book from another library.⁷⁴

and copyright holders, may be more palpable in other jurisdictions (for a taste: *EBF statement on the Association of American Publishers, Authors' Guild, Google settlement agreement*, Nov. 12, 2008, available from <http://www.ebf-eu.org/papers.html>). Also, it may be predicted that libraries outside the U.S. would be interested in actually doing the scanning (which is the case of the *Bibliothèque nationale de France*). This would have an impact on, among others, the distribution of operational costs of scanning.

⁶⁹ Press Release, Federation of European Publishers, Statement on the AAP-AG-Google Settlement (Nov. 4, 2008), <http://www.fep-fee.be>.

⁷⁰ Robert Darnton, *Google & the Future of Books*, *New York Review of Books*, 56 N.Y. REVIEW OF BOOKS 2, Feb. 12, 2009, available at <http://www.nybooks.com>.

⁷¹ Posting of Peter Brantely to UC Berkely Blog, <http://blogs.lib.berkeley.edu/shimenawa.php/2008/11/04/waking-up-to-books-in-richmond> (Nov. 4, 2008) (The author referred only to the parties to the Settlement as “You,” clearly overlooking the “Fully Participating Libraries”).

⁷² The “Non-Settlement Digital Copies” books (public domain books in the first place) will be left outside the discussion here.

⁷³ Amendment to Cooperative Agreement (furthermore: Amendment Agreement), available at <http://www.lib.umich.edu/files/services/mdp/Amendment-to-Cooperative-Agreement.pdf>, at 1. See also §4.4.8(a) of the UM-Google-Cooperative-Agreement, *supra* note 61, as modified by the Amendment Agreement. See also modified 4.4.8(c) (Limited Subscription in Lieu of Discount).

⁷⁴ UM-Google-Cooperative-Agreement, *supra* note 61, at §4.4.3(b), as modified by the Amendment Agreement, *supra* note 71, at 17.

More importantly, the Amended Agreement specifies or lifts certain restrictions of library rights as devised by the Settlement. Google is to identify the location of each part redacted as a consequence of an exemption from the default license⁷⁵. Moreover, the University of Michigan obtains broad latitude in using Library Digital Copies (“LDC”) of its books scanned by Google. It can contribute them, for varying services, to inter-library projects, like HathiTrust, without having to strike additional agreements with Google or the Registry.⁷⁶ The libraries that receive access to Michigan’s LDCs are to sign a contract with Google, but the contract is limited to forbidding further dissemination (either through redistribution or loopholes in security systems) and to limiting the authorization of the receiving libraries to (at the most) the University of Michigan’s scope of uses.⁷⁷ Pursuant to Collective Terms (“CT”) attached to the Amended Agreement, Google will disclose a “searchable, on-line database that will enable the public to determine which Library Works are currently accessible through the Accommodated Service” and make public its assessment whether a work is in the public domain.⁷⁸ As another disclosure obligation, contributing libraries would be informed about Google’s progress in digitizing their collections⁷⁹ and its pricing strategies.⁸⁰ Important to the pricing issue is that any FP or Cooperating Library may annually request a review of whether the prices for Institutional Subscriptions comply with the Settlement’s principles of revenue at market rates and the realization of broad access to the Books. The review would be conducted by “an independent, qualified third party (independence and qualification determined in good faith by the Initiating Libraries) designated by the Initiating Libraries ... subject to approval by Google (which approval shall not be unreasonably withheld).”⁸¹ Google would pay fees and costs of the reviewer, up to pricing caps set by the Collective Terms, or would donate similar sums to a charity in years when no entitled library requests the review.⁸² On the basis of the review report, the library initiating the review may bring the case to arbitration to determine conclusively whether Google’s subscription prices comply with the pricing objectives.⁸³

⁷⁵ UM-Google-Cooperative-Agreement, *supra* note 61, at §4.4.5, as modified by the Amendment Agreement, *supra* note 71, at 19.

⁷⁶ UM-Google-Cooperative-Agreement, *supra* note 61, at §4.4.2, as modified by the Amendment Agreement, *supra* note 71, at 16.

⁷⁷ *Id.*

⁷⁸ Attachment to the Amendment Agreement, *supra* note 71, at 6(c).

⁷⁹ *Id.* at 6(b).

⁸⁰ *Id.* at 10(d).

⁸¹ *Id.* at 3(c)(1).

⁸² *Id.*

⁸³ *Id.* at 3(c)(2).

The entitlement to question pricing strategies is restricted to certain periods and certain categories of libraries. It is entrusted with the libraries contributing their books to the database (often, like the University of Michigan, exempted from the fees) instead of those libraries that incur the financial burden and thus are primarily motivated to challenge the pricing scheme. This may seem unfair, but Google certainly is motivated to limit challengeability of its pricing scheme, considering rather unavoidable vagueness of the pricing principles. Cooperating Libraries (those merely opening their collections to the scheme) broaden the entitled group significantly and seriously strengthen the pressure on Google. The Amended Agreement, therefore, does introduce a practical instrument of turning the Settlement's principle of uncontrolled subscription fees into a principle of rational fees. Also, it extends free library access (yet only in one respect) by lifting the requirement of the per-page fee printing in the Public Access Service model.⁸⁴

The single most important element, in no way rectified by the Amended Agreement, concerns the patrons' rights of use. More specifically, despite labeling the rights as a "First Class Access," the Agreement upholds all the use limitations imposed by the Settlement.⁸⁵ It seems that, quite successfully pressing for their (individual and collective) rights, the libraries tend to be less concerned with the interests of the fundamental (yet unrepresented directly in either negotiations) category of library patrons.

VI CONCLUSION

Terms of the Settlement treat libraries much less favorably than the Google's direct agreement with the University of Michigan. This effect is obvious, considering that the libraries had no chance to negotiate the Settlement. The plaintiffs did not sue them, apparently realizing that chances to win the case against libraries participating in the Google Library Project were extremely tenuous. Yet, by this inaction, the plaintiffs also implicitly admitted that the libraries had infringed on no copyrights and thus had caused no damage whatsoever to the rights-holders.

As third parties, the libraries should only benefit from the Settlement and be free to press Google in direct negotiations to alter its position expressed in the Settlement (like the University of Michigan did). The Settlement acknowledges this by recognizing the libraries as "Third-Party Beneficiaries."⁸⁶ Such a move means unenforceability of the Settlement's library-related obligations. At the same time, however, a divergence from the Settlement would cause Google to fall afoul of its commitments to the rights-holders. Moreover, according to the Settlement, the Registry is authorized to admit participating (FP or Contributing) libraries to the scheme, by signing with them so called Library-Registry Agreements. The Registry is barred by the constitution of the agreement from

⁸⁴ *Id.* at 9(b).

⁸⁵ *Id.* at 3(b).

⁸⁶ Settlement Agreement 2009, *supra* note 2, at §7.2(f).

enabling a library to participate in the scheme if the library expresses “its intent not to comply with the obligations imposed on a Fully Participating Library or a Cooperating Library by this Settlement Agreement or the applicable Library-Registry Agreement.”⁸⁷

It is less important in this context that the rationality of such a Library-Registry Agreement is questionable as long as the library follows its agreements with Google, and Google complies with its default license. More importantly, the ruse used by the Settlement parties to “lock in” the libraries does attempt to directly impose obligations on third parties. This idea, to which Google sticks to consistently, is not only incongruent with the constitution of the Settlement, but also has major ramifications for the Amended Agreement between the University of Michigan and Google. The deal explicitly says that: “In the event that compliance with the terms of this Amendment or the Agreement would cause Google to breach the Settlement Agreement or would cause the Institution to breach its Library-Registry (Fully Participating) Agreement, then such compliance with this Amendment or the Agreement will be excused ... to the extent that such compliance would result in such a breach.”⁸⁸ On the other hand, the Settlement allows Fully Participating Libraries or Cooperating Libraries to enter into separate agreements with Google, and even derogate provisions of the former, “provided, however, that no such amendment or other agreement will permit any Fully Participating Library to make any uses of its LDC that are prohibited by its Library-Registry (Fully Participating) Agreement or by this Settlement Agreement.”⁸⁹

Therefore both Google and the University of Michigan must comply with the obligations put on them by the Settlement and by its concomitant agreements, at least when it comes to the use of the scanned books. In those aspects the term “compliance will be excused” written into the deal between Google and the University of Michigan translates into “this Agreement is breachable,” and all the concessions the University of Michigan received in bilateral negotiations with Google, so far as they diverge from the Settlement, are inherently vulnerable. Parties to the Settlement may tolerate them since both Google and the Registry are certainly interested in smooth cooperation with the libraries, but as long as the Settlement includes provisions referring to participating libraries, the default license would put obligations on them as well. This undermines every reasonable concession gained in direct negotiations with Google and pushes the whole scheme into the direction of “putting little money into pockets of some libraries.” It sways the scheme towards the scenario detriment to the libraries, researchers, and the reading public. This “latent defect” stems directly from one obvious, fact disregarded by the Settlement: that the libraries cannot be bound by the settlement concluded between third parties like Google or the Authors Guild, unless they had been sued as well. And this defect will persist as long as the Settlement contains provisions regarding libraries.

⁸⁷ *Id.* at §7.1.

⁸⁸ Amendment UM-Google-Cooperative-Agreement, *supra* note 71, at 2.

⁸⁹ Settlement Agreement 2009, *supra* note 2, at §7.2(f).

