Google, the Guilds, and the Reading Public: Settlement is Code is Law?

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Outline

In fall 2008, the Authors Guild and Google submitted a spectacular settlement of damages to the Southern District of New York federal court. In exchange for $125 million and 63% of future revenues earned from the Book Search Project, Google 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 by September 4, 2009, except for when a rights holder exercised the right to withdraw from the scheme within subsequent 27 months. The franchise would enable Google to turn the Google Book Search into a gigantic e-bookstore. The deal does not only settle for past damages, it also determines how the books are to be commercialized by Google in the future. The settlement links 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 collective society of the rights-holders, the Book Rights Registry, thereby representing rights holders in their future relationships with Google.

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

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2 Id. at § 1.16. (September 4, 2009 was the extended Notice Commencement Date).
3 Id. at § 3.5(a).
1. The Settlement is great

When the mechanism for determining the default contracting position of millions of authors and publishers, a legislative matter, is determined by a deal negotiated by less than a dozen of lawyers, it looks suspicious. But by doing precisely that, the Settlement achieves a tremendously desirable social effect—it knocks out a large share of the enormous transaction costs plaguing the copyright system. As a result, the Settlement opens up an entirely new way of making books available online, which arguably benefits both the copyright holders and the readers alike. The purchasing of more books would positively influence what the economists call dynamic efficiencies: the prospect of enhanced innovation and creativity in the future. A higher 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. The interests of readers and writers seem to converge in the Settlement. The more digitized books are available the more readers can purchase, the more readers purchase, the more writers earn and write more. Google profits

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4 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 Googlierization of Everything, http://www.googlierizationofeverything.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.

5 “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. 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 limits significantly 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 product, 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.
by creating and proliferating a system that benefits everyone.\textsuperscript{7} Considering all these, the Settlement should indeed be called “a huge, quantum leap in our ability to find information.”\textsuperscript{8}

2. The Settlement gets puzzling

The deal is more curious in regards to commercially unavailable books.\textsuperscript{9} 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.\textsuperscript{10} Regardless of the fact that it is unlikely that an orphan work’s rights holder would even be aware of the Settlement, thereby not be able to either grant or refuse a license, Google would market the book and profit from it.

Under the Settlement, all royalties are to be paid to the Registry. The Registry deduces 10-20\% as an administrative fee and then either transfers the remaining part to the rights holder(s) or, if no rights holder comes forward, it redistributes the royalties between active rights-holders of other books in the database.\textsuperscript{11} The Settlement thus poses several questions: Should Google profit from orphan works? Should the Registry? Should unclaimed royalties go to authors and publishers of unrelated works? Should there be any royalties for those works at all? These are all legitimate dilemmas made visible by the Settlement, though not created by the Settlement. Orphan works are engendered by a copyright system that over-protects intellectual property, not allowing them to enter the public domain even if a rights holder does not take the basic steps to protect what legislation determines as their sphere of interest. The Settlement alleviates these problems in two respects. First, all an

\textsuperscript{7} Except for other intermediaries, sellers of printed and e-books, for whom the new commercial channel is created by the Settlement, if it proves a success, which poses a serious risk for their revenue models.


\textsuperscript{9} 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.


\textsuperscript{11} Settlement Agreement, \textit{supra} note 1, at § 6.3(a)(i).
orphan book needs to be read is a reader, which the Settlement provides. The deal, therefore, restores 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.

A more legitimate concern regarding commercially unavailable books is the antitrust concern, which is the non-existence of imminent mechanisms to restrain prices for the Google scans. To over simplify, “Amazon would not have the book.” Yahoo and Microsoft would not have it easy access to it either. Parties to the Settlement have strived to enhance entry barriers and to magnify the first mover advantage for Google. To strike a similar deal with the Registry, one of Google’s competitors would first have to be sued by the Registry, in order to settle and thus gain a similar default license. But the Registry shall not be interested in it. Google will have paid for establishing the Registry and even though Google does not have a say on the Registry’s Board of Directors, it is hard to imagine that, in such a situation, its interests would not be sincerely taken into account by the Registry. By failing to sue Google’s competitor, the Registry would preempt entry to the market created by the Settlement. 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 states, “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.” 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 have suggested that the Most Favored Nation ("MFN") clause should be struck out of the

12 Id. at § 6.2(b) ("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.")

13 Id. at § 3.8(a) (the clause would apply for 10 years from the extended Notice Commencement date).
Settlement, and possibly replaced by an obligation of non-discrimination.\textsuperscript{14} Arguably, this would level the playing field and enhance competition—both very desirable effects. At a second glance, however, the idea is not as compelling and it leads to serious practical complications: What should non-discrimination mean if Google solely pays for setting up the Registry and then the revenues of potential entering competitors are impossible to calculate upfront? Who and how would such a regulatory structure be enforced? And how can the regulatory structure avoid high costs and limited efficiency, two constant features of US economic regulation?

However, no competitor of Google has 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. The default license Google would receive is non-exclusive;\textsuperscript{15} the rights holders can authorize anyone else to scan their books as well. In such a situation certainly none of Google’s competitor would have access to its scans, and no claim solely on this ground seems tenable.\textsuperscript{16} 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 be bound by multiple licenses by default.

Certainly all this seems 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 default copyright licenses. Most importantly for the antitrust matters, such a maneuver entirely obliterates the arguments of a digital cartel allegedly created by the Settlement.


\textsuperscript{15} Settlement Agreement, \textit{supra} note 1, at § 2.4.

\textsuperscript{16} 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 \textit{Verizon Comm Inc. v. Law Offices of Curtis V. Trinko LLP}, the argument would be tantamount to authorizing less creative firms to free-ride on the efforts of Google. 540 U.S. 398 (2004). Besides this, it may be predicted that in few years either the technology used or/and 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.
3. What this 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).” Yet the same sentence promises equally “great benefits” to “libraries, researchers, and the reading public.” The Settlement, however, leaves this promise entirely 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 mostly students.

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.” 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. 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, FP

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17 Settlement Agreement, supra note 1, at 1.
18 U.S. Const. Article I, §8, cl. 8.
19 Settlement Agreement, supra note 1, at §§ 1.36, 7.2(a).
20 Id. at § 7.2(a)(i) (“Google may” is used in this context).
libraries may receive scans, referred to in the Settlement as Library Digital Copies ("LDC"), of the items from its collection which Google decides to digitize.21 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 collection is valuable enough for Google to scan more than one-third of the library.22 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.23 It also, quite predictably, restricts for itself free searching services and may freely limit those services to 85% of the collections.24 Essentially, no FP library may receive from Google a LDC of a title it does not have in its paper collection.25

The relationship between the digital copies and the library collections demonstrates the meaning of “full participation.” There are some more aspects 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.”26 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.”27 Moreover, while the authorization for Google to use the digital books is very broad (2.2), and covers both Display Uses and Non-Display Uses, the ability of the libraries (the FP Libraries only) 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-competitive28) research on the digital copies. “Qualified users” are roughly comparable to

21 Id.
22 Id. at § 7.2(a)(ii) (the method is similar, but more complicated, regarding Institutional Consortia. See Id. at § 7.2(a)(iii)).
23 Id. at § 7.2 (d)(ii).
24 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)).
25 Id. at §§ 7.2(a)(ii)-(iii).
26 Id. at §7.2(b)(iii)(1).
27 Id.
28 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.”)
researchers, affiliated with institutions that manage various libraries, who have positively passed a cumbersome authorization process and act primarily on non-commercial basis. The “non-consumptive research,” on the other hand, is “computational analysis ... performed on one or more Books, but not research in which a researcher reads or displays substantial portions of a Book to understand the intellectual content presented within the Book.” 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. 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.” 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.” Certainly no university (or equivalent) library would ever disable access to its collection for teachers and researches 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.

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29 See Id. at § 1.121 (full definitional category); see also, Id. at §§ 7.2(d)(xi)(2)-(3) (regarding the research agenda).
30 Settlement Agreement, supra note 1, at §1.90.
31 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).
32 Id. at §7.2(b)(vii).
33 Id.
34 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.
Firstly, the Institutional Subscriptions a discussion of which necessarily includes the Consumer Purchase. 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. 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. Fore one thing, the fees are based on (what the Settlement calls a “parameter” of) “pricing of similar products and services available from third parties.” 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.” 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. Because of these considerations, subscription fees would practically follow the logics determining prices for individual “Consumer Purchases”: of maximizing profits. In the context of the “Consumer Purchases” the Settlement empowers Google to design a “reasonable” mechanism (an algorithm) for setting prices for this service. To achieve the reasonableness Google is to “find optimal … price for each Book and,

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35 Settlement Agreement, supra note 1 at §4.1(a)(i).
36 Id. at §4.1(a)(ii). The other two “parameters” are: “the quality of the scan and the features offered as part of the Institutional Subscription” Id. at § 4.1(a)(ii). None of these two, however, have any bearing on the principles of maximizing/minimizing the fees.
37 Id. at §41.(a)(vii).
38 Pricing strategies are to be proposed by Google and approved by the Registry. Id. at 4.1(a)(vi).
39 “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).
accordingly, to maximize revenue for each Rightsholder." The "reasonableness" of the algorithm is to be validated by the Registry’s experts only, outside external scrutiny or any publicity. (4.2(c)(ii)(3)).

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. Others are more annoying. To understand fully how, we have to 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 with 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." 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 the 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." The same exceptional restrictions apply to consumer purchases.

These curtailments of the 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:

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40 Settlement Agreement, supra note 1, 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 “specific price” determined by the rights-holders).
41 Id. at §4.2(c)(ii)(3).
43 Settlement Agreement, supra note 1, at §7.2(b)(vii).
44 Id. at §4.1(d).
45 Id. at §4.2(a).
using the Digital Rights Management Systems (DRMs) to reengineer the architecture of rights as devised by the legislation.\textsuperscript{46} In particular, through the provisions quoted above, the Settlement essentially disables the Fair Use “for nonprofit educational purposes,” as allowed by 17 U.S.C. 107.\textsuperscript{47}

The third type of the Access Use provided for by the Settlement along the Consumer Purchase and Institutional Subscriptions is called “Public Access Service,” gives the public free access to the Google database through libraries.\textsuperscript{48} It sounds very good, but those who are suspicious about the details are on the point here. The “Public Access Service” is to be restricted to one computer terminal in a public library, 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.\textsuperscript{49} 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, according to the Settlement, readers certainly would not be able to copy or paste the books, enabling one person to read the whole book would be tantamount to disabling the terminal for anyone.

\textsuperscript{46} 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, supra note 1, at § 4.1(e), and to consumer purchasers, Settlement Agreement, supra note 1, 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 Berkeley Library Blog, http://blogs.lib.berkeley.edu/shimenawa.php/2009/04/15/everyone-a-user-account (April 15, 2009).

\textsuperscript{47} This Fair Use provision provides:

\section*{§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—

(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.

\textsuperscript{17} U.S.C. § 107 (2009).

\textsuperscript{48} If Google feels like being so generous, this remains at Google’s discretion.

\textsuperscript{49} Settlement Agreement, supra note 1, at §4.8(a)(i).
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. Thus it is required that a per-page fee printing would be the only mode available, with revenues going to the parties of the Settlement (4.8(a)(ii)).

4. Two scenarios

When Google started its library project, the scheme seemed to produce no losers, even though 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.

At one point the Settlement makes it even better. Its brilliant idea of the “default license” brings back to readers books which 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 to piggyback Google and the rights holders.

The question, though, is to what extent the Settlement is in a position to 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. 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 should it be erroneous.

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50 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.


52 Settlement Agreement, supra note 1, 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.”)
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.

But the picture is different regarding the libraries contributing their collections to the Google Library Project. On the day of submitting 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 the difference clear.\(^5\) The deal allowed Google to use scanned Michigan books for searching services only (4.5.1 and 1.20). In other words, it did not cover selling access to the digital copies at all. Moreover, it was explicitly saying that Google would make the digitized works available “to the University of Michigan for preservation, archival or other purposes of its choosing.”\(^5\) The 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 one of them). They clearly differ from the copyright compliant environment preferred by the Authors Guild, et al. Yet, not suing the Michigan University, 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 embraced by the Settlement, they must have been renegotiated. In this process the Settlement was an opening offer by Google. But the position of Google was crippled by 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 other purpose than search services. Exercising their power, the libraries could press towards one of two extreme scenarios. One is to pursue individual interests at the expense of other libraries. The other is to protect the interests of other libraries and the broad reading public alike.

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\(^5\) Id. at §4 (outlining Google’s obligations generally); Id. at §§4.4.1, 4.4.2 (detailing more specifically Google’s obligations).
Quite naturally the first of those two scenarios was favored by the Settlement and the rights-holders. Google was to pursue it. Dan Clancy, the engineering manager of Google Book Search, sketched the Google’s position in this respect emphatically. Clancy, responding to a blog post describing with acute precision what the Settlement has for libraries, 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.”

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 a pill otherwise pretty bitter in taste. To paraphrase Clancy, it is 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 “the Google’s good” and the public good seems to determine this rhetoric.

“The Google’s good” is driven by a different conception of 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. Also, the libraries should 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. Simply, with

55 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.”)

56 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, supra note 1, §4.8(a)(iii)).

57 After discounting the growing costs of subscriptions for professional periodicals.
or without free access to the Google system, libraries would spend on books roughly the same amounts.58 The libraries would buy new books in the first place, while the Settlement targets books published before September 2009. The difference is that in the latter scenario much less books would be available to patrons.

After these adjustments, the rights-holders and Google would monetize 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.”59

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.60 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.” 61 Second, resistance of local booksellers, the obvious category of losers in the deal between Google 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.

58 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.

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This scenario requires hard negotiations from the contributing libraries. First of all, however, it necessitates firm commitment to “[the promotion of] the Progress of Science and useful Arts” from the libraries, and what Robert Darnton calls, “the twenty-first-century equivalent of the Library of Alexandria.” And, as Peter Brantely states, it requires understanding that, “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.”

5. Amended Library Agreements and the Settlement?

Quite predictably, the first of the Amendment Agreements between the Regents of the University of Michigan and Google, signed on May 19, 2009, offers two scenarios. As promised by Clancy, the University of Michigan can enjoy (with some further restrictions) a gratuitous version of the Institutional Subscription for 25 years since Google launches its service commercially under line 23. Additionally, the library receives access to improved

66 The “Non-Settlement Digital Copies” books (public domain books in the first place) will be left outside the discussion here.
67 Amendment to Cooperative Agreement at 11, http://www.lib.umich.edu/files/services/mdp/Amendment-to-Cooperative-Agreement.pdf. See also, §4.4.8(a) of the Agreement as modified by 23 of the Amendment Agreement. See also modified 4.4.8(c) (Limited Subscription in Lieu of Discount).
digital copies of the titles from its collection once Google digitizes a better preserved book from another library.  

More importantly, the Amendment 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 license. Moreover, the University of Michigan obtains broad latitude in using Library Digital Copies ("LDCs") 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. Those libraries that receive access to Michigan’s LDCs are to sign a contract with Google, but the contract is to be 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 Michigan’s scope of uses. Pursuant to Collective Terms ("CT") attached to the Amendment 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. As another disclosure obligation, contributing libraries would be informed about Google’s progress in digitizing their collections and its pricing strategies. Important to the pricing issue is that any FP or Cooperating Library may request a review annually 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).” Up to pricing caps set by the Collective Terms, Google would pay fees and costs of the reviewer or would donate similar sums to a charity in years when no entitled library requests the review. On the basis of the review report the library

68 Id. at 9-10.
69 Id. at 9.
70 Id. at 4-5.
71 Id.
72 Id. at 23- 36.
73 Id. at 33 – 34.
74 Id. at 34.
75 Id. at 25.
76 Id.
initiating the review may bring the case to arbitration. The arbitration is to determine conclusively whether Google’s subscription prices comply with the pricing objectives.\footnote{77 \textit{Id.} at 26.}

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.\footnote{78 \textit{Id.} at 33.}

The single most important element, in no way rectified by the Amendment 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.\footnote{79 \textit{Id.} at 24.} 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.

Conclusion

Terms of the Settlement treat libraries much less favorably than the Google’s direct agreement with the Michigan University. 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 are 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 Michigan University did). The Settlement acknowledges this by recognizing the libraries as “Third-Party Beneficiaries.” Such a move, however, means unenforceability of the Settlement’s library-related obligations. And a divergence from the Settlement would cause Google 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 doing so if a participating 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.”

It is less important in this context that 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 Amendment Agreement between the Michigan University 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.”

Therefore, both Google and the Michigan University must comply with the obligations put on them by the Settlement and by its concomitant agreements. In other words, the term “compliance will be excused” translates into “this Agreement is breachable,” and all the

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80 Settlement Agreement, supra note 1, at §7.2(f).
82 Id. at §7.1(b).
84 Amendment supra note 54, at 2.
concessions the Michigan University 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,” for this aspect would certainly not fall afoul of the Settlement. 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. The defect will persist as long as the Settlement contains provisions regarding libraries.