

Jonathan Band PLLC

Technology Law and Policy

policybandwidth.com

The Google Book Search Settlement: The Reader's Digest Version

Jonathan Band
Jonathan Band PLLC
jband@policybandwidth.com

A Typical U.S. Research Library Collection

Public Domain

“The Twilight Zone”

Out of Print.

Orphaned Works, or simply unclear copyright status

In-Print

Available in a bookstore



*OCLC analysis of the Google Books Library Project <http://www.dlib.org/dlib/september05/lavoie/09lavoie.html>

**O'Reilly Radar: http://radar.oreilly.com/archives/2005/11/oops_only_4_of_titles_are_bein.html

The Original Library Project

- Scanning in perhaps up to 30 million volumes from major research libraries into its search database.
- For public domain books, Google displayed full text.
- For books still in-copyright, Google showed “snippets” in response to search request.
- Each snippet consists of only a few lines, and only three snippets can be shown per book.
- So, for an in-copyright book, in response to a particular search request, a user could only see 10-15 sentences.

The Original Library Project

- Additionally, Google provided an opt-out.
- Any rightsholder could simply request Google not to scan his or her book into its search database.
- Rightsholders could opt into the Partner Program, where they could share revenue with Google.
- Google did not seek permission because of the enormous transaction costs – large number of works and owners, unclear ownership.
- So what's the big deal? Why did publishers and authors sue Google?

Legal Liability

- Google's act of scanning a book into the search database, even though it displayed only snippets to the public, involved copying, which may infringe the copyright owner's exclusive rights under the Copyright Act.
- In addition to scanning, Google converted files into searchable format using Optical Character Recognition (OCR) software.
- Google also made a copy of each file for participating libraries.
- From a legal perspective, it didn't matter that Google would honor opt-out requests; the burden should be on Google to ask permission to copy the books.

Legal Liability

- Google would escape liability only if a court found its copying permitted under the fair use doctrine.
- So the legal issue was whether Google's copying of all these library books into its search database was a fair use.
- Stated differently: is fair use a viable mechanism for addressing the transaction cost problem?

Fair Use

- The fair use doctrine appears in Section 107 of the Copyright Act.
- Supreme Court has said that fair use is an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when it would stifle the very creativity which the law is designed to foster.
- Fair use is decided on a case-by-case basis, looking at the merits of each individual case.

Fair Use

- Four statutory factors:

Purpose and character of the use.

Nature of the work.

The amount and substantiality of the portion used.

The effect of the use upon the market for the work.

Kelly v. Arriba Soft

- Before Google began, there was a relevant precedent: *Kelly v. Arriba Soft*, 336 F. 3d 811 (9th Cir. 2003).
- Arriba Soft, a commercial search engine, created a search database of thumbnail images copied from the Internet.
- In response to search queries, Arriba Soft displayed responsive thumbnail images.
- If a user clicked on a thumbnail, he was linked to the original website where a full size image was displayed.
- A photographer whose images on his website were included in the search database without his permission sued for copyright infringement.

Kelly v. Arriba Soft

- Both the trial court and the appellate court found Arriba Soft's use of the thumbnail to be fair.
- Although Arriba Soft was a commercial entity, its use did not supplant the original. Rather, Arriba Soft transformed the work by using it in a different way – as part of a search engine. And search engines have great social utility; without them, content cannot be found on the Internet.
- The court ruled that inclusion of the image in the search engine would not harm sales of the image. If anything, it will help sales by steering traffic to Kelly's website.

Google v. *Kelly*?

- Google believed that it had an even stronger case than Arriba Soft in *Kelly*. It showed the user less of the work than Arriba Soft – snippets vs. thumbnails of the entire image.
- Also, an index to all the world's books is more useful than Arriba Soft's search engine.
- Moreover, Google allowed owners and authors to opt out.
- More recent cases: *Perfect 10 v. Amazon.com*, 487 F. 3d 701 (9th Cir. 2007); *Bill Graham Archives v. Doris Kindersley*, 448 F. 3d 605 (2^d Cir. 2006); *AV v. iParadigms*, 562 F. 3d 630 (4th Cir. 2009).

Google v. *Kelly*?

- The publishers and authors suing Google argued that their case was very different from *Kelly*.
- Kelly placed his photo on his website, knowing that it would be included in a search engine. He could have used software “do not enter” signs to keep the search engine out. Thus, he gave an implied license to Arriba Soft.
- Google’s use would harm the market for the licensing of books to search engines.
- By digitizing the books, Google placed them at risk of widespread infringement.
- *Kelly* involved just one plaintiff.

The Settlement

- After three years of litigation, the authors, publishers, and Google announced a settlement on October 28, 2008.
- Settlement is extremely complex with its own language.
- Settlement creates a mechanism for Google to continue including books in its search index in exchange for payment to rightsholders.
- Only applies to books published before January 5, 2009 – not periodicals. Applies to U.S. and foreign holders of U.S. copyright.
- Creates a Book Rights Registry (BRR) to manage the copyright for these books.
- Settlement provides rightsholders with many options concerning Google's use of their books.
- Court must approve settlement.

The BRR

- The settlement's creation of the BRR solves the central problem of this enterprise: the transaction costs and uncertainty relating to clearing the rights in millions of out-of-print, in-copyright books.
- The settlement resolves the claims of all class members (two subclasses – publishers and authors), including absent members, against Google.
- The BRR represents all class members, including absent members.
- The BRR's board will be divided equally between publishers and authors.
- Google pays for BRR start-up costs.

The Settlement's Services

- The settlement creates four services for U.S. users: previews, consumer purchases, institutional subscriptions, and public access.
- Only previews analogous to pre-settlement program.
- Different “default rules” for in-print and out-of-print books.
- Default rules for out-of-print books: displays available in all services, unless the rightsholder “excludes” use.
- Default rule for in-print books: not in consumer purchase or institutional subscription; display only bibliographic information.
- Rightsholders can opt-out of settlement, or permit uses different from default rules (remove book, exclude uses).

Holes

- A book can contain an “insert” – a work with a different rightsholder from the book itself (e.g., foreword, essay, short story).
- Rightsholder of insert can exercise rights separately from rightsholder of book.
- Images not covered by settlement (unless owned by rightsholder of book), so many images will be blacked out.

Author-Publisher Procedures

In-Print Books

- Display uses permitted only if author and publisher agree (unless work-for-hire author). Revenues to be divided in accordance with author-publisher contract for book.
- Once display uses authorized, either author or publisher can request removal or exclusion.

Author-Publisher Procedures

Out-of-Print Books

- Work for hire: only publisher can remove or exclude book.
- Rights have reverted: only author can remove or exclude book.
- Unreverted rights: either author or publisher can remove or exclude book.

Author-Publisher Procedures

Out-of-Print Books

- Rights revert to author:
 - When revert under original book contract, or
 - When revert under procedure in Attachment A.

Author-Publisher Procedures

Out-of-Print Books

- Revenue Allocation:
 - 100% to publisher if work-for-hire author.
 - 100% to author if rights have reverted.
 - If unreverted and book published in or after 1987, 50% to publisher and 50% to author.
 - If unreverted and book published before 1987, 65% to author and 35% to publisher.

Previews

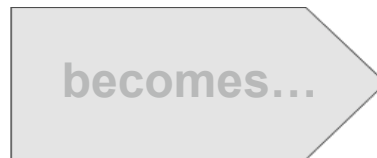
<i>Book Status</i>	<i>Pre-Settlement</i>	<i>Post-settlement</i>
public domain	100%	100%
in copyright, not commercially available	3 snippets/book	20% ¹
in copyright, commercially available	3 snippets/book and/or Partner Program preview	bibliographic information

¹ nonfiction limited to 5 adjacent pages/query, fiction limited to 15 adjacent pages/query; no text preview for anthologies, poetry collections, short stories, solutions manuals; "fixed preview" for dictionaries, drug reference guides, encyclopedias, price/buyer's guides, quotations books, test prep/certifications guides, thesauri; no copy/paste, annotate or print of Preview Uses

Changes to Book Search user experience

If this agreement is approved, Google will be able to show previews of in copyright books scanned through the Library Project. By default Display Uses are ON for out-of-print books and OFF for in-print books.

A rightsholder can change the settings for their books at any time.



From Snippet View...

- 3 snippets only
- User must get physical book

...To Preview

- 20% preview
- Ability to purchase



Consumer Purchase

- Consumer can purchase perpetual online access to full text of a book.
- Google will set price algorithmically between \$1.99 and \$29.99 (80% of books below \$10). Rightsholder can change price (even allowing free distribution).
- Consumer can print out 20 pages with one command; cut and paste four pages with one command; make book annotations.
- All services under the settlement, including consumer purchase, will accommodate the visually disabled.

Institutional Subscriptions

- An institution can purchase an annual subscription to view the full text of all books in the institutional subscription database (ISD).
- Access to books in the ISD will be limited to “appropriate individuals” within institution.
- Authorized user can print out up to 20 pages with one command; cut and paste four pages with one command; make book annotations; provide links to e-reserve or course management systems.
- Google can offer subscriptions to discipline-based subsets of the ISD.

Institutional Subscriptions

- Google and the BRR will set the price of the institutional subscription.
- Objectives in pricing: realization of revenue at market rates; realization of broad access to books.
- Pricing will be based on full-time equivalent (FTE) users.
- Pricing can vary based on category: corporate; higher-ed; K-12; government; public library (only higher-ed can have remote access).
- Google can subsidize subscriptions of participating libraries. Google can provide discounts to consortia; early subscribers.

Institutional Subscriptions

- If Google and BRR can't agree on pricing, arbitrator will decide.
- BRR might seek to emulate online journal subscription model of high price, limited access.
- Average academic library spends \$4.3 million annually for access to 30,000 journal titles; what if arbitrator decides that this is a “comparable product”?
- New Pricing Review procedure in Attachment A to Amended Google-Michigan agreement.
 - Available only to partner libraries, which may not have incentive.
 - No judicial review.

Public Access Service

- Google will provide free public access to full text of books in the ISD to each public library or higher-ed institution that requests it.
- Public access service will be available at one terminal in each public library building (but not federal or school libraries).
- At associate colleges, Google can provide one PAS terminal for each 4,000 FTEs.
- At four-year colleges, Google can provide one PAS terminal for each 10,000 FTEs.
- User can print pages on a per-page fee set by BRR. User cannot cut and paste or annotate books.

Participating Libraries

- Fully participating library will provide Google with in-copyright books to scan into its database, and will receive a digital copy of each book it provides. The set of books the library receives is the library digital copy (LDC).
- FPL must sign agreement with BRR. Agreement releases FPL from liability for infringement, and highly constrains what FPL can do with LDC while book is in copyright.
- FPL may use LDC to print replacement book; to provide access to people with print disabilities; to develop finding tools that display snippets; read or download five pages of book if not commercially available.

Participating Libraries

- FPL must comply with extensive security, record-keeping obligations.
- Michigan, Wisconsin, Texas, UC, Stanford are FPLs.
- LDC books will emerge from restrictions on rolling basis as copyright expires.
- Cooperating libraries will provide in-copyright books, enter into agreement with BRR, receive release, but will not receive LDC.

Research Corpus

- Two centers (selected by FPLs) will host research corpus: a set of all digital copies made in connection to project.
- “Qualified users” may use research corpus for “non-consumptive research.” Non-consumptive research involves computational analysis, not reading books for intellectual content.
- Host must comply with strict security requirements.

Google's Obligations

- Within five years, Google must provide previews, public access service, and institutional subscriptions for 85% of the in-copyright, out-of-print books it has scanned.
- Google must use commercially reasonable efforts to accommodate users with print disabilities. These include screen enlargement, voice output, and refreshable Braille displays.

Revenue Sharing

- Google must pay at least \$60 to the rightsholder of each book scanned prior May 5, 2009. Google must pay at least \$45 million for these scans.
- Of the revenue Google generates through advertising, institutional subscriptions, and consumer sales, Google will retain 37% and pay 63% to the BRR. The BRR will then distribute the revenue to the rightsholders of claimed books.
- Once BRR collects sufficient revenue, it will distribute a \$200 inclusion fee to rightsholder of each claimed book.
- Additionally, BRR will pay usage fees based on how many users access a particular book.

Foreign Rightsholders

- Settlement applies to U.S. copyrights owned by U.S. and foreign rightsholders (under Berne Convention, U.S. copyright exists in books published abroad).
- > 50% of books in the U.S. research libraries are published abroad.
- Even though settlement applies only to U.S. copyrights, and displays are available only to U.S. users, the settlement applies to a large number of foreign rightsholders.
- If settlement is approved, litigation in other countries will continue.

Approval Process

- Class action settlement requires judicial approval. Judge either accepts or rejects settlement.
- Court must decide whether settlement is “fair, reasonable, and adequate.”
- Original deadline for opting out, objections and comments was May 5, 2009.
- Court extended deadline by four months to September 4, 2009.
- Fairness hearing was scheduled October 7, 2009.

Approval Process

- Hundreds of objections were filed, 75% from foreign rightsholders.
- Justice Department raised concerns regarding fairness to absent class members and competition.
- Justice Department recommended that parties attempt to modify settlement to address concerns.
- Parties have begun negotiations regarding modifications and have asked court to adjourn proceedings.
- Extent of modifications remains to be seen.