

THE GOOGLE BOOK SETTLEMENT  
THE NET BENEFITS  
OF PRIVATE CONTRACT PRECEDENCE IN THE ABSENCE  
OF ADEQUATE COPYRIGHT LAW

by

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Project submitted in partial fulfillment  
of the requirements for the degree of

Master of Publishing

In the Faculty of Communication, Art and Technology

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## Abstract

Internet search giant Google Inc. began digitizing library collections in 2004, confident that scanning and indexing books to display excerpts based on users' search queries were fair uses under US copyright law. Authors and publishers disagreed, and in 2005 representatives filed class action copyright infringement complaints. Rather than litigate, the parties negotiated a settlement that not only allowed Google's original uses but licensed Google to use, and sell online, millions of books published before 5 January 2009. This report uses the experience of Canadian scholarly publisher University of British Columbia Press to illuminate the 13 November 2009 proposed amended settlement agreement's technical details, and examines the settlement's economic and cultural costs and benefits and its implications for digital publishing, public access, and copyright law in a rapidly developing digital market. Whatever this settlement's outcome, its proposal underlines the need for meaningful, legislative copyright reform capable of encompassing present technological realities.

### KEYWORDS

Google Book Search; Google settlement; Google Library Project; copyright reform; UBC Press; Google Partner Program; orphan works

### SUBJECT TERMS

Books—Digitization; Digital libraries; Fair use (Copyright); Publishers and publishing—Technological innovations; Scholarly electronic publishing

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## Introduction

The Google Book Settlement has been hailed as an audacious and brilliant move by proponents and critics alike.<sup>1</sup> Google's goal of digitizing up to twenty million books drawn from participating libraries has been recast so that it cuts authors and publishers in on the deal. With one comprehensive and complex legal document, Google, the Authors Guild, and the Association of American Publishers have crafted a deal that could transform the digital marketplace for books, and could give Google a legal—and exclusive—method to clear rights for some copyrighted works neither it nor anyone else could acquire any other way, excepting changes to US copyright legislation. This report considers the circumstances that led to this settlement and explores its primary components, focusing on the amended agreement of 13 November 2009, which in many respects remains similar to the original agreement of 28 October 2008. The settlement makes positive steps in the tricky areas of public access and digital rights, but remains open to serious legal, economic, and cultural criticisms.

The University of British Columbia Press is a Canadian publisher with numerous US copyright interests (most works are published in Canada and subsequently released in the US), and a potential member of the settlement's publisher sub-class. In October 2009, I began to assemble UBC Press's settlement claim. The Press had already decided not to opt out of the settlement, but also to limit Google's uses of UBC Press books if possible. My work on behalf of the Press had two main aspects. First, I studied the settlement agreement itself and drew on resources available through UBC Press's membership in the Association of Canadian

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<sup>1</sup> See, for example, Lawrence Lessig, "For the Love of Culture: Google, Copyright, and Our Future," *The New Republic*, 26 January 2010, <http://www.tnr.com/article/the-love-culture?page=0,0>; Pamela Samuelson, "The Audacity of the Google Book Search Settlement," *Huffington Post*, 10 August 2009, [http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl\\_b\\_255490.html](http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl_b_255490.html).

Publishers, Access Copyright, and the Association of American University Presses, as well as other research materials, to determine how the settlement would directly affect the Press and clarify what opportunities and vulnerabilities the settlement presented. A solid understanding of the settlement's terms will assist the Press in the ongoing management of its interests in Google Books. Second, I identified all UBC Press titles already included in Google Books and submitted an online claim to the settlement administrator on the Press's behalf. In testing this process, I also gathered technical information from the settlement administrator on how Google will recognize claims. Throughout, I considered whether the settlement offers a fair deal to those it affects; it is this report's central question. I focus primarily on the settlement's implications for publishers, particularly those—such as UBC Press—in the niche market of scholarly monographs, and on its consequences for the public.

Chapter 1 presents an overview of the settlement and the legal and technical issues it raises. Chapter 2 outlines UBC Press's position with respect to the settlement: the Press's strategy, some of its concerns, and the commercial motivations that informed its choices. The settlement administrator has created a website that includes settlement information and a database of Google's scanned books; this database will lay the foundation for the Book Rights Registry. All class members are encouraged to register at this site and identify works to which they hold rights. In chapter 3, I detail the work of assembling the claim and navigating the online claims process as it existed in early 2010.

There are other grounds on which to evaluate the settlement than the primarily legal and technical ones explored in the first chapter, and in chapter 4 I turn to questions of fairness, in both economic and practical senses, from the perspectives of Google and the settling publishers and authors. Finally, I take a deeper consideration of the settlement's relationship to and potential effects on existing US copyright law. This privately negotiated contract could set precedents outside the laws' current scope. Through this lens, I explore the settlement's treatment of the largest party, whose rights are perhaps least explicitly addressed by it: the public. The settlement is neither wholly good nor wholly bad, but perhaps above all else it exposes how wholly inadequate current copyright legislation is at addressing copyright's extension to a digital environment.

# 1

## A Grand Digitization Project

Since its incorporation in 1998, Google has grown to dominate the online search market: over 70 percent of the world's search queries start at Google's search box.<sup>2</sup> Its search engine's popularity and technical superiority allowed Google to monetize search through the development of now ubiquitous online text advertising. While search and ads remain the core of Google's activities and considerable success, it continues to research, develop, and acquire a number of other online products and services.

One such service is Google Book Search, which applies Google's search algorithms to a growing index of scanned book pages rather than just web pages. Google Print, as it was first known, was initiated in the early 2000s; it was renamed Google Books in 2005. By 2004, Google had secured the participation of a number of publishers to contribute their in-print books to the initiative. This publisher component of the project became what is now called the Partner Program; it has grown steadily if relatively slowly to approximately one million in-copyright titles by 2009. Also in 2004, Google revealed the Library Project, which proposed to scan the entire collections of several leading libraries and add these scans to Google Books. The Library Project was poised to grow significantly larger (and more quickly) than the Partner Program. The libraries' collections encompassed out-of-copyright works as well, and offered Google access to 15–20 million titles through a handful of library partners, as opposed to the thousands of publishers in the Partner Program, each with perhaps hundreds of titles. However, the Library Project attracted a flurry of controversy that ultimately led to a class action settlement before a New York court.

In order to understand this controversy, it is useful to consider the circumstances from

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<sup>2</sup> Ken Auletta, *Googled: The End of the World as We Know It* (New York: Penguin, 2009), xi.

which the Library Project and Google Books emerged as well as the main features of the proposed amended settlement agreement, especially the changes that attempt to address criticisms of the initial proposal. The settlement offers advantages and disadvantages on several fronts: from its complex mechanics to its potential legal and cultural effects. Although the benefits are compelling, the criticisms remain significant.

#### FROM SCANS TO SETTLEMENT: A BRIEF HISTORY OF THE GOOGLE LIBRARY PROJECT

Google maintains that its development of Google Books was just another aspect of its mission to organize the world's information and thereby make the world a better place.<sup>3</sup> Its plan to create a massive digital library would not only bring additional information online but also make Google's search engine more comprehensive. Since this book content would only be available to searches made through Google, the Library Project would, as a side effect, further advance Google's competitive advantage in the search market. An online collection also purported to bring books to where the readers were, presuming the Internet would supplant libraries or physical collections as students', and future researchers', resource of choice.<sup>4</sup> The Library Project was, in some ways, the natural extension of what Google had already done. Google founders Sergey Brin and Larry Page created the search engine that became Google by downloading the entire web and analyzing it. All the world's books must have seemed like a similarly large, complex, and useful collection of data. It is perhaps not surprising that Google considered scanning and indexing books a fair use of readily available information, not copyright infringement. But unlike the web—at least the web as it was in 1996—books have a long history as intellectual property, and a number of deeply invested business models and commercial relationships that depend on that property's copyright.

The initiative's technical challenges were to design a scanner as well as algorithms to de-warp images and render them usable, both to human eyes and indexing computers. Google

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3 Google, "About Google Books: History," [2008?], <http://books.google.com/googlebooks/history.html>. Sergey Brin and Larry Page's core search technology sprang from a graduate school project focused on digital libraries, in which indexing and analysis of data interrelationships could help users find and evaluate the relevance of books.

4 Larry Page and Dan Clancy of Google, quoted in Auletta, *Googled*, 96.

needed books, so it sought library partners, and in 2004 Google announced the Library Project, in which Google would scan the collections from the Bodleian Library at Oxford University, the libraries at Harvard, Stanford, and the University of Michigan, and the New York Public Library, representing an estimated 15 million volumes or more.

The Library Project caused authors and publishers concern. Google proposed to scan library books and index their contents, but then only display short excerpts or “snippets” in response to a user’s search query. Public domain works would be fully accessible and even downloadable, but for copyrighted material Google would only show bibliographic data and short excerpts. Rightsholders could request that Google not scan their works, but many saw the entire scheme as copyright infringement. In the fall of 2005, the Authors Guild of America and several authors filed a class action lawsuit against Google on the basis that the agreement with the libraries “entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries’ archives” and that in so doing, Google “has infringed, and continues to infringe, the electronic rights of the copyright holders of those works.” One month later, five publishers filed a similar complaint against Google, echoing the Authors Guild’s complaint that Google would scan, store, and display excerpts of books, as well as include those excerpts in its publicly available search results, all of which would “increas[e] the number of visitors to the google.com website and, in turn, Google’s already substantial advertising revenue”; that is, Google would make commercial use of the copies.<sup>5</sup>

For the next three years, authors, publishers, lawyers, legal scholars, and corporations or non-profit organizations with an interest in any of the complaints’ many facets argued over whether and how the case should proceed, ranging over fair use, copyright law in digital spaces, the implications of a possible settlement, and competing models. Google continued to scan books, and by the end of 2007 it had 28 libraries participating in the Library Project, along with more than 10,000 publishers contributing to Google Book Search through the Partner Program.<sup>6</sup> Google had responded to the two complaints in two submissions to

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5 *Authors Guild et al. v. Google*, No. 05 CV 8136, 20 September 2005, 2. *McGraw-Hill et al. v. Google*, No. 05 CV 8881, 19 October 2005, 3; see also 2–4. Both available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.html>.

6 Google, “About Google Books: History.”

the court in November 2005, but, as Pamela Samuelson points out, the case remains, over four years later, “in relatively early stages as a litigation.” Samuelson, a law and information professor at the University of California, Berkeley, suggests that Google continued scanning during settlement negotiations and pending the court ruling because it could reasonably assume the project would ultimately go forward.<sup>7</sup>

It was the Authors Guild that proposed the idea of settlement. As Roy Blount, president of the Authors Guild, said, “Our proposal to Google back in May 2006 was simple: while we don’t approve of your unauthorized scanning of our books and displaying snippets for profit, if you’re willing to do something far more ambitious and useful, and you’re willing to cut authors in for their fair share, then it would be our pleasure to work with you.”<sup>8</sup> All parties agreed, and they announced the proposed settlement agreement on 28 October 2008, after two and a half years of negotiations.

Dan Clancy, engineering director of Google Book Search, describes the motivation for seeking a settlement: “We strongly believe in our fair use position, but we didn’t start this project to win a court case on fair use. We started it to provide discovery tools. This settlement is an opportunity to do what, I think, from a user perspective is far better. The snippets we’ve been showing are a far cry from what the user wants, and really the only solution was a partnership. We assume we would have gone through the courts and won. But once we won, we still would’ve had snippets.”<sup>9</sup> The settlement offered the parties an opportunity to expand the terms of the discussion far beyond the initial complaints, and the resulting agreement covered a broad spectrum of uses by Google, libraries, and the public. It also called for the creation of an entirely new agency, the Book Rights Registry (BRR). This non-profit organization would act as intermediary between Google, as it applied its sweeping new licence, and the millions of rightsholders who held a US copyright interest in any work

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7 Pamela Samuelson, “Google Book Search and the Future of Books in Cyberspace,” *Minnesota Law Review* (forthcoming), 5N35. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535067](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535067) (posted 13 January 2010).

8 Roy Blount Jr., “\$125 Million Settlement in *Authors Guild v. Google*,” Member Alert, Authors Guild, 28 October 2008, <http://www.authorsguild.org/advocacy/articles/member-alert-google.html>.

9 Dan Clancy, quoted in Andrew Richard Albanese and Norman Oder, “Corner Office: Google’s Dan Clancy,” *Library Journal*, 1 May 2009, <http://www.libraryjournal.com/article/CA6652445.html>.

published on or before 5 January 2009.

The court granted preliminary approval to the proposal, and notices were distributed to the many people and entities affected. It was a complex agreement and, due to the US class action mechanism combined with reciprocal rights for foreign nationals under the Berne Convention, it affected authors and publishers around the world. As uncertainty increased among putative class members, the deadlines and next steps were deferred from the spring of 2009 until the fall. The court received some four hundred formal objections as to the legitimacy of the settlement, many from non-US citizens or organizations who were shocked that a US case could so broadly encompass their copyrights. Some rightsholders opted out; many more were simply confused, overwhelmed, and deeply uncertain about where their best interests lay as they tried to interpret the agreement. In September 2009, the US Department of Justice (DOJ) submitted a statement of interest outlining serious concerns, primarily with respect to the settlement's potential failure to satisfy the technical requirements of a valid class action and its seeming inconsistency with antitrust law.<sup>10</sup> Rather than proceed with the fairness hearing scheduled for 7 October 2009, the parties requested more time to discuss with the DOJ and revise the agreement. An amended settlement was submitted on 13 November and granted preliminary approval on 19 November 2009, initiating another round of notice, a new deadline to opt in or out (28 January 2010), and a timeline to submit statements to the court in advance of the new fairness hearing on 18 February 2010.<sup>11</sup>

The amended settlement included several key changes, primarily in response to the DOJ's concerns.<sup>12</sup> One of the largest differences was in the definition of the class. While many non-English books would no longer be covered by the settlement—at least in part due to vehement opposition from France, Germany, and other European Union countries—works originating in Canada, the United Kingdom, and Australia were still included. (The publication cut-off

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<sup>10</sup> US Department of Justice, Statement of Interest of the United States of America Regarding Proposed Class Settlement, 18 September 2009, <http://www.justice.gov/atr/cases/f250100/250180.pdf>.

<sup>11</sup> Letters of objection or of support from any class members who did not opt out were accepted until 28 January 2010. The DOJ had until 4 February 2010 to submit its statement on the amended settlement to the court. The parties then also filed briefs on 11 February 2010.

<sup>12</sup> *Authors Guild, Association of American Publishers, et al. v. Google*, No. 05 CV 8136, Amended Settlement Agreement (ASA), 13 November 2009, [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement). See ASA, Attachment N: Supplemental Notice for a summary of amendments.

date of 5 January 2009 was unchanged.) Rightsholders from these three countries would now be represented on the board of the Book Rights Registry, with an author and publisher director each.<sup>13</sup> A change to the definition of *commercially available* also addressed the treatment of non-US rightsholders.<sup>14</sup> A book for sale new from anywhere in the world (not just within the US) to a buyer in any of the four countries would meet the criteria for commercial availability.

A second big change was with respect to the distribution of revenues generated through Google's use of unclaimed or orphan works. US copyright extends until seventy years after the author's death; in practice, this means that a large number of works created since 1923 are still in copyright even though they may be long out of print and the rightsholders (or their heirs) are unknown or unlocatable. Because the settlement includes all rightsholders who do not specifically opt out, these orphan works by definition will be swept into the agreement. It can be argued that an opt-out class action is the most practical way to address licensing for orphan works; it is certainly strategic and efficient. Even if comprehensive orphan works legislation would better serve the public interest, legislative efforts in this area so far have stalled.

The initial agreement provided that after five years, the portion of revenues earned through Google's use of works for whom no rightsholder had been found would be distributed among all the rightsholders currently registered with the BRR. Many alleged this created a conflict of interest between different class members since keeping orphan works orphaned would benefit identified claimants, and therefore the rightsholders of orphan works were not fairly represented as members of the class.<sup>15</sup> The amendment created an unclaimed works fiduciary to represent unlocated rightsholders. Unclaimed funds would not be used to cover the Registry's own costs or shared among known rightsholders; they would be held for five years, after which the fiduciary could use a portion of the revenues to attempt to locate missing rightsholders. After ten years, with fiduciary approval, the BRR could distribute the balance of

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13 ASA, section 6.2(b)(ii). The board will include an equal number of author sub-class representatives and publisher sub-class representatives, and each country will be represented by at least one director from each sub-class.

14 Technical terms are indicated with italics at first appearance. The settlement's definitions of these terms can be found in ASA, article 1.

15 US DOJ, Statement of Interest (2009), 8–9.



unclaimed funds to charities that promote literacy.<sup>16</sup>

The amended agreement also limited the scope of forward-looking activities the settlement addressed. Instead of an open-ended clause allowing for non-specified future uses to be developed by Google and the Book Rights Registry, the amended agreement narrowed its scope to three additional possible products or services: books in the collection might be purchased as print on demand copies, if they are no longer commercially available; as downloadable files, such as PDF or EPUB, for offline use; or through individual consumer subscription. The original settlement ensured that Google would always have at least as favourable terms as any the BRR might offer to other third parties. In the amended settlement, this “most favoured nation” clause was removed, allowing the Registry to negotiate new deals with third parties without regard for the terms it offered Google.<sup>17</sup> Creative commons licences were explicitly allowed; other changes offered additional options around pricing, revenue splits, and other terms.

The US DOJ, in its second statement of interest, acknowledges the amendment’s positive changes but still believes the core problem remains: the settlement “is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court.”<sup>18</sup> The DOJ is particularly concerned by the notice provided to class members, the settlement’s creation of “author-publisher procedures” that attempt to impose a single template for rights and revenue allocations on individualized publishing contracts, and ongoing antitrust concerns (price-fixing, orphan works). However, the DOJ seems to prefer working with the parties rather than dismissing the whole enterprise: after all, there is the potential for real public benefit, with Google footing the bill, in an online collection. (Based on his line of questioning at the fairness hearing, it appears that the presiding judge, Denny Chin, is also interested in practical solutions that could resolve the

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<sup>16</sup> Procedures for unclaimed funds are described in full in ASA, section 6.3.

<sup>17</sup> ASA, section 4.7; section 3.8 eliminated “Effect of Other Agreements” and now only includes “Effect of Changes in Law,” which allows Google to take advantage of future legislative changes that may provide better terms, such as with respect to orphan works.

<sup>18</sup> US Department of Justice, Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, 4 February 2010, 2, <http://www.justice.gov/atr/cases/f255000/255012.pdf>.

settlement's possible shortcomings.) In this vein, the DOJ makes several suggestions: revise the settlement to make it opt-in; impose an embargo period before orphan works can be used in Google Books (to give time to seek out rightsholders before their rights are licensed on their behalf); limit the term of the orphan works licences and evaluate their market at the close of that term; and consider other means for competitors to use orphan and "rights-uncertain" works.<sup>19</sup> The parties have declined interest in an opt-in settlement or in opening another round of negotiated amendments, but their responses may change once the court has ruled on the settlement's fairness.

#### BENEFITS OF THE SETTLEMENT

The settlement appears to offer a variety of benefits, both to its direct parties as well as the public. The most obvious—and to many, the most appealing—is the creation of a vast digital collection: the pooled results of many leading libraries, themselves the result of in some cases centuries of care and thoughtful stewardship. Old, rare, or long out-of-print books would become available for use to a much broader audience. Research would not depend on a scholar's or student's physical location: in an instant, any user could access a copy of any item from any participating library. Research libraries, especially those at smaller institutions, would benefit from sharing the combined resources of other libraries. In particular, it would signal a renewed life for orphan works. With new copies unavailable, these books have likely been less accessible than those with a rightsholder to tend them. A reader looking for an orphan or out-of-print work has had to rely on existing accessible physical collections or the second-hand book market; while not insurmountable, searches could be time-consuming or inconvenient. These advantages are not limited only to scholars and students: public library terminals would also offer full access to the collection, while anyone could search the collection online and read preview material. It should be noted that these benefits will only be available in the US, and so for now the "universal library" is far from truly widely accessible, an ironic limitation given how easily digital texts can render geography irrelevant, not to mention that Canadian, UK, and Australian authors and publishers will contribute their works yet be

<sup>19</sup> US DOJ, Statement of Interest (2010), 23–25. The DOJ makes eight specific recommendations, some of which follow directly from these four.

unable to view or read them.

Through Google Books, publishers and authors would receive a new income stream without a substantial investment of their own resources. The books covered by the settlement are mostly old books; by the time the settlement is implemented, even those published on 5 January 2009 may have drifted into the backlist.<sup>20</sup> The settlement offers ongoing incremental income from several possible sources: revenues from any ads displayed on book information pages in Google Books, fees from the institutional subscriptions, and sales revenues from individuals' purchase of online access. Google offers a better split than publishers can get from most book retailers, with 63 percent of the revenues returning to the rightsholders.<sup>21</sup> Nor do publishers and authors have to worry about providing books to Google or technical resources to the project; Google will take care of it all.

The existence of the Book Rights Registry would create a copyright record of sorts: a list—one that aspires to be comprehensive—of who owns rights to what. Google's licence fees provide an economic incentive to encourage previously unlocatable rightsholders to come forward, and the BRR will be authorized to actively seek them out.<sup>22</sup> Michael Boni, representing the Authors Guild, alludes to the Authors Registry's 85 percent success rate at locating authors, and an over 90 percent success rate of comparable collecting societies in the UK, to argue that the BRR will reduce the number of orphan works.<sup>23</sup> Although on the surface such facts sound encouraging, Boni fails to qualify his numbers, and it is unclear if these rates refer to all authors and all works, or some subset (such as known authors who agree to participate after the organization solicits them, or works with accrued fees above some

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20 Since rightsholders have until 31 March 2011 to claim their works, Google Book Search will not be fully available until at least some time in 2011, assuming no further legal or technical barriers. In practice, legal and technical barriers are both likely.

21 ASA, sections 4.4, 4.1, 4.2, and 2.1(a). As discussed below, in practice rightsholders will not receive this full share.

22 Samuelson describes the US\$60 compensation for books that were digitized without authorization—only available to those who register a claim before 31 March 2011—as a reward for early registration. See “Google Book Search and the Future,” 10.

23 Michael Boni, remarks at *Authors Guild, et al. v. Google*, No. 05 CV 8136, Fairness Hearing, transcript, 18 February 2010, 140–41. Available at [http://thepublicindex.org/docs/case\\_order/fairness-hearing-transcript.pdf](http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf). The Authors Registry in New York collects and remits fees for use, but does not negotiate these fees or represent authors.

minimum amount). Hadrian Katz, representing the Internet Archive, argues that the fact that Google asserts the settlement must be opt-out “in light of the prohibitive transaction costs of identifying and locating individual rights holders of these largely older out-of-print works” is itself an admission that the people at Google “know very well they can’t find the rights holders.”<sup>24</sup> There does seem to be an assumption that identifying and locating rightsholders will be easier for the BRR than it is now for Google. More to the point, the settlement allows Google to download these prohibitive transaction costs to the BRR, which is to say to the rightsholders themselves. If the BRR does manage to identify, engage, and register most rightsholders, the resulting record could facilitate the negotiation of other licences. It could even be of broad public use in implementing changes to copyright policy, such as shorter but renewable copyright terms. However, as of yet, there are no provisions to make the BRR database publicly available. Some critics advocate this database should be turned over as a public good.

The collection offers another immensely exciting tool for research simply as a digitized dataset. Computational analysis of texts was previously possible on a relatively small scale, but here would be millions of titles spanning centuries of book production, all within easy reach of a computer processor. Any number of linguistic, rhetorical, historical, sociological, or other types of queries could be run against an impressive bulk of information on human culture and thought.

#### CRITICISMS OF THE SETTLEMENT

The settlement hinges on the class action mechanism, and yet its conception of that class may be problematic. Several critics question whether the named plaintiffs are representative of all class members, and even whether the author sub-class or publisher sub-class are meaningful labels for such a broad, numerous, and variously motivated population. The rightsholders of orphan works continue to be unrepresented. Authors of *inserts* (poems, songs, short fiction, essays) will enjoy more limited rights and benefits than authors of books; some say their interests diverge enough to warrant a separate sub-class.<sup>25</sup> Some potential class members may

<sup>24</sup> Hadrian Katz, remarks in Fairness Hearing, 94.

<sup>25</sup> Arlo Guthrie, Julia Wright, Catherine Ryan Hinde, and Eugene Linden, Supplemental Objections, 28

have had no work digitized by Google, but the settlement would then give Google permission to digitize their work in future; “superstar” authors, who may also have trademark interests in their names or have licensed works for other purposes, are not currently represented.<sup>26</sup> Foreign rightsholders are treated differently in that US rightsholders who did not register with the US copyright office are excluded from the class, but non-US rightsholders who did not register their work are included. An objection from a group of Canadian authors points out that at least with respect to Canadians, the settlement may violate NAFTA’s requirement for national treatment of investors (which includes publishers or authors, since a book, as intellectual property that can be used for economic benefit, meets NAFTA’s definition of investment).<sup>27</sup> The notice of the class action must be adequately distributed, and some argue the notice was too confusing, did not reach everyone it needed to, and was not adequately available in translation.<sup>28</sup> Scott Gant, a lawyer and member of the author sub-class, argues that the expectation that the BRR will seek and locate rightsholders is work that should have been done during the notice period, not after the opt-out deadline.<sup>29</sup>

Proper conception and treatment of the class are not the only requirements to ensure the courts recognize a class action’s validity. The settlement goes well beyond the scope of the original complaint (scans and snippets), transforming the class action into a broad commercial transaction addressing full-text display and sales. This too may cast doubt on the legitimacy of the class action.<sup>30</sup> The settlement provides for a range of future uses. It licenses Google to use the works it already digitized but also to scan additional works for similar use; it also gives Google the option to develop other revenue models. In doing so, the settlement fails to limit

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January 2010, 7. Available at [http://thepublicindex.org/docs/amended\\_settlement/Guthrie\\_objection.pdf](http://thepublicindex.org/docs/amended_settlement/Guthrie_objection.pdf).

26 Cynthia Arato, remarks at “L is for Lawsuit,” panel discussion at D is for Digitize, New York Law School, New York, 9 October 2009. Video at [http://www.nyls.edu/centers/harlan\\_scholar\\_centers/institute\\_for\\_information\\_law\\_and\\_policy/events/d\\_is\\_for\\_digitize/program](http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/d_is_for_digitize/program). The supplemental objections of Guthrie et al. also discuss trademark interests, 6.

27 David Bolt et al. (177 Canadian authors), letter to the Court, 28 January 2010, 2–3. Available at [http://thepublicindex.org/documents/amended\\_settlement/canadian\\_authors.pdf](http://thepublicindex.org/documents/amended_settlement/canadian_authors.pdf).

28 Cynthia Arato and Kiran Raj discuss these points in the “L is for Lawsuit” panel at D is for Digitize.

29 Scott E. Gant, Objection to Proposed Settlement, and to Certification of the Proposed Settlement Class and Sub-Classes, 19 August 2009, 18. Available at <http://thepublicindex.org/docs/objections/gant.pdf>.

30 Gant, Objection, 6–9; also Arato, “L is for Lawsuit.”

itself to the past wrongs of alleged infringement and could be seen as a strategic route toward separate ends: Google's desire for a comprehensive index and the plaintiffs' attempt to earn new revenues while transforming print publications into digital ones.

Perhaps most galling, to some, is that the settlement circumvents existing copyright law and carves out an exclusive private deal for Google in "the formulation of [US] copyright policy," an area that the US Supreme Court has on numerous prior instances acknowledged "lies solely in the hands of [the US] Congress."<sup>31</sup> For rightsholders outside the US, the proposal implicates them in a set of rules that diverge significantly from their existing rights and international copyright conventions, and in whose negotiation they had no voice. Pamela Samuelson stresses that class action creates private law, whose application is limited to a particular case and not of broad public use, whereas legislation provides clear guidelines that apply to anyone in similar situations. The implications are not trivial: "Use of a class action settlement to restructure markets and to reallocate intellectual property rights, particularly when it would give one firm a de facto monopoly to commercialize millions of books, is arguably corrosive of fundamental tenets of our democratic society."<sup>32</sup> Given the slow progress made to date in the US Congress on orphan works legislation, it is not unreasonable to worry that the settlement may serve as a substitute for public legislation for the near future at least.

By default, the settlement confers membership in the class on authors and publishers unless they have explicitly opted out. Rightsholders who did not know they were affected or who missed the deadline will be bound by the settlement, as will those who intentionally ignored the deadlines as a form of protest. Works with no rightsholder to claim them will automatically be included. The settlement thus offers Google an effective monopoly on digital uses of unclaimed and orphan works; this, coupled with its significant head start on digitizing books at all, means Google will be a difficult—some say impossible—leader with which to compete. Google took a calculated risk and has continued to digitize even while the legalities are debated; the risk for competitors, even if they could also negotiate a licence of their own, is much higher since the existence of Google's settlement could cast doubt

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31 Yahoo!, *Objection to Final Approval of the Proposed Class Action Settlement*, 8 September 2009, 2; specific legal precedents provided, 2–3. Available at <http://thepublicindex.org/docs/letters/yahoo.pdf>.

32 Samuelson, "Google Book Search and the Future," 34.

on others' claims of fair use. In addition, the BRR can only negotiate licences on behalf of registered rightsholders: the orphan works remain Google's alone until legislation rewrites the rules.<sup>33</sup> Not only will there be insurmountable barriers to entry for would-be competitors, but a Google monopoly threatens the long-term viability of the digital collection for users. Academic libraries are painfully familiar with the ever-rising prices of journals subscriptions today, where large publishing conglomerates control key journals and can set aggressive terms of access—subscription prices, bundles—since scholars insist the libraries maintain their subscriptions. Given the likely appeal of Google's digital collection and the foreseeable lack of any comparable products in the market, libraries may find themselves vulnerable to price-gouging in the future, and the settlement offers no explicit protections against this possibility.<sup>34</sup>

Google's assurances that it will not seek only to maximize profits and that it has the public interest in mind are not explicit provisions in the settlement, but rely instead on Google's historical institutional culture.<sup>35</sup> Even if Google resists the temptation to maximize profits, future owners of Google or its collection may have differing views, and Google may assign its rights under the settlement to any successor without seeking the consent of the rightsholders.<sup>36</sup> Rather than leave such risks unaddressed, a better settlement might impose certain limits or stipulations, or at least provide for a review mechanism in the case of divestiture. Similarly, while Google must provide certain minimum services within five years, there are no provisions for the future of the collection of scans should Google abandon the project for any reason.<sup>37</sup> Samuelson outlines a number of reasons the collection could become unavailable: technical glitches or malicious hackers could disrupt or compromise the collection; subscription sales may be too low to justify continuing the service (if large numbers of rightsholders exclude their works, or if poor scans and metadata erode scholarly

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33 Yahoo!, *Objection*, 24.

34 Samuelson, "Google Book Search and the Future," 19–20.

35 See Peter Brantley, "Is 'Trust Us' Good Enough?" Open Book Alliance, 3 September 2009, <http://www.openbookalliance.org/2009/09/is-trust-us-good-enough/>. Paul Courant suggests the trust is well-placed; see Courant, remarks at "K is for Keynote," presentation at D is for Digitize, New York Law School, New York, 9 October 2009.

36 ASA, section 17.30.

37 ASA, sections 3.7(a) through (c).

usefulness).<sup>38</sup> Several commentators suggest that Google may simply abandon a project in which it loses interest—perhaps hard to imagine in an undertaking as big and seemingly dear to Brin and Page as this one, but not without precedent.<sup>39</sup> Concerns for the robustness of the collection as well as that Google may not meet the obligations of cultural stewardship could be mitigated, for example, if the court proposed the scans be publicly owned and leased to Google. Google would certainly protest—no doubt on the grounds, ironically, that the scans are its own productions and property. In the US, more so than in Canada, such state intervention is viewed with suspicion, although antitrust measures have if not divested US commercial interests, at least limited and dispersed them. Regulatory interventions could effectively support other digital collections, particularly since individual research libraries will hold portions of Google’s collection. In the future, these libraries might be allowed to pool or aggregate their digital collections outside of Google.

Some kind of additional regulation might be required if Google is found to be in a position of monopoly, but the settlement as proposed does not impose conditions to prevent monopoly, stimulate competition, nor protect the public interest. The DOJ antitrust department continues to investigate Google’s position in various markets: the new digital book market this settlement develops as well as the search market.<sup>40</sup> The DOJ, if not the court, will have to determine if the settlement creates a monopoly. Not only will Google be the only entity with legal access to orphan works, but the settlement gives Google the power to simulate the competitive market and determine appropriate prices for books’ consumer purchase sales.<sup>41</sup> In addition, the Registry has the power to negotiate additional licences on behalf of all rightsholders as a group. Both these features could be seen as a form of price-

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38 Samuelson, “Google Book Search and the Future,” 22–24.

39 See Kevin Poulsen, “Google’s Abandoned Library of 700 Million Titles,” *Wired*, 7 October 2009, <http://www.wired.com/epicenter/2009/10/usenet/>. Poulsen describes the “last time Google assembled a giant library that promised to rescue orphaned content for future generations. And the tattered remnants of that online archive are a cautionary tale in what happens when Google simply loses interest.” He is referring to Usenet, an archive of online articles from the 1980s and ’90s; despite more than a year of inaction on these known problems prior to Poulsen’s article in *Wired*, Google responded immediately to address his charges. Poulsen, “Google Begins Fixing Usenet Archive,” *Wired*, 8 October 2009, [http://www.wired.com/epicenter/2009/10/usenet\\_fix/](http://www.wired.com/epicenter/2009/10/usenet_fix/).

40 William Cavanaugh on behalf of the DOJ, remarks in Fairness Hearing, 129–30.

41 ASA, section 4.2(b)(i).



fixing, which is illegal in the US because it suggests a monopoly, or at least collusion, is in place. The BRR to some extent resembles collecting societies like Canada's Access Copyright. In the US, the Copyright Clearance Center serves similar purposes, although unlike the BRR it requires rightsholders to enroll for its services before it collects revenues for their work; it also negotiates different licences for particular uses rather than one licence for all uses.

Even with the amended settlement's addition of reseller provisions, Google's effective monopoly endures, since resellers will not control access to the products but will in essence refer customers to Google.<sup>42</sup> Law professor James Grimmelmann describes these resellers as "little more than franchisees" since even though they will receive the majority of Google's 37 percent revenue share, they will have no role in setting prices or other terms of access, and "do not create any structural competition."<sup>43</sup> However, telecommunications providers, which are regulated as common carriers, offer a useful parallel here. Third parties are able to resell an identical base product, but might compete on price (or more accurately, on tolerances for profit margin), additional bundled features, customer service, or ease of use. Resellers of digital books could thus present competition even if they could not alter the fundamental mode of access to Google's collection. Again, this competition would only emerge with some sort of regulatory mechanism to prevent an unchecked monopoly.

The settlement contains no protection for user privacy, even though Google must track all page views of all book content and Google will be able to trace uses back to individuals in order to ensure only licensed uses are made of the works. Even if anonymized, users' search queries are easy to trace to identifiable individuals.<sup>44</sup> Many wonder if Google's oversight will lead to a chilling effect on reading.<sup>45</sup> Marc Rotenberg, representing the Electronic

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42 ASA, section 4.5(b)(v)(2); Yahoo!, Objection, 22–23 and 23n19; Amazon.com, Objection to Proposed Amended Settlement, 27 January 2010, 18–20. Available at [http://thepublicindex.org/docs/amended\\_settlement/amazon.pdf](http://thepublicindex.org/docs/amended_settlement/amazon.pdf).

43 James Grimmelmann, Letter from the Institute for Information Law and Policy Recommending Rejection, 28 January 2010, 4. Available at [http://thepublicindex.org/docs/amended\\_settlement/iilp.pdf](http://thepublicindex.org/docs/amended_settlement/iilp.pdf).

44 Nicholas Carr, *The Big Switch: Rewiring the World, From Edison to Google* (New York: Norton, 2008), 185–90. Carr details the ease with which two reporters used anonymized AOL searches to positively identify the searcher (along with her address and phone number), and other examples of how easily the Internet reveals the personal data of its users.

45 Cindy Cohn, Jennifer Lynch, Aden J. Fine, and David I. Pankin, Privacy Authors and Publishers'

Privacy Information Center, argues that the settlement runs radically against the technical community's efforts to minimize privacy risks, and given that Google "already knows more about internet users than any other company in the world, [and] for its business model relies on the commercial extraction of that information" in order to target ads and search results, the settlement's non-specific and non-binding privacy assurances are completely inadequate.<sup>46</sup> Rotenberg suggests that privacy must be addressed in the design of the technology. In its initial release of Gmail and its recent launch of Buzz, Google has shown that privacy issues may not figure into its design specifications except as afterthoughts.<sup>47</sup>

Some academic authors criticize the settlement for not going far enough in providing public access, and claim the settlement privileges economic interests even if an author's primary interest is public dissemination.<sup>48</sup> Although many publishers (and non-academic authors) might disagree, it is interesting to note that the settlement can fail to satisfy class members on such diverse grounds. The plaintiffs affirm the fundamental commercial nature of the transaction when they attempt to dismiss arguments for open access: "That the reading public may wish to have free access to scientific and other academic works covered by the ASA, or that some academic authors may not wish to exploit their works through the Revenue Models, should not supersede the economic interests of members of the Class."<sup>49</sup>

Samuelson also outlines that readers' fair use rights—for example, copying excerpts or

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Objection, 8 September 2009, 12–15. Available at [http://thepublicindex.org/docs/letters/privacy\\_authors.pdf](http://thepublicindex.org/docs/letters/privacy_authors.pdf). See also Samuelson, "Google Book Search and the Future," 26–27.

46 Marc Rotenberg, remarks in Fairness Hearing, 87–88.

47 Gmail "reads" users' personal email messages in order to serve relevant ads, and met with some resistance when it was launched for this reason and for its initial omission of a delete-message function. Buzz launched with a misstep when it automatically populated user profiles (essentially publishing users' address books) and offered no way for Gmail users to decline to participate, though Google adjusted the service in response to criticisms. Tim Wu, a law professor at Columbia University, believes Google has a "total deaf ear to certain types of issues. One of them is privacy"; the people at Google "just love that data because they can do neat things with it." Wu, quoted in Auletta, *Googled*, 198.

48 Pamela Samuelson et al. (150 academic authors), Supplemental Academic Author Objections to the Google Book Search Settlement, 27 January 2010, 6. Available at [http://thepublicindex.org/docs/amended\\_settlement/Samuelson\\_supplemental\\_objection.pdf](http://thepublicindex.org/docs/amended_settlement/Samuelson_supplemental_objection.pdf). See also James L. Turk, Objections of the Canadian Association of University Teachers to the Google Book Search Settlement, 28 January 2010, 7. Available at [http://www.caut.ca/uploads/CAUT\\_Google\\_Settlement.pdf](http://www.caut.ca/uploads/CAUT_Google_Settlement.pdf).

49 Michael J. Boni, Joanne Zack, Bruce P. Keller, Jeffrey P. Cunard, and Richard S. Lee, Plaintiffs' Supplemental Memorandum Responding to Specific Objections, 11 February 2010, 94. Available at [http://thepublicindex.org/docs/amended\\_settlement/Supplemental\\_memorandum\\_of\\_law.pdf](http://thepublicindex.org/docs/amended_settlement/Supplemental_memorandum_of_law.pdf).

short works for personal or educational use—will be weakened if public access terminals in libraries charge printing fees; in addition, first sale rights lose ground since the purchaser of an online Google Book will not be able to lend, gift, or resell it.<sup>50</sup> The settlement allows Google to exclude up to 15 percent of its scanned books “for editorial or non-editorial reasons.” Editorial reasons are not well-defined, though they would be something other than “quality, user experience, legal, or other non-editorial reasons.”<sup>51</sup> While Google must inform the Registry of its omissions, the settlement does not appear to offer any recourse for appeal or justification. Although Google and the plaintiffs assert freedom of expression is important, Google has bowed to government pressure to filter or otherwise control content before. Between the potential for censorship and the absence of privacy protections, along with the lack of comparable alternative digital collections, the settlement offers Google an impressive tool for information control.<sup>52</sup> Even if Google declines to use this power (though its search and ad businesses would benefit from it), others may pursue it; regardless, the settlement again offers weak or no checks to limit this dizzying possibility.

The concerns the settlement arouses are varied. Legal criticisms include whether the settlement is technically valid as a class action and whether it is consistent with, or at least a reasonable development of, copyright law. Socio-economic criticisms include that the settlement creates a monopoly for Google and gives it unfair access to an otherwise unobtainable market: the orphan works. A third broad category of criticisms relate to public risks and public benefits: these are “cultural” or moral criticisms, such as protection of the integrity of the collection, role or power of libraries, access, or user privacy. Many objectors, including the DOJ, focus on the class action validity and antitrust arguments. Since the settlement proposes new rules for rights negotiations that will shape public access

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50 Samuelson, “Google Book Search and the Future,” 27.

51 ASA, section 3.7(e).

52 Nicholas Carr describes the oscillations between freedom and control in the development and application of information technologies, concluding that history demonstrates “that the most powerful tools for managing the processing and flow of information will be placed in the hands not of ordinary citizens but of businesses and governments,” and that their interest is control. Carr, *The Big Switch*, 208–9; see also 192–209.

in an emerging digital market, it may be entirely reasonable for the court also to consider the settlement's cultural effects in determining its fairness. Moreover, many class members, especially authors, have claimed these concerns as representative of their interests.

## 2

### UBC Press and the Settlement

Canadian publishers who hold US copyright interests, as many of them do, have the option to participate in the settlement as members of the publisher sub-class. Publishers (and authors) could choose to opt out of the settlement, in which case they would not receive any compensation through the settlement and Google should remove their works from the digital collection. Rightsholders who remain in the settlement class have a second set of choices: they may *remove* (a permanent designation) or *exclude* (a reversible one) their works from the collection, either of which would prevent those works from accruing revenues under the settlement; they may also *include* their works in some or all of the settlement's proposed uses and receive a portion of revenues for those uses only. Removal, exclusion, and inclusion—all distinct technical terms in the settlement—are discussed further in chapter 3.

A publisher which has not opted out will consider various factors in determining its strategies for participating in the settlement. Small publishers and individual authors may believe their strategic choices with Google are limited; large publishers might intentionally restrict their participation in the settlement's schemes and pursue individual parallel agreements with Google directly. In fact, all publishers, and presumably authors too, might obtain a more tailored relationship with Google through Google's own Partner Program. Although the settlement appears to offer one approach for all books and all rightsholders, there remain methods to affect or control Google's licensed uses from within the settlement and in parallel to it. UBC Press has taken advantage of such options.

Canadian rightsholders may have additional distinct concerns with respect to the settlement's treatment of Canadians and Canadian laws. Moral rights in Canada have a more robust tradition than in the US, and include protection of a work's integrity. The Canadian

Association of University Teachers (CAUT) points out that Google Books proposes to associate authors' work with commercial advertising they cannot choose, which may be inconsistent with their moral rights.<sup>53</sup> The argument is stronger for authors, but relevant for publishers. CAUT also points to Canada's existing provisions for unlocatable rightsholders, a model of diligent search and clearance through the Canadian Copyright Board and Access Copyright. The settlement replaces this Canadian scheme with an additional layer of bureaucracy—the Book Rights Registry—mostly to the benefit of Google, not necessarily rightsholders. CAUT argues that the Copyright Board “mechanism is flexible, [and] likelier to identify and compensate” Canadian rightsholders.<sup>54</sup> The settlement's implied conflation of Canadian and US copyright law is problematic, but at the same time it is difficult to separate the commercial circumstances of Canadian and US publishers. Canadian publishers are in many ways already at a disadvantage in reaching the large US market, and the settlement offers a way for US readers to find and purchase access to Canadian books. However, the lack of competition in the US—should Google Books remain an effective monopoly—and the fact that Canadian representatives did not participate in the negotiation of the settlement but Canadian rightsholders may be bound by it could undermine Canadian publishers' ability to develop or exploit other channels to reach the US digital book market. Although concern over the presence of commercial advertising was not a key issue for UBC Press, the economic costs of additional bureaucracies and the settlement's possible effects on emerging market opportunities were factors in determining UBC Press's approach to the settlement.

#### DIGITAL SCHOLARLY PUBLISHING AND THE LIBRARY MARKET

The commercial initiatives of the settlement present certain advantages to readers and libraries, and other separate advantages to authors or publishers. Additionally, university presses may have different concerns with respect to the proposed settlement than other publishers or rightsholders. Scholarly publishers have often obtained a transfer of all copyright interests from their academic authors. This may change the way these publishers and authors understand who holds the rights for digitized versions of the books, and a scholarly press may

<sup>53</sup> Turk, *Objections of the CAUT*, 5–6.

<sup>54</sup> *Ibid.*, 6.

have a stronger contractual claim to digital rights than a trade publisher even if digital rights are not specifically mentioned in the contract.<sup>55</sup>

The original library partners were mostly academic libraries, and their collections include many more books written by academics and published by scholarly presses than by non-academic authors or published by trade publishers. The original complaints against Google, therefore, directly implicated many scholarly presses; however, the settlement was negotiated by more commercially minded elements of the publishing industry and may not represent scholarly interests. The research library market is particularly important for a scholarly press's sales. Though the settlement focuses on older books, the limited commercial markets for scholarly books and the services Google offers the libraries could seriously alter the landscape of this market.

The settlement also allows Google to share scans with those libraries that provided books. Scholarly publishers, and perhaps all publishers, may be interested in limiting the participating libraries' permitted uses of these digital copies. The settlement imposes restrictions on such use, but publishers may see the conversion or supplementation of libraries' physical collections by digital ones as a market opportunity they do not want to share with Google. As copyright law developed, many of its rules never applied to libraries. Libraries preserve and lend the works they hold—activities that could include making and distributing copies—in order to advance public knowledge and learning, and libraries fulfilled this role long before the legal concept of copyright was articulated. Legislation's temporary and exclusive grant of copyright protection to authors and publishers does not wholly govern libraries' use of their works, in part because libraries work in the service of the greater public good and do not commercially exploit their collections. Copyright's typical restrictions are limited so that libraries may share and lend freely and widely, but exactly how widely has itself been limited by practicalities such as the number and location of books. When books are physical objects, library uses remain easily constrained; once books are digitized, lending acquires a different character. Some might argue that libraries' collaboration with Google to digitize

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<sup>55</sup> However, authors may still argue that digital rights not contemplated in the original contract remain outside the contract. *Random House vs. Rosetta Books* suggested that an exclusive licence to publish in “book form” does not necessarily extend to e-books or digital rights.

their collections oversteps their historical sharing privileges; if so, the settlement could be invalidated as inconsistent with the underlying copyright laws, or the original complaints could be considered outside the jurisdiction of the court. Regardless, scholarly publishers may see the settlement's provisions for libraries in direct conflict with their own ambitions to sell e-books or other forms of digital works to libraries or to their natural audience of scholars and students, many of whom will be affiliated with organizations targeted by the institutional subscriptions.

Academic authors may be less concerned by this library access than their publishers, as many of these authors primarily want their work to be widely available. Digital publishing promises to maximize reach, and Google Books, poised to become the single largest digital publisher, and imposing no exclusivity requirements, may become the natural choice for broad dissemination. Scholarly publishers have been the distribution channel of choice for academic authors, but as online distribution and other options proliferate, this may no longer be the case; for the moment, the imprimatur of the university press is still a critical element. Google Books could threaten publishers' traditional dominance of knowledge distribution, but the settlement creates a distribution platform that offers publishers a way to solidify some role in online distribution. Its economic incentives may draw publishers in even as Google's practices dismay them.

#### OPTING IN OR OPTING OUT: ADVANTAGES AND DISADVANTAGES

UBC Press was never pleased with Google's unauthorized digitization through the Library Project and did not necessarily want to contribute to the Library Project or Google Book Search under the settlement terms. At the same time, walking away from the deal by opting out did not seem to serve the Press's best interests. UBC Press had remained a member of the publisher sub-class under the original settlement in September 2009, and did not revise that choice in January 2010: UBC Press did not opt out and will be bound by the settlement, if it is approved. There are several factors that led the Press to this choice.

UBC Press's strategy was to optimize its own position under the settlement while minimizing Google's ability to commercialize intellectual property in which the Press



had an interest and to which the Press felt Google had no rights. The settlement offers two commercial incentives to rightsholders: *cash payment*, a minimum US\$60 one-time compensation for any works that were digitized without authorization before 5 May 2009; and ongoing income through three *revenue models*, which include ad revenues associated with *display uses*, institutional subscription fees, and consumer purchase sales. The cash payments absolve Google of legal challenge of its previous digitizing acts. The revenue models generate more revenues for Google than for publishers.<sup>56</sup> On principle, UBC Press did not want to allow Google to make display uses of scans it obtained without permission, and the *access uses* (subscriptions and purchases) could compete with the Press's own library and e-book sales. The Press decided to remain in the settlement, collect the cash payments, but remove or exclude its works from the revenue models. This approach prevents Google from making its own uses of the scans and retains for UBC Press the possibility to pursue library and e-book markets without going through Google and the Registry.

In this light, with UBC Press disinclined to pursue the residual income offered under the revenue models, opting out might appear reasonable: if UBC Press will not use the settlement to collect revenues from access uses, then perhaps it should save itself the bother of going through the claims process at all. The cash payments alone are not large sums, with the publisher's share only 50 percent or less of whatever amount the Registry distributes for each book.<sup>57</sup> However, although the work to assemble and manage a claim is not trivial, opting out does not relieve a publisher of much of that work, as it must still forward to the settlement administrator a complete list of all books that the opt-out covers. There is no economic

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<sup>56</sup> Google is guaranteed 37 percent of these revenues. Publishers and authors together may receive more than 37 percent, and authors of out-of-print works, who need not share with publishers, may receive a larger portion. Depending on the royalties or splits negotiated in their contracts, publishers' portions of the proceeds from digital rights activities may or may not be more than half of the 63 percent they share with authors. It is also unclear how much of the 63 percent reserved for rightsholders will trickle down to rightsholders after the Registry subtracts its own undefined expenses.

<sup>57</sup> See ASA, Attachment A: Procedures Governing Authors and Publishers, sections 6.2 and 5.5. For out-of-print works published before 1987, 35 percent of any revenue will go to the publisher and 65 percent to the author; if published in 1987 or later, the split will be 50–50. In these cases, the revenues will be distributed by the Registry directly to each rightsholder. For in-print works, the Registry will remit revenues to the publisher only, who will accord the author whatever splits her contract specifies. UBC Press considers the settlement's cash payments to be subsidiary rights revenue, and will pay its authors 50 percent.

savings in opting out.

Opting out would allow UBC Press to retain the right to sue Google, perhaps under some future class action, but there is no indication that another suit will emerge, and it is not at all feasible for UBC Press to sue on its own.<sup>58</sup> Grace Westcott, a Toronto lawyer specializing in copyright, puts the choice in stark terms: “frankly, it is hard to see the benefit in opting out. An individual rights-holder is unlikely to sue on his own; he forgoes any settlement amounts he’s otherwise due, and, given the dominance the Google Settlement will likely have in the digital marketplace, it seems unwise to count oneself out.”<sup>59</sup> Google has far more readers than any publisher does, and individual dissenting publishers may ultimately hold little bargaining power.

Finally, the settlement does not impose a legal obligation on Google to remove the works of those who opt out, though “it is Google’s current policy to voluntarily honor such requests, if the Books or Inserts are individually specified, are in copyright, and the author or publisher has a valid and unchallenged copyright interest in their Books and Inserts.”<sup>60</sup> As Savitha Thampi, associate legal counsel at Access Copyright, points out, remaining in the settlement may offer more legal protections than opting out.<sup>61</sup> For all these reasons, UBC Press did not opt out, though it will restrict Google’s use of its works. The Press has deferred the final decision to remove or exclude works and will consider both the court ruling and subsequent developments to the settlement terms, as well as authors’ wishes, in making those decisions.

#### A BETTER DEAL WITH GOOGLE: THE PARTNER PROGRAM

For UBC Press, the primary appeal of Google Books is that it makes books discoverable to potential readers where those readers are already searching for information. UBC Press, like

58 The original settlement required parties to give up their rights to sue should any disputes arise, and instead submit to binding arbitration. This has been relaxed: parties may agree to resolve disputes other than through the suggested arbitration process. See ASA, section 9.1(a).

59 Grace Westcott, “Googleopoly,” *The Globe and Mail*, 20 February 2009, <http://www.theglobeandmail.com/books/article972380.ece>.

60 “What happens to the Books of authors and publishers who opt out of the Amended Settlement?” (question 21), Google Book Settlement FAQs, <http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q18a>.

61 Savitha Thampi, teleconference on the Google settlement, presented by Access Copyright, 10 December 2009.

many publishers, already has a digitization agreement with Google: in 2005, the Press began submitting books to Google Book Search under the Partner Program, which offers many of the benefits the settlement does, but further limits uses by Google. Each book is included at the publisher's initiation. Publishers, not libraries, submit books to Google, which scans them and makes them discoverable in Google Books and through its search engine. For each book, Google generates an overview page with basic bibliographic data, links to related editions, a brief description, and algorithmically derived representations of the book's content (a tag cloud showing frequently used words, for example). The publisher can control the percentage of content available in a limited, non-continuous preview. Links to buy the book include the publisher's own link first. Information about the book, including the preview settings, can be changed at any time through the publisher's online account. The text ads that Google runs on pages devoted to a single book generate revenues for the publisher, and therefore the author, of that book. Google receives no additional default licensed uses as it does under the settlement. UBC Press has gradually been submitting to the Partner Program all the books to which it holds rights, unless an author has requested her book not be included in Google Books. Ad revenues are minuscule (at least for most scholarly titles), but Google Books does deliver traffic and sales leads, which result in revenues for the Press and its authors.

In terms of a publisher's ability to commercialize its books, the Partner Program is comparable to the settlement and offers the publisher more control more easily. A would-be reader can browse a book, but is directed to purchase the publisher's editions of that book rather than purchase personal access to Google's online version. When the publisher signs in to its Partner account, it can review a range of analytics on user data, page views, and click-throughs. The publisher can generate reports of ad revenues by time period or by book and can drill into this data as it pleases. This level of detail will not be available under the terms of the settlement, since Google will deal with the Book Rights Registry rather than individual rightsholders. The Registry will be able to review and audit Google's information to some extent, but the settlement does not provide for publishers and authors to obtain detailed reports from either the Registry or Google.<sup>62</sup> Under the Partner Program, publishers receive

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62 ASA, sections 4.6(a) and (e).

ad revenues directly from Google; the settlement specifies that Google forwards all revenues to the BRR, from which the Registry will first deduct its own operating costs and then remit the balance remaining to rightsholders.

The Partner Program does not sell full collection access by subscription, nor full access to individual books by consumer purchase, but these are two settlement benefits in which UBC Press is not currently interested. The institutional subscription targets an important segment of the market for UBC Press titles—academic libraries and research institutes—but arguably this is a market UBC Press is already able to reach well. It has relationships with library wholesalers and academic e-book wholesalers, who may negotiate individual sales or bundle purchases with university libraries. A number of UBC Press books were included in the Canadian Research Knowledge Network’s bulk e-book purchase for Canadian libraries; similar deals with other libraries could emerge. In contrast, Google’s institutional subscription may ultimately offer the Press low revenues that cancel out any potential to reach a wider market. In terms of consumer purchase, UBC Press titles tend to be niche books that appeal to a small, focused audience. While reaching that audience online is certainly to UBC Press’s advantage, the Partner Program already ensures titles are visible in Google Books but does not determine e-book pricing or sales strategies. The Press’s specialized titles may command above-average prices, even as e-books; as reference works with long shelf lives, they may flourish differently as electronic or print versions.

Both the Partner Program and the Library Project feed content into Google Books.

Users search both collections simultaneously from a single interface.<sup>63</sup> The agreement through

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63 Although both Partner Program and Library Project scans end up searchable in Google Books, we should not conclude that the two scanning programs are equivalent. Library Project scans result in the creation of *library digital copies* (LDCs) such that Google provides the libraries with electronic versions of their physical collections. See Google, “Information for Publishers and Authors about the Library Project,” Google Books, [http://books.google.com/intl/en-US/googlebooks/publisher\\_library.html](http://books.google.com/intl/en-US/googlebooks/publisher_library.html); see also ASA, section 7.2(a). Scholarly publishers see research libraries as the natural market for purchasing their e-books. UBC Press does not bundle its e-books with print purchases, but in fact charges the same rate for an e-book as for a hardcover book. While e-books are still not widespread, some libraries are undertaking bulk purchases of e-book versions of current and recent books (e.g., the Canadian Research Knowledge Network project). Google’s provision of an LDC could undercut the library market for purchasing e-books. Section 7.2(b)(iii) specifies that libraries can only use their LDCs to replace a physical copy if a replacement copy cannot be obtained new for a reasonable price. Display and access uses are allowed for users with print disabilities or as excerpts for educational or classroom use. The

which Google received a book governs how Google displays the book's content, but for most practical purposes a user—in the US at least—will not be aware of how Google obtained the book. Outside the US, this will be much clearer. The settlement only deals with, and offers display or access uses in, the US. The Partner Program lets Google display book material in any geographic regions for which publishers hold rights, and thus it reaches a broader audience among all Google search users. UBC Press's audience is not limited to Canada, but it is also not limited to the US; the settlement is.

#### COMBINING THE SETTLEMENT TERMS WITH THE PARTNER PROGRAM

UBC Press has participated in the Partner Program since March 2005; currently, over 20,000 other publishers participate as well.<sup>64</sup> Under the settlement, books covered by separate agreements with Google will be subject to those separate agreements' terms. For publishers who are also Google Partners, opting in to the settlement may still exclude some books published before 5 January 2009. Any books in the Partner Program will remain in the Partner Program, which will take precedence over the terms of the settlement, unless the rightsholder requests to transfer the books to an alternative agreement.<sup>65</sup> As of 2010, the majority of UBC Press's titles are included in the Partner Program, which means that even before the Press removes or excludes its list, most of its titles should not be subject to the settlement's access and display uses anyway.

In 2005, UBC Press agreed with other publishers that the Library Project was a breach of copyright. Peter Milroy, the director at UBC Press, instructed Google not to scan any UBC Press books for the Library Project.<sup>66</sup> Milroy drew a distinction between the books provided under the Partner Program—instances in which UBC Press granted permission for limited

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LDCs could be valuable as finding tools or in non-consumptive research. For books out of copyright, the LDCs would add significant flexibility and richness to the collection, since they could be used much more expansively.

64 Google, "The Future of Google Books," [2010?], <http://books.google.com/googlebooks/agreement/>.

65 ASA, section 17.9. This section states that "the payments required to be paid to the Registry set forth in Article IV (Economic Terms for Google's Use of Books) shall not apply to those Books and the payments set forth in the applicable direct agreement will apply." Article 4 governs the revenue models, and the cash payments are covered separately in article 5; thus even books also included in a separate direct agreement are eligible for cash payments if all other criteria have been met.

66 R. Peter Milroy to Sheryl Sandberg, Google Inc., 27 October 2005, UBC Press files.

preview online only—and the larger pool of titles that Google might draw into the Library Project. An attachment to the letter lists 435 titles already submitted or then underway in the Partner Program, and Milroy’s letter prohibits Google from including these or any other book with UBC Press’s ISBN prefix in the Library Project. It is unclear whether Google respected this request: of the titles Google shows as digitized without authorization, some are also “live” in the Partner Program while some are not.

The Partner Program does not have an institutional subscription component, but although inclusion in the institutional subscription set could increase the public availability of UBC Press books’ contents to US readers, the commercial advantage this inclusion offers UBC Press as a publisher is less obvious. UBC Press is still developing its own e-book marketing and distribution strategies, and bundled backlist packages targeting academic libraries could be part of them. The Press is loathe to allow Google to broker, and profit from, selling access to these books; subscription revenues to individual publishers, while difficult to predict, are likely to be modest.<sup>67</sup>

The Press already derives ad revenues and generates sales leads through the Partner Program; whatever the scope of the Press’s participation in the settlement, the Partner Program terms will govern access uses and any advertising that would accompany display uses for most books. These terms include limited preview uses for individuals similar to the settlement’s standard preview. However, the other compensation mechanism of the settlement, the US\$60 cash payments that make up for Google’s unauthorized digitization, is not affected by the Partner Program agreement. UBC Press is still entitled to cash payments for any eligible books regardless of whether it also submitted a copy of that book at another time to Google for scanning.

<sup>67</sup> ASA, Attachment C: Plan of Allocation, section 1.2 specifies a target one-time *inclusion fee* of US\$200 per book; books may also accrue *usage fees* (section 1.1). The Book Rights Registry will hold collected subscription revenues for the first ten years, with 25 percent apportioned to the inclusion fee sub-fund (this amount further divided, with 80 percent earmarked for books and 20 percent for inserts), and 75 percent apportioned to the usage fee sub-fund. If the ten-year target for a book’s inclusion fee is US\$200, extrapolating these figures suggests around US\$750 in usage fees (on average, for a ten-year period; particular books could vary from nothing to much more). The BRR will also take its cut before these revenues are shared between author and publisher. In terms of income earned, UBC Press may well see higher returns selling one or two copies of each backlist title per year than on a title’s inclusion in the institutional subscription.

It is therefore to UBC Press's advantage to remain in the settlement class *and* participate in the Partner Program. Opting in to the settlement provides UBC Press a better opportunity to legally restrict Google from making use of its titles under the settlement's blanket licence. While the Press's Partner profile lists a general instruction to exclude titles with an 07748 prefix from the Library Project, claims under the settlement include a specific instruction for the exclusion or removal of each claimed ISBN. UBC Press thus obtains control and flexibility in monetizing digital publishing—Google will not manage digital sales—but retains all the benefits of discoverability in Google Books.

# 3

## The Claims Process

Publishers and authors who have not opted out of the settlement have several ways to establish claims to their books with the Book Rights Registry, but completing a claim is the only way to obtain any share of the settlement payments or the revenues Google generates through the proposed licences. As part of the settlement, Google must pay at least US\$45 million in cash payments. Another US\$34.5 million, paid into a settlement fund, will cover administrative costs related to the settlement including the notice, claims administration, and establishment of the Book Rights Registry.<sup>68</sup> Rightsholders must register claims by 31 March 2011 in order to receive cash payments. Funds generated through the revenue models can be claimed up to ten years from the period in which they were earned.

Rust Consulting has been appointed settlement administrator. It manages settlement and claim information at <http://www.googlebooksettlement.com>, which includes a searchable database of all the books Google has or thinks it has as well as other settlement resources.<sup>69</sup> Rightsholders must create an account and can then claim items from this database online. In response to numerous complaints that the online process is too complicated, the Registry also allows rightsholders to simply submit a list of titles with as much bibliographic and other identifying information as is available; the settlement administrator will record these claims

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68 ASA, sections 5.2 and 5.3. This accounts for US\$79.5 million of the US\$125 million settlement. The other US\$45.5 million will go to the plaintiffs' lawyers. Pamela Samuelson questions whether these legal fees are excessive. Only two law firms are involved, yet the legal fees are more than the amount reserved for all the authors and publishers combined. This could be interpreted as an abuse of the class action process. Samuelson, "Reflections on the Google Book Search Settlement," presentation, OCLC/Kilgour Lecture, University of North Carolina, 14 April 2009, slide 17, <http://www.slideshare.net/naypinya/reflections-on-the-google-book-search-settlement-by-pamela-samuelson>.

69 While the site's general information is available to all, the searchable database is only available to signed-in account holders. Creating an account is simple and has no fee or other barrier.



in the database on rightsholders' behalf. However, submitting a claim using the online claims process allows rightsholders better control of their claim as well as more immediate feedback as to the claim's status and subsequent management.

UBC Press's claim highlights the main steps required to register with the settlement administrator, as well as what will likely be challenges common to other rightsholders. To complete a claim, any rightsholder must compare her own list of titles with those identifiable in Google's database, locate and resolve missing titles or other issues, submit the claim, and provide instructions to the BRR regarding display or access uses—unless she is satisfied with Google's default assumptions and permissions. The technical terms and logistics of the settlement are made manifest in the database and the claims process; understanding and evaluating these elements are key to successfully navigating a claim.

#### PREPARING PUBLISHER DATA

To assemble a claim, UBC Press required a complete list of all its titles to ensure it identified all UBC Press books in Google's database. Naturally the Press tracks this information, but over the years, locations and formats have changed to reflect available technology. There was no single source that listed titles from 1971 until the present day. The Press merged data drawn from several sources—Press Track, an internal database focused on the management of production data, and C-Press, a second internal database which, along with the University of Toronto Press distribution database, tracks inventory—into an Excel spreadsheet that also included data on titles' digital rights and e-book production status, among other details. This spreadsheet included most (though not all) of the Press's books, and became the basis for a master list.

Although UBC Press has generally been an early adopter of technology in the publishing process, a digital record of all UBC Press's assigned ISBNs did not exist. The Press had kept a paper register since 1971 that was still being used until the mid-2000s; a digital version was used inconsistently from the late 1990s, and regularly from about 2006 onward. The two sources together comprised a complete record of assigned ISBNs and confirmed a number of ISBNs apparently missing from the master list. The master list could then also be used to

populate the digital register with titles and authors of older works. Searches retrieved from Google's database in some cases highlighted missing titles (typically older works from the 1970s or 1980s that had been dropped as the Press migrated tracking systems). If Google's results were confirmed as UBC Press titles, they were added to the master list. For conflicting or missing data, cross-references with online third-party ISBN databases, the catalogues of various research libraries, as well as UBC Press's own reference library, which contains physical copies of nearly all its published books, generally supplied answers.

This reference library was a valuable resource for some of the more puzzling inconsistencies. In some cases, Google's database showed more than one title assigned to the same ISBN, or several ISBNs published in the same format and year linked to the same title. Though some Google simply had wrong, these duplicates were in other cases distinct editions (such as an abridged and a complete paperback). One book, *The Physiological Ecology of Pacific Salmon*, was produced in both hard and softcover formats under the same ISBN when damaged stock was re-covered. Two others had the wrong ISBN originally printed on their copyright pages and had corrections printed separately and pasted in; Google listed these under both ISBNs. The reference library also confirmed the format (cloth versus paper), a detail Google's database is frequently missing, and clarified multiple editions' respective ISBNs.

On 2 November 2009, Google filed a list of all books it had digitized without authorization up to 5 May 2009.<sup>70</sup> Google's set of scanned books numbered over twelve million at the time, including books Google had permission to scan; Google continues to scan books now, but these will be authorized scans (assuming the settlement is approved).<sup>71</sup> Yet not all ISBNs for books published up to 2009 are included in Google's database. Three UBC Press titles published before 5 January 2009 are not found at all. Approximately one hundred books

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70 ASA, section 3.1(b)(i). The list is not publicly available, though presumably the database reflects it.

71 Dan Clancy confirmed the collection had topped twelve million books in his remarks at the "I is for Industry" panel discussion at D is for Digitize, New York Law School, New York, 9 October 2009. This may not be twelve million unique works, as Google may scan more than one copy. See Samuelson, "Google Book Search and the Future," 113. The results for UBC Press suggest this is definitely the case; in addition, Google may count items which are not books at all, such as ISSNs or the ISBN for a multi-volume set, or erroneously group separate books as variants of the same work, as in its treatment of UBC Press's annual volumes of *Canadian Yearbook of International Law*.

are listed under either their hardcover or softcover ISBNs, but not both. Google's database includes relatively few e-book ISBNs, but UBC Press had assigned ISBNs for e-book editions of some 800 pre-2009 titles. Google's database includes additional entries that do not use the ISBN, but may use ISSN, LCCN (Library of Congress control number), OCLC (the Online Computer Library Center number, or WorldCat number), or nothing at all; while not all of these entries designate actual books, there is no simple way to revise entries to use consistent or multiple identifiers.<sup>72</sup> Various identifiers that appear to refer to the same work may show different statuses for digitization or commercial availability. Though these error rates may be acceptably small to Google given the database's size, they create a more significant effect on individual rightsholders. Since Google continues to acquire or create scans, it may be in UBC Press's best interest to claim online all relevant items currently in Google's database and claim any other assigned ISBNs not included in Google's database by submitting a list. In this way, UBC Press should be able to control the uses of its works in all forms, rather than rely on Google to correctly link multiple formats to a work's single set of instructions.

Google's database allows one entry for each ISBN or other identifier. Although UBC Press uses ISBNs only, not LCCN or OCLC identifiers, the Press's master list has a separate entry for each work rather than each identifier. This allows hardcover and paperback ISBNs (in both ten- and thirteen-digit formats) and e-book ISBNs to be associated with each other and with a single work. Title, author, publication date, rights status, and other metadata will be consistent across each format of the same book; truly separate editions are tracked as separate entries. This also permits accurate cross-referencing of digitization status and commercial availability. Google will only make one cash payment per *principal work*, so a book that was digitized without authorization in its hard and softcover versions will only be eligible for a

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72 Google's database can have multiple identifiers—ISBN, LCCN in several versions, and OCLC in several versions—in the identifier field for a single entry. The reports that the database generates use only one identifier and identifier value, and as such do not offer any clear way for a rightsholder to confirm identifiers that represent the same work or edition are linked, or to link database entries with no identifiers to their correlates. In an email message to the author on 22 January 2010, Kory Kennelly, a project manager with Rust Consulting, confirmed that Google is working on ways to link editions and translations. As of January 2010, individual rightsholders are not able themselves to add or correct bibliographic data (ISBN, title, author, publisher name, publication year), although Google invites rightsholders to submit lists of errors that it will correct itself in due time.

single cash payment.<sup>73</sup> Conversely, if any format or edition of a work is deemed commercially available, then all formats and editions of that work will be considered commercially available, with Google's default licensed uses set to match.<sup>74</sup> The settlement administrator has not articulated how Google will reconcile hard and softcover versions, nor how it will determine if a revised edition is truly a new principal work. Additional challenges may arise with respect to co-publications or reprint editions, which could involve multiple publishers. The settlement limits Google's obligation to one cash payment per principal work; in practice, the costs of identifying separate works and managing or resolving competing claims will fall to the rightsholders themselves.

The Google database permits broad searches as well as title-specific ones, and users can download search results in spreadsheet format. Three sets of broad search terms located most Press titles: by ISBN prefix, by most common short name (UBC Press), and by full name (University of British Columbia Press). Because of the many possible abbreviations of UBC Press's name, and Google's demonstrated inconsistency, there is no reason to believe these searches have successfully retrieved all UBC Press items in the database. Sadly, this abbreviation problem likely affects most scholarly presses, whose names frequently reference both a university and a geographic place name (potentially confusing its works with government publications as well) and whose works may make up the majority of research libraries' holdings.

For UBC Press, the ISBN prefix set is most relevant. It contains only a few duplicates and non-UBC Press books under the wrong ISBNs; it also omits about a third of the Press's pre-2009 hardcover and paperback ISBNs. The "UBC Press" set captures additional titles listed by LCCN and OCLC, as well as many titles not actually published by UBC Press. The full name set includes a wide variety of titles, many of which are published by other units or departments at UBC, but also some legitimate titles not captured previously. Downloading

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73 ASA, section 5.1(a). Two books whose content is identical, except for ISBN or format, are treated as one work with only one cash payment. Two books that contain the same principal work but also contain other variant materials (such as different forewords or annotations) could be eligible for additional cash payments, though possibly only once as a book, with other portions treated as inserts.

74 ASA, section 3.2(d)(i). If a revised edition is commercially available, previous editions, even if out of print, will be treated as commercially available as well in setting default display uses.

search results from Google's database allowed for close review of the entries, including problem identification (duplicates, ISBN errors, missing/extra editions). It also provided a simple gauge of the number of titles digitized without authorization, as this data is included in Google's database for each entry. In October and November 2009, these search results showed nearly 54 percent of titles had been digitized without authorization in at least one format (491, any edition, out of 916 separate works). By January 2010, search results for the same set showed only 41 percent had been digitized without authorization (379 out of 916).<sup>75</sup> As Google continues to revise its database, these results could continue to change; there is no way that a publisher can verify what Google digitized when. Google appears to be its own auditor in this respect.<sup>76</sup> However, the digitization status does not affect the publisher's claim to the book (merely the publisher's expectation of compensation related to that claim). Since Google continues to update its records in this area, rightsholders should strive to claim all works, not just those that Google believes it scanned without permission.

The next step was to determine to which books UBC Press held rights. Until recently, most contracts did not explicitly address electronic rights; UBC Press considers the revenues from the settlement to be a form of subsidiary rights and proposes to split the revenues 50–50 with authors. For some books, addenda had been prepared to explicitly address electronic rights in conjunction with the negotiation of the deposit of a large number of e-books in a recent Canadian Research Knowledge Network initiative. A very few contracts have included time-delimited reversion clauses, but in general, UBC Press contracts provide for a book to

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75 In a 10 March 2010 email, Kory Kennelly explained this dramatic shift: in November 2009 Google updated the database "to reflect books that were scheduled for digitization, but ended up not being digitized. In this update, Google reviewed the digitization status of books to further ensure the accuracy of the designation, and subsequently made further updates. Google has confirmed that the current digitization status of the books UBC [Press] is inquiring about are accurately listed in the books database." The Press has no way to verify this claim.

76 There is no reason to assume a Partner book would only be scanned through the Partner Program. The Google Books overview page includes digitization source and date for Library Project scans, as seen with the book *Killer Whales: The Natural History and Genealogy of Orcinus orca in British Columbia and Washington State*. UBC Press initially provided the 2000 edition through Google Partner with limited preview, and later requested no preview. Google also has the 1994 and 2000 editions available in snippets only; these two include, under the "More book information" section, two additional metadata fields: "Original from" and "Digitized." Both books were digitized from the University of California on 7 August 2009. See the appendix for screen shots that demonstrate these variations.

pass out of print only upon written notification by the publisher or written request from the author. Indeed, with print on demand becoming much easier to manage (both in terms of the Press's current workflow, and recent changes with its distributor), UBC Press is contemplating how it could extend the sales life of many of its titles, including older backlist items. Unless rights have reverted or an author has given specific instructions, UBC Press considers any of its titles which exist as active e-books or are available for print on demand to be "in print." Additionally, UBC Press maintains relationships with other publishers that lead to co-publication agreements or buy-ins; for these titles, UBC Press may not hold the relevant rights even if the Press is actively selling physical copies.

To confirm the status of each title, information from author files was collated with the Press's e-book tracking sheet and active sales information. Peter Milroy also reviewed the lists to confirm titles' status and to identify titles whose rights belonged to other publishers or to which special circumstances applied.

#### TECHNICAL LOGISTICS: A GOOGLE DATABASE HOW-TO

With a complete list of all UBC Press ISBNs, the Press could then turn to the settlement claim website. Claims for books can be initiated in several ways.<sup>77</sup> "Upload a file of books" uses a spreadsheet listing any number of books; "search for books" offers several potential search fields and accepts whole or partial expressions of the desired search terms. A rightsholder with only a few works to claim might choose the search for books option, select the relevant works from the results displayed online, and click the submit button to complete her claim. Open-ended searches (such as by ISBN prefix or publisher name) can be conducted most easily from the search for books screen; the results can be downloaded as a spreadsheet for review. To claim by uploading files, a rightsholder would complete a spreadsheet pre-populated directly from the Google database or obtain a blank template and populate it herself. (Open-ended searches, such as by ISBN prefix, via spreadsheet fail because of the large number of matches.)

To successfully complete a claim, several criteria must be satisfied. (See Figure 3.1 for a

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<sup>77</sup> The claims process and settlement rules for inserts are not necessarily the same as those for books. Since UBC Press does not have any inserts that it will not already claim as books, this report deals only with books.

Figure 3.1 Diagram of the Google Books Database Lookup Procedures, as at January 2010

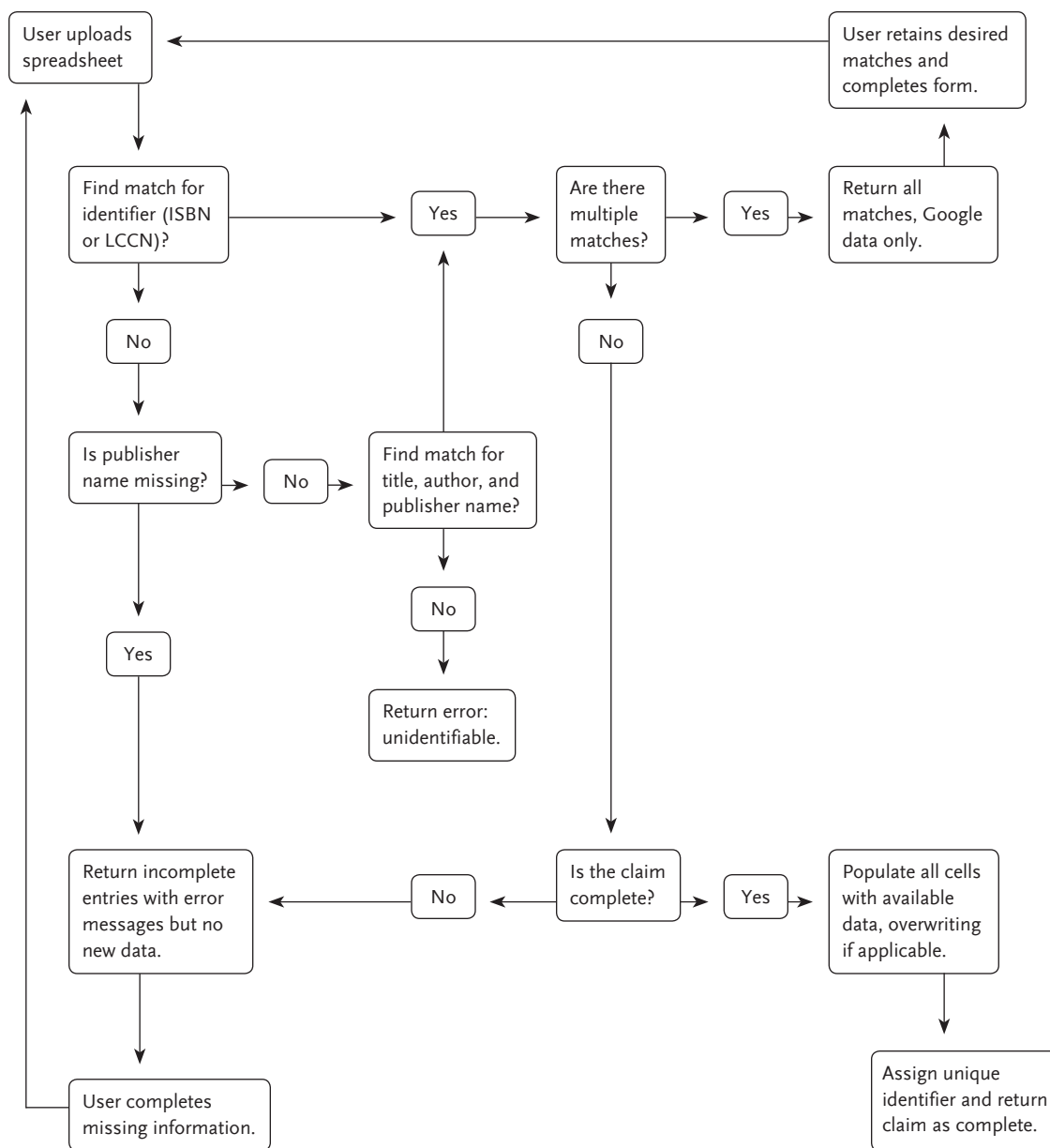


diagram of the database lookup procedures.) Each book will be described on one line in the spreadsheet, with a number of columns for different data. First, the database considers the identifier, now limited to ISBN or LCCN. If no ISBN is provided, the database next seeks a match using the combination of title, author, and publisher. If this combination finds no match (which could be because too much information is provided, such as including “University

of BC Press” when the database lists “UBC Press”), the claim will be returned with the error “unidentifiable.”

If either the ISBN or other bibliographic data produce a match, the database will then check for multiple matches. If more than one entry seems to use the data provided, the claim will be returned with the error “multiple.” Each possible match will be returned populated with Google’s available data on author name, title and subtitle, publisher name, publication year, digitization status, commercial availability, and format (Google recognizes hardback, paperback, and book options). The rightsholder can delete whichever entries are not her books and complete the remaining fields.

If multiple matches are not found, or once multiples have been addressed, the database checks for completeness. A complete claim must include an assertion of rights status. In order to give instructions as to the use of the work, publishers must be *confident* or *highly confident* the rights have not reverted (authors must be confident the rights have reverted).<sup>78</sup> Publishers can confirm commercial availability and challenge Google’s designation if necessary, though this is not required. If some lines remain incomplete, the claim for those items will be denied and will return an error message for each affected item. Incomplete claims may be the result of an invalid ISBN or LCCN, or a line with only the title and author (no identifier or publisher). Incomplete claims will be returned as submitted, without drawing additional information from Google’s database. The rightsholder can correct or add data and resubmit, at which point the database will reiterate its review. The presence of incomplete items or other errors in the spreadsheet does not block the successful claim of complete items in the same spreadsheet.

Once the completeness test is passed, the books have been claimed and will appear in the rightsholder’s account online. Fresh downloaded results will show that for each item, Google’s data has populated the fields for author name, title and subtitle, publisher name, publication year, digitization status, commercial availability, and format. Google will also indicate any other claimants (by name) to the book, a Registry identifier (a 103-character alphanumeric

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78 “Highly confident” means the publisher bases its claim “on the individual Book or contract for the Book”; merely “confident” means the publisher bases it “on the type of Book or type of contract for the Book” (that is, relying on generic data rather than specific and confirmed data). See ASA, section 13.1(c)(ii)(2).



string), and the date and time of the most recent update to the claim.<sup>79</sup>

The database records rightsholders' submissions regarding commercial availability separately from Google's designation. Certain fields are overwriteable: the assertion of confidence regarding rights status; the option to exclude the book from all display uses (a "no" or blank answer uses the default settings based on commercial availability); the option to remove the book from Google Books and the library digital copies; and the option to unclaim the book. Exclusion instructions can be more fine-grained, but the spreadsheet allows only for the Google-defined defaults or complete exclusion. To allow certain uses and deny others, a rightsholder must submit instructions on a book-by-book basis, which can be accomplished by selecting a particular book in the account management screen and then selecting the specific uses to permit. Instructions can be changed as often as necessary, although any instructions other than Google's defaults or blanket exclusion/inclusion will be cumbersome to manage.

Although the settlement administrator suggests rightsholders can correct their bibliographic data, this capability is non-functional as of January 2010.<sup>80</sup> Google may be hesitant to accord millions of rightsholders (not all of them pleased with their lot) read-write powers in its database, but funnelling corrections requests through the settlement administrator seems a painfully slow way to address errors or omissions in the database. Linguist Geoffrey Nunberg points out a number of metadata errors in Google's data, including mismatched titles (i.e., clicking a link on one title leads to a different book); errors in differentiating authors from foreword-writers, translators, or names in the title; date errors; and bizarre classifications. Nunberg questions "whether Google's engineers should be trusted to make all the decisions about metadata design and implementation for what will probably

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79 Although the Registry identifier appears to be a convenient stable marker, allowing revisions as necessary to any of the ISBN, title, or author fields, this may not be the case. In an email on 29 January 2010, Kory Kennelly confirmed that the Registry identifier may not be static and is primarily for Google's own use in maintaining the database. However, results with UBC Press claims indicate that a claimed book always uses 103 characters, while an unclaimed book's identifier varies in length and is typically 200 to 300 or more characters.

80 "Instructions Regarding Claiming Template Spreadsheet," "How to Use the Spreadsheet to Manage Claimed Books" section, <http://www.googlebooksettlement.com/help/bin/answer.py?answer=128054&hl=en>.

wind up being the universal library for a long time to come, with no contractual [sic] obligation, and only limited commercial incentives, to get it right.”<sup>81</sup> Paul Duguid echoes these concerns, underlining in particular that while Google may be making “a splendid, fantastic bunch of books,” it is a long way from a research corpus of real scholarly use if its metadata does not improve. Research libraries may decline to purchase subscriptions if the metadata is too unreliable. At the same time, Google’s responsibility to “get it right” is amplified by the fact that in taking the role of “the one” digital library, Google has effectively diverted scholarly and library resources away from other, perhaps higher-quality, scanning projects. Duguid mentions various funded research projects that have withdrawn resources from digitization activities in the wake of Google’s proposal to scan everything itself.<sup>82</sup> Inadequate metadata could have unintended repercussions for the future of the book, especially if books are increasingly virtual rather than physical. Nunberg’s argument hints at what researchers and the public might lose in the grand digital library: “Google’s great achievement as a Web search engine was to demonstrate how easy it could be to locate useful information without attending to metadata or resorting to Yahoo-like schemes of classification. But books aren’t simply vehicles for communicating information, and managing a vast library collection requires different skills, approaches, and data than those that enabled Google to dominate Web searching.”<sup>83</sup> Library classification schemes, while not perfect, hold meaning. The contexts of and interrelationships between texts are enriched with creative and semantic analysis that mere indexing may not afford—even an index as all-encompassing as Google’s.

#### KEY SETTLEMENT CONCEPTS FOR RIGHTSHOLDERS

A book’s digitization status (with or without authorization, as at 5 May 2009) determines whether it is eligible for a cash payment. These payments—at least US\$60 per book, and

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81 Geoffrey Nunberg, “Google Books: A Metadata Train Wreck,” *Language Log*, 29 August 2009, <http://languagelog.ldc.upenn.edu/nll/?p=1701>.

82 Paul Duguid, remarks at “Is Google Good for History?” panel discussion at annual meeting of the American Historical Association, San Diego, CA, 5 January 2010. Video at <http://www.youtube.com/watch?v=27ipvbZaZ8g>.

83 Geoffrey Nunberg, “Google’s Book Search: A Disaster for Scholars,” *The Chronicle of Higher Education*, 31 August 2009, <http://chronicle.com/article/Googles-Book-Search-A/48245/>.

possibly more if relatively few books are claimed and eligible—compensate rightsholders for Google’s failure to obtain permission to copy the works and buy Google the legal right to use the scans.<sup>84</sup> Google alone can affirm whether a book was digitized without authorization. Rightsholders may be able to compare the database information with the digitization provenance that can appear in Google Book Search’s overview pages, but this is prohibitively time-consuming (for publishers if not authors) and may be inconclusive.

The commercial availability of a book determines the default permitted uses Google is licensed to make. If the book is commercially available new (used book sales do not count), Google will not make display uses unless the rightsholder grants explicit permission. A book that is not commercially available will be included in display uses, although the rightsholder may explicitly deny some or all display uses.<sup>85</sup> For the convenience of the settlement, commercial availability is used to establish whether a book is in print, but this designation only determines Google’s default uses. Once rightsholders have claimed their work, they can override these defaults and change instructions to Google at any time. If more than one rightsholder has an active interest in a work (such as the author and publisher of an in-print book), Google must respect the more restrictive instructions.

There are several types of display uses, all of which centre on the direct expression of the book’s content. Bibliographic data, a list of frequently occurring words or phrases in the book,

84 The settlement requires that Google pay at least US\$45 million in cash payments, with minimums of US\$60 per principal work, US\$15 per insert, and US\$5 per partial insert. (An insert could be an essay, chapter, short story, foreword, quotation, excerpt, or other non-book length work contained in a collection or within or alongside the book’s principal work; see ASA, section 1.75.) If a large number of rightsholders claim works, Google may have to pay out more than US\$45 million in order to award the minimums required. If few rightsholders claim works, Google will increase the individual payments up to maximums of US\$300, US\$75, and US\$25 until the full US\$45 million is disbursed. See ASA, section 5.1(a) and ASA, Attachment C, section 3.2. It seems unlikely that rightsholders would receive substantially more than the minimums, since US\$45 million would cover only 750,000 books (or perhaps 500,000 books and 1,000,000 inserts). As of 5 May 2009, the digitization cut-off date for cash payment eligibility, Google had scanned between seven and twelve million books; even discounting public domain works, Partner Program works, and duplicates, claims could easily surpass US\$45 million. As of 8 February 2010, 1,125,339 books and 21,829 inserts had been claimed, though not all of these are necessarily eligible for cash payments. For interim figures on claimants and claims, see Tiffany Allen, Declaration [of Settlement Administrator], 11 February 2010, 4, [http://thepublicindex.org/docs/amended\\_settlement/Allen\\_declaration.pdf](http://thepublicindex.org/docs/amended_settlement/Allen_declaration.pdf).

85 ASA, sections 3.2(b), (d)(i), and (d)(ii). If Google finds no information, it will determine the book is not commercially available.

or a map of the place names mentioned are not display uses.<sup>86</sup> Display uses include snippets, front matter display, limited preview (in various configurations), and access uses (institutional subscription, consumer purchase, and public access). Snippets can be allowed or restricted separately from other types of preview use, as can front matter display, which includes the title page, copyright page, table of contents, and index. The standard preview is Google's default preview for most types of books, and allows the user to see up to 20 percent of the book (but no more than five adjacent pages at a time). Rightsholders may adjust the percentage viewable, or may instruct Google to use a different type of preview. Fixed preview includes the front matter up to the table of contents, the index, and a set of pages up to 10 percent of the total book: the pages displayed will not be selected based on a user's search and will be the same for all users. Continuous preview allows up to 10 percent of the book, and does not have the limitations on number of adjacent pages that standard preview does.<sup>87</sup> No preview is also an option, as is "unlimited" preview, if the rightsholder elects to display 100 percent of the book.

Access uses, a type of display use, allow users to view an entire book. As with other display uses, Google may by default offer access uses for books that are not commercially available, and rightsholders may override that default. There are three ways for users to access full texts. With institutional subscription, for which Google sets the price, universities or other educational institutions as well as government or corporate institutions pay an annual or per-semester fee for their members' unlimited access to the collection. Individual users will have the option of consumer purchase, which gives them access to individual full texts online. Users will not download their own copy of the work, but will connect to it through Google. Rightsholders can set the consumer purchase price, or they can allow Google to determine the price through an algorithm that is supposed to maximize sales revenues and distribute prices among Google's designated price tiers.<sup>88</sup> The third access use is through free terminals at

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86 ASA, section 1.94.

87 ASA, sections 4.3(b) and (c).

88 ASA, section 4.2(c). The pre-set tiers—specific percentages of all books at twelve set price-points—suggests price-fixing to some critics, as discussed above. James Grimmelmann points out that placing a predetermined portion of books in each pricing bin is "mathematically incompatible" with an algorithm that also sets the price for each book independently in a simulation of the competitive market. Grimmelmann, Letter from the Institute for Information Law and Policy, 5.

public libraries and at non-profit post-secondary institutions. This public access includes the same collection as the institutional subscription, but some features of the subscription (the ability to copy/paste or annotate text) will be disabled.<sup>89</sup>

#### THE MEANING OF “IN PRINT”: SETTING LICENSED USES AND SETTING RIGHTS

The settlement aims to separate in-print from out-of-print books and to permit blanket uses of out-of-print books, while reserving exploitation of in-print books for rightsholders’ own products. To do this, the settlement uses a book’s commercial availability to create a technical definition of “in print”: commercially available books will be designated “in print” and will not be displayed through Google Books. In this way, Google’s display and access uses should not cut into existing trade markets, as Google will direct would-be readers of the book to sites from which they can purchase it. The settlement presents itself as creating opportunities to find and read primarily books which are not otherwise commercially accessible.

The settlement’s particular definition of “in print” is not entirely in line with the way that term is usually understood within the publishing industry. Generally, a publisher’s contract with an author includes some provision for establishing whether a work is out of print and how and when the rights revert to the author. These terms vary. UBC Press contracts, for example, do not set automatic reversion terms, though contracts can be terminated by written notice or request. UBC Press may hold small quantities of stock for a number of years, continuing to promote the books on its own web site and through its distribution partners. With the increasing convenience and competitive performance of print on demand, UBC Press anticipates better satisfying long-tail demand for a larger proportion of its backlist. Since scholarly monographs achieve consistently modest sales but hopefully long lives, many authors have been content to let the Press manage and exploit rights indefinitely. As such,

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89 These three modes of access are the only access uses proposed for immediate implementation. The settlement also proposes three additional access uses as possible new revenue models. These may or may not be established in future: print on demand, to create physical copies of books not otherwise commercially available; file download, such as PDF or EPUB files for personal use; and consumer subscription, to offer individuals access to the full collection or a subset of the collection, similar to the institutional subscription. See ASA, section 4.7.

many older UBC Press books are still considered in print: contractually, UBC Press retains active rights even if the book is not continuously sold.

Apart from establishing Google's licensed use, the commercial availability/in-print designations also have implications for rights control. The settlement deems rights in an out-of-print book to have reverted to the author, in which case the author is the sole rightsholder. If the rights have not reverted, then both the author and publisher are rightsholders: both can give instructions to Google through the BRR on how to display or sell access to the work, and both share in any revenues from such uses.<sup>90</sup> But if Google fails to find commercial availability, and lacking instructions to the contrary, the Registry will assume the book is out of print, rights have reverted to the author, and the publisher may not have any input or receive compensation related to Google's use of the book.

Commercial availability is easier for Google and the BRR to determine than contractual rights status, but the settlement's approach ignores or oversimplifies existing agreements between authors and publishers and is potentially disadvantageous for publishers. A commercially available book is almost certainly in print, but a book may still be officially in print—at least according to UBC Press's contracts—even if it is not commercially available. The settlement acknowledges this possibility, and allows for rightsholders to override Google's out-of-print designation separately from any challenges to its commercial availability designation. There are two methods to reclassify a book as in print. The first defers to the author-publisher contract terms, and allows that if rights have not reverted to the author according to those terms, then the book is still in print. The second requires the publisher to publicly announce its plan to publish a reprint or revision, and its release must occur within one year.<sup>91</sup>

The designation of commercial availability is significant to all rightsholders because it determines Google's default use. More important to the publisher, however, is the ability to claim rights at all. In order to complete a claim, publishers must communicate to the Registry their level of confidence that rights have not reverted. This is the procedural technique for

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<sup>90</sup> Work for hire may be controlled solely by the publisher or other rightsholder rather than the author.

<sup>91</sup> ASA, Attachment A, section 3.2.

informing the BRR if a book is in print according to its author-publisher contract. If the publisher is confident or highly confident that the rights have not reverted, it will have a voice in controlling Google's uses of a work, such as excluding or removing the work. However, the publisher will only receive a share in any payments or revenue if it is highly confident; mere confidence will leave all disbursements to the author alone. Although it can be time-consuming to confirm individual titles' rights status, this is not an unreasonable demand of publishers, which should already have systems to manage rights.

Establishing that a book is in print does not affect Google's default permitted uses—those are still governed by commercial availability. In or out of print establishes whom the settlement recognizes as holding rights. Some critics of the settlement suggest that older contracts never addressed digital rights but that the settlement's author-publisher procedures allow publishers to claim rights to which they are not entitled. Although academic authors often assign full rights to scholarly publishers, a trade publisher's claim may be more ambiguous. The author-publisher procedures also appear to rewrite existing contractual arrangements between authors and publishers (in order to set revenue splits paid by the BRR, for example). Authors and publishers may both feel unfairly treated by the settlement's attempt to impose a one-size-fits-all allocation of revenues. Similarly, the settlement may oversimplify rights; authors may have granted different subsets of rights to several publishers or other entities.<sup>92</sup> In this as in other aspects, the settlement privileges Google's administrative convenience over individual rightsholders' justifiable claims.

#### NEXT STEPS FOR UBC PRESS

UBC Press will claim all its books (including those already in the Partner Program) and share any settlement revenues with its authors. At this time, UBC Press is less concerned with ensuring Google has accurate information on titles' commercial availability. Rather than adjust individual display uses, UBC Press wants to withhold all titles from all settlement display uses,

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<sup>92</sup> These issues also comprise the main complaints of the DOJ with respect to the author-publisher procedures, which it contends cast doubt on the validity of the class action: specifically, the author-publisher procedures overturn distinct individual contracts, which could create conflicts of interest between class members and undermine the conception of the class. See US DOJ, Statement of Interest (2010), 14–15. Many objecting authors echo these concerns.

overriding Google's defaults for all books. The Press is more concerned with establishing the legal priority of its own contracts with authors rather than allowing Google's author-publisher procedures to rewrite them. UBC Press considers the identification or negotiation of in or out of print to be a matter between its authors and itself, not something Google or a US class action can determine by decree.<sup>93</sup> The Press is better positioned to identify and locate authors or their heirs than the Registry, and can offer authors more efficient disbursements and ongoing claims management.

It is likely that until the 31 March 2011 deadline, Google will continue to revise and expand its database, and the settlement administrator may further refine the claims process. UBC Press can claim books already present in Google's database immediately. To add books, the Press may submit a list to the settlement administrator or may wait in case the online process allows that. The advantage of waiting is that the Press retains control of the data and its accuracy. At the same time, UBC Press has no plans to discontinue its participation in the Partner Program. The clear limits of this program suit UBC Press's interests better than the sweeping licence granted by the settlement agreement.

UBC Press intends to withhold its books from Google's digitized collection under the settlement. There are two types of withholding possible: removal and exclusion. Removal is permanent and means the work will not be available in Google Books at all: its contents would not appear in searches (the indexed scans would have been removed), nor in institutional subscriptions or other access uses. If a removal request is made on or before 5 April 2011, the book will also be removed from the set of library digital copies (LDCs: the scans that Google shares with the libraries which have shared their physical collections with Google) and from the *research corpus*. Removal requests made after 5 April but before 9 March 2012 will effectively remove a book from Google Book Search and access uses, but individual libraries may keep their digital copies (all books they already hold in their physical collections), with

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93 Google can challenge a rightsholder's assertion of commercial availability, but it seems that Google will not challenge the author-publisher procedure tests. (Google does not have access to author-publisher contracts, so would have no grounds.) To reclassify a book based on its contract terms rather than its commercial availability, a publisher could be required to produce the contracts for the Registry, especially if there are disputes between publishers and authors over in-print status. See ASA, Attachment A, section 3.3.



restrictions placed on their use. The research corpus will also retain removed books, though it can only be used for non-consumptive research—none of its books will have their content displayed.<sup>94</sup> If UBC Press removes its works, it will effectively block Google from extracting any commercial value from those works under the settlement, and will block libraries from acquiring free digital versions of their own collections, potentially preserving the incentive for libraries to convert or supplement their physical collections with e-books purchased from UBC Press itself or distributors that offer a more favourable or direct relationship to the Press. (LDCs are not lending copies in the usual sense, though they can be used to replace a damaged or lost book if that book cannot be obtained new at a reasonable price, and excerpts can be used in classrooms or other fair-use educational contexts.<sup>95</sup>)

Exclusion imposes fewer restrictions on a scan's use. A rightsholder can exclude a work at any time, and can change from include to exclude and back again. Works can be excluded from some or all display uses, as selected by the rightsholder, although access uses are subject to a coupling requirement: if consumer purchase is allowed, then the book must also remain in the institutional subscription collection; if institutional subscription is allowed, then the book must also be available through the free public terminals offered to some libraries.<sup>96</sup> If UBC Press excludes its works from all display uses, it retains the ability to experiment with the whole spectrum of proposed uses and evaluate them based on their actual performance. At the same time, Google and participating libraries retain certain uses of the works which may affect UBC Press's own efforts at digital publishing sales. With exclusion, the Press receives no additional revenues, since revenues are only triggered by display uses. However, Google may

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94 Google's obligations to remove books are specified in ASA, section 1.126. If a book has not yet been digitized when a removal request is made (at any time), Google will use reasonable efforts not to digitize the book at all. Removal requests made after 9 March 2012 will only be honoured if the book has not already been digitized; otherwise, the rightsholder will only be able to exclude a book. See sections 3.5(a)(i) and (iii).

95 See ASA, section 7.2(b), especially 7.2(b)(iii).

96 ASA, section 3.5(b)(iii); see also Claim Form for Members of the Publisher Sub-class, page 4 (available at <http://www.googlebooksettlement.com>). The coupling requirement works to Google's advantage. Publishers already have ways to negotiate bulk deals with libraries, but have fewer channels through which to reach individual consumers online. If publishers want to maximize their use of Google to reach individuals, they must give Google what it wants, which is to build a large collection to support subscription sales.

be able to extract commercial value from the works simply by their ongoing presence in its dataset and in the research corpus; after all, Google's business is founded on its excellence in search, and the larger the pool of data, the better its search algorithms will be.

UBC Press's assertion that virtually all its books are still in print unless authors say otherwise could be cynically interpreted as an opt-out digital rights clearance strategy of its own. However, the Press maintains ongoing communication with its authors, and, unlike Google's, UBC Press's use of authors' work is founded on an initial explicit grant of rights and mutual investments in the work's content.<sup>97</sup> It will keep authors informed of settlement developments, though the Press has deferred its planned author outreach until the settlement's future is clearer following the ruling. The Press's strategy restricts access through the settlement but maintains discoverability through the Partner Program; however, authors can request that the Press remove titles from the Partner Program and can provide their own instructions to the Registry. Pamela Samuelson posits that most academic authors would prefer a more generous interpretation of fair use or even open access, since their interests in books (and intellectual property) emphasize public dialogue and dissemination rather than economic interests.<sup>98</sup> UBC Press is open to author input on how to include works in Google Books, though it does not at the moment favour open access.

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97 As do many scholarly publishers, the Press invests significant editorial work (as well as production and promotion) in its books and may derive just enough revenue to cover its direct and often substantial costs; academic authors may expect little commercial reward from book sales, but still enjoy tangible benefits from its publication through tenure or promotion regardless of its sales levels.

98 Pamela Samuelson, remarks in Fairness Hearing, 58. All the academics with which she has spoken (at minimum, presumably the 150 co-signatories to her objection letters) have "to a person" agreed that they would prefer their out-of-print books to be open access (*ibid.*, 55).

# 4

## A Steal of a Deal: What the Settlement Offers the Parties

Technical interpretations of the settlement's fairness—whether it meets the criteria for a valid class action, represents all members' interests, or violates antitrust laws—have been discussed above. However, there are other points to consider in evaluating whether the deal treats all parties fairly. The costs and benefits of the economic and commercial transactions the settlement describes, and their subsequent effects, will not be shared equally among all parties. Google has invested financial resources in developing the Library Project, and if the settlement is approved, Google will incur additional direct expenses in the form of its settlement payments as well as ongoing development and maintenance of the Google Books digital collection. While rightsholders will not make comparable cash outlays, the revenues generated by Google's use of their works may not offer them significant financial returns, either. These revenues will pay for a range of new services from Google (scanning, hosting), but also for the entire edifice of the Book Rights Registry itself.

Google emerged from the settlement negotiations with its cost obligations mostly known, with guaranteed revenue rates, and potential additional commercial benefits whose scope will be revealed over time. It is possible that the total cash payments will swell beyond US\$45 million, but even if they do, millions of dollars are surely manageable sums for a company earning billions, and Google also obtains legal access to millions of books for no fees at all, since not all books are eligible for cash payments. Rightsholders, however, are in the trickier position of estimating the potential value of their works in a market just barely emerging. There are no expiry terms in the settlement: rightsholders will only be able to license these rights to Google once. Technological changes could mean that in just a few years, the subjects of this settlement might be valued quite differently. Google also had to estimate this potential

value, but the stakes for a resource-rich corporation are surely different than for publishers and authors, who have limited resources in comparison and who in most cases do not even know if or when Google digitized their works. The settlement saddles rightsholders with unknown costs (indirect costs, deducted from their portion of earned revenues, and opportunity costs of selling Google the right to scan their works at what might be undervalued rates), non-guaranteed revenue rates, but also some degree of economic benefit.

#### FOR GOOGLE: MORE THAN FAIR

If the settlement is approved, Google can congratulate itself on a particularly excellent deal. It avoids years of uncertainty, not to mention ongoing legal fees, in litigation. It avoids prohibitive transaction costs by not having to clear rights individually for the works it has scanned already and all the works covered by the settlement and yet unscanned. It will receive a blanket licence to use a broad swath of copyrighted works, and it will enjoy an exclusive position, both as a market leader and with legal peace of mind, in the realm of digital rights: its private licence goes much further than current copyright legislation, particularly with respect to orphan works, for which rights are currently unobtainable in any market. Low transaction costs and legal certainty are key requirements for any mass digitization or digital archiving project.<sup>99</sup> The settlement offers both, to Google and Google alone. It will be years ahead of any potential competitors digitizing print works and may easily end up with an effective monopoly and a leading stake in the emerging markets for digital books. And all this costs Google only US\$125 million—a mere 0.53 percent of its gross revenue, or 1.92 percent of its net income, for 2009 alone.<sup>100</sup>

Had Google lost its fair use claim in court, it could have faced statutory damages for copyright infringement of US\$750—or as much as US\$150,000—per instance.<sup>101</sup> Even if

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99 Sally McCausland, “Googling the Archives: Ideas from the Google Books Settlement on Solving Orphan Works Issues in Digital Access Projects,” *SCRIPTed* 6, 2 (August 2009): 392.

100 Google, “Google Announces Fourth Quarter and Fiscal Year 2009 Results,” 21 January 2010, 9. Available at [http://investor.google.com/releases/2009Q4\\_google\\_earnings.html](http://investor.google.com/releases/2009Q4_google_earnings.html). The unaudited figures list total revenues of US\$23.65 billion and net income of US\$6.52 billion.

101 See Lewis Hyde, “Advantage Google,” *The New York Times*, 1 October 2009, [http://www.nytimes.com/2009/10/04/books/review/Hyde-t.html?\\_r=1](http://www.nytimes.com/2009/10/04/books/review/Hyde-t.html?_r=1). Samuelson quotes the same figures; see “Reflections on the Google Book Search Settlement,” slide 8.

the judge did not fine Google for each of twelve million instances, this liability could have easily totalled far more than the US\$60 or even US\$300 per book that Google pays under the settlement. Google maintains it was confident that scanning and snippets were both permissible fair uses, and it was therefore not afraid of statutory damages. Settling could be viewed as an admission of uncertainty; regardless, settling could give Google far more permissible uses than could ever have been considered “fair.”

Google has suggested its scanned books will not generate vast revenues; after all, the settlement primarily deals with out-of-print books, and the more valuable market is books in print or yet to be published.<sup>102</sup> The revenues Google will share with rightsholders may well be modest, but they represent just a small slice of all the uses to which Google might put the book content as pure data. Adding all books up to 2009 to its dataset could help Google improve its search algorithms and optical character recognition technologies, or develop voice recognition or translation functions. Since Google is a search company with growing media concerns, these are significant benefits—any of which could contribute to increasing revenues or lead to new commercial products or services. It is difficult to value the non-consumptive uses of the dataset because many of the possible uses are potential uses, in emerging technological territory: no one knows how they will play out, but rightsholders will not participate in the development or monetization of these non-consumptive uses should they emerge.

Dan Clancy, Google Book Search’s engineering director, denies that the books are such a boost for Google’s databanks. His argument estimates all the pages of all books Google wants to scan—somewhere between 12 and 20 million books, perhaps an average of 200 pages each, and clearly an impressive dataset. Yet Google has also scanned and indexed some 100 billion web pages: the book-page dataset is not even on that order of magnitude. In terms of raw data, scanned books thus offer less information than web pages.<sup>103</sup> However, Clancy’s appraisal of “information” seems to consider merely sheer quantity of characters, rather than the varying qualities (syntactical, contextual, semantic, linguistic, cultural) any information-as-text also

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102 Clancy, remarks at “I is for Industry.” Clancy claims out of print books represent only 3 percent of the book market.

103 Clancy, “I is for Industry.”

contains. Given that Google's powerful search function depends on its interpretation of the links between discrete pieces of data, the semantic depth in books surely makes them more valuable than Clancy lets on. Web pages collect information from the last twenty years or so, whereas books offer a sophisticated and robust repository of knowledge that spans centuries. Even if the qualities of individual books offer Google little value—it could be that copious amounts of raw data really are the only valuable element for Google's search algorithms—individual readers will and do find worth in individual books. Google's possession of the books that readers prize will make Google more attractive to search users and further secure its status as online destination of choice.

The existence of the Partner Program—for which services Google receives no fee—suggests that scanning books was already worth something to Google, even without the additional licences the settlement offers. Books offer Google certain advantages that scanning web pages do not. One of these is stickiness. Google is fundamentally an advertising company. Its text and display ad programs account for 97 percent of its revenues.<sup>104</sup> Its genius is that ads are harnessed to search queries, and the quality of Google's search algorithms mean it can target both search and ad results to users' particular interests. In the 1990s, other search engines preferred to be portals and enticed users to stay on their sites; Google from the start was committed to search and willing to “get users out of Google and to their search destination quickly.”<sup>105</sup> With Google Books, users will stay in Google's garden, searching within books or clicking from book to book, building rich data trails on user preferences and connections among content. Tracking user behaviour is the key to unlocking and exploiting the considerable power of the “World Wide Computer”; as Nicholas Carr argues, “Every time we write a link, or even click on one, we are feeding our intelligence into Google's system. We are making the machine a little smarter—and Brin, Page, and all of Google's shareholders a little richer.”<sup>106</sup> This kind of data has become the currency of any successful online enterprise, which increasingly must be adept at identifying or creating communities and then serving them tailor-made experiences. Data—the more, the exponentially better—is the foundation

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104 Google, “Google Announces Fourth Quarter,” 13. This figure was stable throughout 2008 and 2009.

105 Auletta, *Googled*, 52.

106 Carr, *The Big Switch*, 219.

from which the web is monetized.<sup>107</sup> While the acquisition of book user data will not make or break Google (it is already much too large for that), it contributes to Google's dominance online.

Google may argue that it has made substantial investments in building its digitized collection, and should be able to derive revenues from it both to offset those costs and to create a return on investment. But how substantial is this investment?<sup>108</sup> Developing book scanners and de-warping algorithms are fixed costs, even if making scans is not. It is unclear how much Google has put into building the accompanying metadata; much of it was obtained from a wide variety of sources, including libraries, database vendors, and now the rightsholders themselves, who will correct details as they work through claims. The server space to host these scans may be non-trivial, but surely the costs of hosting, maintaining, and extending Google's search functionality to books' content are more than balanced against the other advantages Google may also exploit—not to mention the public relations credit Google accrues for facilitating the largest library to date.

#### FOR PUBLISHERS: AS FAIR AS IT GETS

From many rightsholders' perspectives, the settlement remains a gross distortion of copyright law. First, Google made copies (and continues to make copies) of works without permission. Second, the settlement reverses long-standing copyright practice by putting the onus on rightsholders to request their works not be used, rather than on Google to obtain permission. The fact that Google has also swelled the default uses far beyond even the grey area of fair use

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<sup>107</sup> See also Tim O'Reilly, "What is Web 2.0: Design Patterns and Business Models for the Next Generation of Software," O'Reilly.com, 30 September 2005, <http://oreilly.com/pub/a/web2/archive/what-is-web-2.0.html?page=3>. In the section "Data is the Next Intel Inside," he characterizes data as "a sole source component in systems whose software infrastructure is largely open source or otherwise commodified," while "control over the database has led [or can lead] to market control and outsized financial returns."

<sup>108</sup> Dan Clancy claims "Google has spent hundreds of millions of dollars researching, developing, patenting and implementing cutting edge digital scanning technology" since 2004, but he does not further specify these expenses. See Clancy, Declaration in Support of Motion for Final Approval of Amended Settlement Agreement, 11 February 2010, 1, [http://thepublicindex.org/docs/amended\\_settlement/dan\\_clancy\\_declaration.pdf](http://thepublicindex.org/docs/amended_settlement/dan_clancy_declaration.pdf). It seems likely that Google will be able to apply much of its research, patents, and technologies to other applications beyond rightsholders' works within the settlement.

seems a further circumvention of copyright law. Much material posted online is intended to be accessible, not protected or explicitly commercialized: in general, the Internet has been a conduit for allowing people to publish freely. Books, and their traditional use of copyright to lever compensation, fit awkwardly in this context. The premise of exclusive exploitation—fundamental to the conception of copyright—is in some ways fundamentally incompatible with online media.

Google's revenues from the deal include 10 percent off the top to cover Google's administrative, hosting, or other costs, plus another 30 percent of the remaining nine-tenths of all revenues: total, 37 percent. While this split is a little better than what publishers have historically received from booksellers (60–40, and now often falling to 55–45), it is unclear how much of Google's cut is required to cover its expenses to sell books. Rather than recoup costs, Google seems to be selling services; the settlement suggests Google's operating costs will be covered by 10 percent of total revenues, meaning the other 27 percent is presumably profit or return on investment, if revenue projections are accurate.<sup>109</sup> If those projections prove optimistic, the 27 percent will cushion Google from taking a loss. The settlement is an expedient way for Google to obtain digital rights, but it also offers a quick fix to publishers and authors struggling with how to commercialize digital rights at all. In exchange for rights plus a cut of the revenue, Google will scan and host the books, sparing rightsholders (and libraries) the trouble, and then manage and secure online material. Google has the technological expertise to block copy/paste or print functions, as well as control preview and blocked pages; a publisher can easily put up a PDF copy of the book, but may have less facility in limiting its access and use, although readily available tools with these functions continue to emerge.<sup>110</sup>

Google offers software as a service, but as much as this relieves publishers or authors of the

109 The breakdown of Google's 37 percent share to include 10 percent for Google's operating costs is described in ASA, section 2.1(a).

110 Examples include applications such as Adobe Digital Editions or Texterity. Arguably, even Google's security measures to control display will offer limited resistance against hackers and ongoing technological developments, including applications that convert any screen capture into a PDF file and permit users to "rip" copies of DRM-protected e-books or books online. See Science Fiction and Fantasy Writers of America and American Society of Journalists and Authors, Exhibit C ("5 Tools to Download any Book from Google and save it as PDF"), 28 January 2010, [http://thepublicindex.org/docs/amended\\_settlement/SFWA\\_Ex\\_C.pdf](http://thepublicindex.org/docs/amended_settlement/SFWA_Ex_C.pdf). A business model that relies on DRM will constantly be fighting to stay a step ahead of users' ingenuity at breaking locks.



costs of maintaining certain technical expertise, it also locks them into a dependent role in which they are unable to self-direct the use and management of their work. Google may be best positioned now to implement this digitization, but in settling with Google the publishers and authors may contribute to a paucity of alternative models or competitors in the future (perhaps including publishers themselves). Google's head start might encourage others to drop pursuit. If Google is able to successfully commercialize its digital collection, and as the relevant technology becomes even easier for any publisher or library to obtain, publishers might wish the settlement had been time-limited to allow them to renegotiate once market values have been established.

Another service rightsholders will pay for is the Book Rights Registry. Before disbursing rightsholders' revenues, the BRR will deduct its own administrative costs.<sup>111</sup> The settlement sets no specific guidelines or ceiling on how much the Registry might take, but clearly rightsholders will not receive a full 63 percent. Estimates of deductions range from 10 or 20 percent up to as much as 50 percent: New York literary agent Lynn Chu suggests the settlement creates "a big, costly impersonal bureaucracy, all of whose expenses you are required to pay, to serve as middleman between you and Google... The deal negotiated between Google and the plaintiffs—now excitedly looking forward to running BRR themselves—is, as to be expected, largely to their benefit, not yours. Their expenses (of unlimited scope) all come off the top. This will account for 40%–50% at least."<sup>112</sup> Pamela Samuelson is less speculative, but states collecting societies like the BRR "historically have engaged in anticompetitive acts, spen[t money] on themselves, not distribute[d] substantial sums to actual rights holders."<sup>113</sup> Existing collecting societies' practices vary. The Authors Registry withholds a 5 percent commission but admits this does not cover their operating expenses; its role is also more limited than the BRR's will be, as it only distributes whatever payments it receives and does not represent authors' rights.<sup>114</sup> Access Copyright does not retain a commission per se, but its financial statements show that a substantial portion of the

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<sup>111</sup> ASA, Attachment C, section 4.2.

<sup>112</sup> Lynn Chu, "On the Google Book Settlement. Part 2," Writers' Representatives blog, revised 12 June 2009, <http://www.writersreps.com/feature.aspx?FeatureID=157>.

<sup>113</sup> Samuelson, "Reflections on the Google Book Search Settlement," slide 16.

<sup>114</sup> See FAQ section at <http://www.authorsregistry.org/>.

revenues it collects are not distributed to rightsholders. In 2009, its distributions totalled 76.01 percent of its revenues. In 2008, distributions rose to 81.8 percent of revenues, but that year included the distribution of several years' accumulated unclaimed funds. In 2007, distributions represented only 62.64 percent of revenues; in 2006, 64.94 percent.<sup>115</sup> The variables affecting the BRR's revenue pool make predictions difficult: no one knows what revenues Google will remit, how many rightsholders the Registry will administer, or what fixed and direct costs the Registry might have. But publishers and authors are paid last: after Google, after the Registry.

The Registry has an open-ended mandate to negotiate ongoing licence developments with Google or with third parties on behalf of rightsholders. The heterogeneity of the class could result in individual rightsholders' sense that the BRR may not work in their best interests. A scholarly press might have very different concerns than a trade publisher for the pricing of the institutional subscriptions, for example, since research libraries—the largest market for scholarly works—will be the primary target of these subscriptions. These challenges are similar to those already facing reproduction rights organizations, like Access Copyright; the potential for conflicting interests remains unless authors and publishers have identical motivations or responses with respect to their creative and economic interests. The sheer scale of the settlement, and its potential to set precedent and create monopoly at such an early stage of the digital book market, adds a new worrisome dynamic.

For Google to create the kind of digital book collection it desires, it needs a register of copyright holders, a simple way of clearing rights, and some method to access the works whose rightsholders are unknown, unlocatable, or disinclined to respond to permissions requests. There is no such register, and existing copyright law does not allow easy mass rights

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<sup>115</sup> See Access Copyright, *Annual Report 2009* (Toronto: Canadian Copyright Licensing Agency, 2010), 8, 11; Access Copyright, *Annual Report 2008* (Toronto: Canadian Copyright Licensing Agency, 2009), 3, 9; Access Copyright, *Annual Report 2007* (Toronto: Canadian Copyright Licensing Agency, 2008), 10, 13. Total revenues in this period were as high as \$37.285 million in 2007 and as low as \$34.194 million in 2006. Access Copyright considers only some of the revenues not distributed as operating expenses or other expenses; these expenses account for between 18 percent (2008) and 24 percent (2006 and 2009) of total revenues. The remainder may be used to pursue certain initiatives on behalf of member-rightsholders, activities which could be in the majority's best interests but which also reduce amounts payable to all rightsholders, or these funds may simply be held for some period as "undistributed royalties." In 2008 and 2009, this remainder seems to have disappeared: the revenues were equivalent to total expenses plus distributed royalties.

clearance or provide any legally certain way to obtain consent from absent or unresponsive rightsholders. Google must have been impatient with what the government and existing regulations allow and provide, and so naturally welcomed the opportunity to create a para-legislative scheme for itself with the Authors Guild and Association of American Publishers. The settlement defines special exemptions from the laws for Google only: Google becomes government, or at least that government branch that defines and controls digital rights for certain forms of intellectual property. In addition, the settlement's creation of the Book Rights Registry, the regulatory body that facilitates Google's direction of books online, is supported via a sort of tax on rightsholders themselves. Revenues earned by publishers' and authors' creative works will subsidize the services Google needs to run Google Books: the settlement is perhaps not as cost-free as it purports to be.

#### FOR AUTHORS: UNEVENLY APPLIED

Though this report focuses on a publisher's experience of the settlement, it is worth noting that authors bring a distinct set of concerns to the case. The settlement for the most part groups publishers and authors together simply as rightsholders, but as the range of objections and statements of support demonstrate, it is incorrect to assume their perspectives align or that the settlement treats both equally. Authors' assessments differ from publishers' and from other authors'. Some see Google Books as infringement plain and simple; some see an escape from obscurity or a convenient distribution platform; some see collusion between Google and publishers to exploit authors; some worry it will undermine their ability to negotiate and earn revenues with their work even as some welcome any income on work that is otherwise gathering dust. In a further challenge to the representativeness of this sub-class, members of the Authors Guild are mostly not academic authors, while most of the scanned books that launched the complaint were written by academics. Though there is much to be said in a detailed consideration of authors' various concerns, it will need to be said elsewhere.

It is worth addressing one line of critique, since UBC Press may appear implicated. The settlement administrator's report on initial claims showed that the bulk of books claimed were from publishers. Publishers, comprising only 10 percent of the claimants,

accounted for 71 percent of the books claimed online.<sup>116</sup> On its own, this is not surprising, since publishers will naturally claim more books than individual authors. Ron Lazebnik, the lawyer representing several large authors' associations, argues that not only were publishers claiming a disproportionate number of books, but Google had designated 56 percent of these books out of print. Therefore "the majority of books... are being claimed by publishers who no longer support the hard copy version of these books. This fact pattern demonstrates the exact reason why we believe the settlement is unfair and unreasonable to authors. It is allowing publishers to lay claim to rights and revenues that belong with authors."<sup>117</sup> It is, however, too early to draw conclusions from these "fact patterns." Google's "out of print" label merely means Google did not find a commercial source for the book, not necessarily that rights have reverted to the author. The claims deadline is 31 March 2011, and there is no reason to believe the distribution of early claimants is representative of the whole. Rightsholders will likely have better information than Google about the commercial availability of their works, and Google's designations may undergo considerable adjustments. Whether trends develop as Lazebnik suggests, his allegation highlights a key tension between sub-classes: objecting publishers are indignant that Google scanned without permission, but many objecting authors feel doubly betrayed by both Google and the publishers themselves.

This fear is not unfounded, but, significantly, it concerns authors and publishers: Google's position is not seriously affected if rightsholders disagree with each other. Authors and publishers may dispute and resolve conflicting claims under the settlement, but this will take time. The settlement makes it relatively easy for publishers to claim, if not keep, active rights.

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<sup>116</sup> See Allen, Declaration [of Settlement Administrator], 4. As at 8 February 2010, 4,392 of the 44,450 claimants were publishers and a total of 1,125,339 books were claimed. These figures include both online claims and hard-copy claims. Allen offered additional details on online claims. There were 1,107,620 books claimed online, of which Google had designated only 488,089 as commercially available and therefore in print. Of the books claimed online, publishers claimed 787,942. See also Exhibit D to Allen's Declaration, [http://thepublicindex.org/docs/amended\\_settlement/Allen\\_declaration\\_exhibit\\_D\\_color.pdf](http://thepublicindex.org/docs/amended_settlement/Allen_declaration_exhibit_D_color.pdf) (but note that the first table contains an error and transposes the number of online claiming accounts of agents and publishers, which also affects the averages cited in this table).

<sup>117</sup> Ron Lazebnik, remarks in Fairness Hearing, 52. Lazebnik represents the Science Fiction and Fantasy Writers of America, the American Society for Journalists and Authors, and the National Writers Union. Again, the concerns of these primarily non-academic authors and the relationships they have with their publishers could be quite different from those of the many academic authors whose works fill the participating libraries' shelves.

Just as Google might have preferred to acquire millions of books from tens of libraries (the Library Project) rather than from thousands of publishers (the Partner Program), it may be easier for Google or the BRR to deal with publishers under the settlement, which can each speak for hundreds of books, rather than authors, who each speak for fewer books. As noted previously, the settlement primarily serves Google's administrative convenience—from its generous default licences, to shifting the costs of locating rightsholders to the BRR (and therefore the rightsholders themselves), to acquiring orphan works—and this may not align with what is either fair or easily accomplished for any other parties. Perhaps more likely than publishers wresting claims from authors is the possibility that some claimants may take advantage of vulnerable orphan works. The economic incentives proffered by the BRR may encourage anyone with even a slim claim to otherwise unclaimed works to establish themselves as the rightsholder of record. Google need not have accurate rightsholder information in order to apply its licence, and the BRR may have limited incentives or resources to verify data.

UBC Press does not anticipate such mistrust from its authors. Rather, the Press will inform authors of settlement developments; steward authors' economic interests; forward half of any cash payments and a portion of any other revenues as determined by royalty contracts; and invite authors to diverge from the Press's strategy with Google if they desire. Due to the complexity and ongoing changes of the settlement, UBC Press believes many of its authors will benefit from having the Press as their intermediary.<sup>118</sup>

These are only some areas of potential concern for publishers and authors. However, the Authors Guild and Association of American Publishers are at least as uncertain as Google about their chances of winning the original case in court, and winning that suit would not

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<sup>118</sup> For example, UBC Press will be aware of which authors have not claimed their works and could alert or assist those authors. Revenues for deemed out-of-print books are paid separately to authors and publishers, but revenues for deemed in-print books are paid to publishers and flow through to authors, as with royalties. UBC Press may thus pass along revenues from the settlement even if individual authors do not want to invest time in managing their claims themselves, although the settlement does not explicitly describe what happens if the publisher claims an in-print book and the author is unlocated by the BRR. In this case, the publisher should receive only its own share until the author registers with the BRR. See ASA, Attachment A, sections 5.5 and 6.2.

quell the inevitable drive to digitize. In settling, the plaintiffs spare themselves litigation costs, put a major digital rights question behind them, and receive revenue from putting their work online—and monetizing digital publishing in any form is the holy grail for the industry right now. Unfortunately, rightsholders might need Google more than it needs them: there may be no other recourse to reach readers online as effectively as Google represents. The deal may not be that good, but publishers and authors do not have many other options that include financial compensation. However, a variety of legislative interventions—the DOJ’s recommendations or other contingencies—could improve publishers’ and authors’ lot.

# 5

## Copyright Reform: Neither Completely Open nor Completely Enclosed

Copyright laws have a long tradition, and have been revised on numerous occasions in each of the countries implicated in the settlement agreement. The original spirit of the law, in the US at least, was to offer limited market protection so producers could profit from their own creative labours but also to support the society-wide benefit of public knowledge development and exchange. Some provision to balance owners' and users' rights emerges through the notion of fair use or fair dealing; differing interpretations of fair use were the spark that led to this settlement. The fulcrum at which appropriate balance rests is also a matter of debate. In Canada, the notion of users' rights, and of this balance, are relatively recent concepts to be explicitly recognized in the courts.<sup>119</sup> Although the US appears to offer broader users' rights and better established legislative grounds from which to claim them, 20th century copyright reforms in the US have often strengthened owners' rights. Restrictive controls such as long copyright terms and special protections for digital rights management, as well as the presumption of automatic protection regardless of context, can be seen to favour rightsholders over users to the point now that the spirit and the letter of the law have fallen out of phase. Digital communications technologies have placed a particular strain on copyright practice such that the laws appear not only unbalanced but dysfunctional. The Google Books settlement configured the Authors Guild and Association of American Publishers' complaint as an opportunity to address this widening legislative gap, a gap that is a consequence both of

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<sup>119</sup> The Supreme Court raised these points in its decision in *Théberge v. Galerie d'Art du Petit Champlain* in 2002, and in *CCH v. Law Society of Upper Canada* in 2004. Previously, fair dealing was frequently conceived "as nothing more than a limited defence to infringement." Laura J. Murray and Samuel E. Trosow, *Canadian Copyright: A Citizen's Guide* (Toronto: Between the Lines, 2007), 76, 78–81.

the loss of balance and, more pointedly, of technological change.

The settlement is a contract between specific parties and charts one seemingly practical transition from selling print books to selling books online. It does not profess to engage copyright legislation nor provide a usable framework for others to do so, though its approaches and features may ultimately influence the creation of such a framework. The precedents the settlement sets may not be the best models for copyright reform, and it is appropriate for the court to weigh their possible consequences before allowing a private contract to stand alongside, and arguably in exception to, existing copyright law.

Other digitization efforts might better serve the collective interests of rightsholders, libraries, digital service providers, and readers. Various legislative reforms could support alternative digital library projects and address copyright inefficiencies in a general and public forum, rather than reserve such benefits for Google alone. Even if the court declines to refer the class action complaint to US Congress to decide, as certain objectors recommend, the settlement certainly underlines the need for and public desirability of congressional action in the shape of meaningful, legislative copyright reform. Canada and other countries might lead or follow such legislative developments, as the problems facing copyright laws are not unique to the US.

#### COPYRIGHT IN A DIGITAL WORLD

In *Authors Guild, Association of American Publishers, et al. v. Google*, the original complaint lay in a difference of opinion on what constituted fair use, which remains a grey area under copyright law. While Canadian copyright law defines five and only five types of activity that can be considered fair dealing, the US fair use provisions leave room for interpretation. In this case, both sides insisted their interpretations of fair use were correct; both sides were also happy to negotiate a settlement and avoid costly and lengthy litigation; clearly, both sides were interested in employing the settlement mechanism to address a number of other desirable clarifications on rights and digitization. The uncertainty around fair use may arise because present US copyright legislation offers an inadequate definition of fair use. It could also be argued that retaining ambiguity in fair use provisions is a feature of the legislation, allowing



the courts flexibility in order to evolve interpretations and legal understandings organically without having to undertake a complete legislative overhaul for every new situation. Unfortunately, the settlement avoids this beneficial ambiguity as well since it subsumes any discussion of fair use in a commercial contract.

The copyright laws we have inherited were built for the industrial era, in which making copies presented certain technical barriers (such as access to a printing press) and for the most part required intentional efforts. In this context, “the law of intellectual property placed its triggers at the point where commercial activity by competitors could undercut the exploitation of markets by the rights holder. Copying, performance, distribution—these were things done by other industrial entities,” not by individuals. But now, with computers making so much production power so trivially available, “the triggers of copyright—reproduction, distribution—can be activated by individual footsteps.”<sup>120</sup> In digital contexts, as Lawrence Lessig elaborates, the architecture of existing copyright legislation “means that the law regulates everything. For every single use of creative work in digital space makes a copy. Thus—the lawyer insists—every single use must in some sense be licensed.”<sup>121</sup> Copyright laws as they stand are ill-equipped to address or employ the technological realities now facing publishers, booksellers, and authors or creators. Worse, copyright grows difficult to enforce without resorting to draconian measures.

In the absence of sensible digital use guidelines, the public drifts toward the conclusion that poor rules should be broken.<sup>122</sup> It is untenable, in a healthy democracy, to allow the common sense of what is permissible and socially acceptable to diverge so significantly

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120 James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008), 50–51, 52.

121 Lessig, “For the Love of Culture,” 4.

122 Lawrence Lessig, “[Open for Business: On Laws that Choke Creativity],” TEDTalk, March 2007, [http://www.ted.com/talks/larry\\_lessig\\_says\\_the\\_law\\_is\\_strangling\\_creativity.html](http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity.html). Lessig describes the lack of common-sense-compatible rules as a contributing factor to the growing extremism from rightsholders (or, more accurately, their corporate designates) who seek to restrict completely, totally, and automatically all uses of works, and users who balk at these restrictions and penalties and reject copyright entirely. What unfolds, Lessig concludes, is that “ordinary people live life against the law... knowing they live it against the law. That realization is extraordinarily corrosive” to both democracy and business: ultimately, neither the public nor private interests will be served by this approach. And yet this is the approach the US has adopted so far.

from what the laws actually support or restrict. Disabling the troubling features of digital technologies would deny many parallel benefits; besides, the technology is everywhere and is not going away. Short of significant market collapse (Nicholas Carr speculates that the insatiable demand for more data centres could precipitate an IT energy crisis), our media environment will not revert non-digital.<sup>123</sup> Given the developments in technical possibility and in emerging patterns of use—what people can do and what they want to do, both substantially changed since the last round of copyright reforms in the 1990s—perhaps it is time to consider comparable changes to the regulatory framework that guides such use.

Had this case gone to litigation, the court’s ruling could have clarified the legal status of scanning for indexing, making snippets, and related activities and could have offered guidelines to other users in similar circumstances. It could have contributed to the ongoing negotiation of the balance between the two fundamental purposes of copyright, as configured in the US: a grant of temporary exclusive rights to incentivize creators, but ultimately a system to advance the public good through promoting the “progress of science and useful arts.”<sup>124</sup> A settlement leaves the fair-use status of basic digital acts unresolved. It could as easily spur legislation on—Google’s would-be competitors may become motivated lobbyists in favour of orphan works legislation, for example—as it could offer an interim patch that becomes an excuse to defer the hard legislative work ahead. A full response to the challenges the settlement attempts to broach requires legislative intervention, both to rediscover the appropriate balance between owners’ and users’ rights, and to ensure everyone has reasonable access to the benefits this balance represents.

Of course, neither litigation nor legislation necessarily ensure that the outcome will be this appropriate balance. There are already powerful lobbyists whose commercial interests benefit from still further strengthened owners’ rights, regardless of the public costs. In the US, the Copyright Term Extension Act as well as the Digital Millennium Copyright Act (both passed in 1998) increased the scope of copyright protections. Given that the legal system in

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<sup>123</sup> Carr, *The Big Switch*, 178–79.

<sup>124</sup> US Constitution, article 1, section 8. Canadian copyright law does not include a similar visionary purpose to contextualize its form and rules: the “Canadian Constitution merely lists copyright as an enumerated power of the federal government, with no rationale or guidance provided.” Murray and Trosow, *Canadian Copyright*, 209n12.

the US continues to fail to address orphan works legislation, it is perhaps not surprising that the parties preferred a private settlement. A new round of copyright reform might result in a larger pool of protected and unusable works, licensing schemes that are more restrictive, or a reactionary rejection of technological capabilities. The fact that no one can predict which influences will ultimately sway legislators' opinions is not reason enough to abandon the legislative process. Even if effective legislation rarely makes it through the thicket of lobbyists and political interests, it does not necessarily justify using the class action mechanism instead, despite its relative expediency; in fact, effecting ad hoc legal change through class action creates other consequences. The settlement may appear to be a safer—and quicker—option than full scale legislative reform, but the settlement only defers, not resolves, the many thorny issues copyright faces. Whatever shape the next round of copyright reforms might take, it is instructive to consider the possibilities that the proposed settlement, or something like it, models.

#### THE SETTLEMENT'S PARA-LEGISLATIVE RESULTS

Daralyn Durie, representing Google and defending the settlement as the best solution for book digitization, points out that “the opt-in regime is just the status quo”; that is, the existing system in which those who wish to use (or digitize) a work must seek out and negotiate with individual rightsholders to acquire their permission. “We know it doesn’t work [on a large scale] because if it worked, someone would have done it already.”<sup>125</sup> Mass digitization projects are today technically feasible, but such initiatives, however publicly desirable (and, in the case of orphan works, without apparent harm to the existing market for the work), face prohibitively high transaction costs under the current rules. One solution would be to give up on large-scale digitization projects, though this is unlikely given public appetite and technological capacity: it makes no sense to deny these possibilities because we have yet to identify the model that supports them. Another solution would be to appeal to legislators to address these inefficiencies and create better means of identifying and negotiating with rightsholders. The parties to the settlement have chosen a third approach: to disregard the

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<sup>125</sup> Daralyn Durie, remarks in Fairness Hearing, 146.

legislative process and pursue a market solution to the orphan works problem. Part of the question before the court now is whether the ends justify the means.

If approved, the settlement may set precedents that poorly serve the public as well as the authors and publishers who have traditionally brought creative works to the public. One such precedent is that privately negotiated settlements offer more efficient and cost-effective means of addressing legislative challenges than does legislation—a depressing thought for the civic-minded, as it potentially offers corporate interests a way of shaping legal loopholes to order. The DOJ quotes the US Supreme Court in its caution that class actions “cannot carry the large load’ of restructuring legal regimes in the absence of congressional action—however sensible that restructuring might be”; the DOJ seems to acknowledge the existing legislation is lacking but disagrees that a class action settlement is the appropriate response.<sup>126</sup> To some extent the settlement justifies a “take first, ask permission later (if at all)” approach to intellectual property. Unlike most digital pirates, both sides used the perceived wrong as a springboard from which to launch more ambitious negotiations, which also illustrates one effect of concentrations of power: being very large is a good way to get what you want.

The settlement, with its tethered access, also erodes first sale rights—readers’ ability to do more or less what they will after the book has been purchased. Google Books shifts the point of sale from a good (a discrete instantiation of a creative work) to a service: that of convenient access, provided by Google. Readers pay for ongoing access to a book, not for any one copy of a book. Even as it promises new levels of public availability, Google Books dangles the proposition of perpetual rights, with a new twist: in selling access, it allows for perpetual monetization. Google proposes to share the spoils with creators and publishers, which should encourage them to participate. Yet publishers and authors might find themselves ultimately outsmarted, as history too often shows that clever brokers make more profits than skilful producers.

Lawrence Lessig sees another significant precedent: the settlement outlines an over-controlled licensing paradigm in which permission can and must be sought for each and every use. Lessig glides over the fact that permissions are already entrenched in publishing: while

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<sup>126</sup> US DOJ, Statement of Interest (2010), 3.

brief quotations are allowed, quoting substantial—with “substantial” a matter of case-by-case interpretation—passages requires explicit permission and frequently a fee. Such permissions are required to print books, but not, significantly, to read them: so far, readers’ personal access and use of books has been largely uncontrolled. In the architecture of the settlement, however, new depths for licensing and permissions emerge, and not only because it clears rights to so many books in one stroke. Individual users will be identified by geographic location, institutional affiliation, and/or previous online sessions at a minimum (all necessary to ensure only allowed access and uses of the texts occur); it is easy for a computer to track which pages or parts of pages are viewed by whom, and it will likely become easier still to separate specific portions of text or illustrations from surrounding text. As Lessig quips, “The deal constructs a world in which control can be exercised at the level of a page, and maybe even a quote. It is a world in which every bit, every published word, could be licensed. It is the opposite of the old slogan about nuclear power: every bit gets metered, because metering is so cheap.”<sup>127</sup> Digital publishing makes two irresistible offers: just as making and distributing digital copies becomes trivially cheap and easy, so too does tracking online access and use—especially for Google. Lessig argues that the appeal of such metering serves corporate interests, while the promise of expanded public access is in fact overshadowed by cementing the presumption that all uses must be licensed. To respect the licences, all uses must also be monitored. This default of control will stop up the flow of knowledge and public access to our own culture; as Lessig puts it, the settlement is more burden than benefit, and it invents a complex legal structure “to make every access to our culture a legally regulated event.”<sup>128</sup> Any advantages the settlement seems to offer as a digital library are dwarfed, Lessig concludes, by the settlement’s eagerness to create a digital bookstore, and most of all by its ominous validation of strong copyright as a basic, and appropriate, tool of control.

#### ALTERNATIVE DIGITAL COLLECTIONS SERVE THE PUBLIC INTEREST

The direct parties to the settlement are not the only ones who will be affected by it. US libraries have much to gain under the settlement: outsourcing their own digitization

<sup>127</sup> Lessig, “For the Love of Culture,” 4.

<sup>128</sup> Ibid.

efforts mostly for free, accessing a much broader virtual collection than their own physical acquisitions budgets might allow. The settlement's promise of a "universal" (US only), more convenient than ever digital library holds huge appeal for casual and avid readers alike. Digitization opens up new options for users with visual impairments or print disabilities to access books, and the settlement includes provisions to allow these users access to LDCs beyond the regular subscription or other modes of access.<sup>129</sup> And the public does not directly pay for any of these new services. However, of all parties, it may ultimately be the public that is least well served.

The risk of price-gouging is certainly plausible, but if Google does develop anticompetitive practices, another lawsuit or legislation can address that, as Paul Courant, university librarian at the University of Michigan, reminds us.<sup>130</sup> Librarians have long championed freedom of speech, and access, over censorship, as well as protected the privacy of patrons' reading choices. Though many point to the settlement's lack of concrete user protections in these areas, there is a chance that Google will respect these principles because its historical institutional culture knows them as the right things to do. These are great hopes to pin on such thin promises; explicit and binding guidelines in the settlement would better address such concerns.

Dan Clancy offers reassurances that libraries (and perhaps through them, the public) will have a strong voice in shaping Google's "[book] product, and the settlement agreement isn't where we define that. This legal document talks about everything we can't do. It doesn't say anything about what we will do."<sup>131</sup> Though Clancy believes this open-ended-ness will lead to positive developments for libraries and Google both, his remarks underscore that little in the settlement speaks concretely to anyone's long term obligations to the books themselves and the richness of knowledge they contain.

Happily, Google Books is not the only mass text digitization project. Even as they participate in Google Book Search, US research libraries have not relinquished their own roles in stewarding cultural knowledge. HathiTrust is an initiative of these libraries to pool and

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<sup>129</sup> ASA, sections 3.3(d) and 7.2(b)(ii).

<sup>130</sup> Courant, "K is for Keynote."

<sup>131</sup> Clancy, quoted in Albanese and Oder, "Corner Office."

preserve their collections in digital form. While HathiTrust partly relies on Google's scans, its purposes are non-commercial and focused explicitly on supporting the needs of research libraries and scholars. There are other repositories: Gallica, an initiative of France's National Library, digitizes materials from public collections. Europeana collects digital items from European libraries, archives, museums, and galleries; it includes published and unpublished texts as well as images, sound, and video.<sup>132</sup> Institutional digital repositories are also becoming increasingly common.

The Internet Archive was established to preserve web pages and ensure ongoing public access to information and cultural artifacts. Its collection now includes 1.9 million books, as well as music, video, and other digital material. The Open Content Alliance (OCA) is an initiative of the Internet Archive and collaborates with libraries and archives to collect digitized text and make it available through the Internet Archive.<sup>133</sup> Heather Morrison, in her analysis of OCA and Google Books, demonstrates OCA's robust network structure: its many collaborators and open nature mean it is flexible and scalable, while its strong sense of purpose ensures consistency among collaborators or "nodes." Google Book Search, she argues, is a poor network: it relies on Google Books as a central control; its partners are not collaborators and have diverging goals; extending its configurations does not scale and will require fresh negotiations. OCA's network is a much better instrument as a long-term public good; in contrast, Google Books, as a single corporate entity, is better suited to its own corporate interests.<sup>134</sup> Of course, OCA's mission is to serve the public good, which may have led it to choose the structure it did; Google Books sometimes pleads public benefits but maintains other goals.

In fact, Google's lawyers have suggested that evaluating the settlement on its merits for the public is inappropriate: as a settlement between the class members and Google, only

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132 See <http://www.hathitrust.org/faq>; <http://gallica.bnf.fr/>; <http://www.europeana.eu/portal/aboutus.html>.

133 See <http://www.archive.org/about/about.php> and <http://www.opencontentalliance.org/faq/>. The Internet Archive was founded in 1996, and OCA was initiated by the Internet Archive and Yahoo in 2005.

134 Heather Morrison, "Open Content Alliance (OCA) vs. Google Books: OCA as Superior Network and Better Fit for an Emerging Global Public Sphere," unpublished paper, Library Staff Papers, Simon Fraser University Institutional Repository, <http://ir.lib.sfu.ca/bitstream/1892/10651/1/OCAdeco9.pdf>.

its treatment of class members' interests is significant.<sup>135</sup> It is to Google's advantage for the court to consider the fairness of the settlement to its immediate parties; strategically, the class action will not succeed by appealing primarily to the benefits it offers outside the class. The DOJ claims that the settlement achieves its various public benefits "in spite of and not in furtherance of the basic premises of the Copyright Act."<sup>136</sup> The primary objective of the settlement is to clarify a commercial relationship between Google and publishers or authors, not to improve legislative interpretation nor even necessarily to advance the public good.

Unlike the other collections mentioned above, only Google offers a revenue stream for rightsholders and explicitly extends the commercial lives of their backlists. Google is already a leader in search, which means lodging material in Google Books should increase a publisher's chance of having that material discovered by potential readers. Other digital libraries boast smaller collections and smaller audiences; this initial advantage with Google could easily snowball due to natural network effects (where having either or both more books and more users means Google's search results will be more useful and relevant, which attracts still more users). Other digitizers may also ask the holders of original or physical copies to contribute to scanning or hosting costs, whereas Google Books offers these services without collecting direct fees. Participating in the settlement extends the network-effects advantage to publishers while applying few costs against their bottom lines.

However, Google offers these possibilities just at the point at which mass digitization is getting easier and publishers are, many for the first time, seriously grappling with how to transform their businesses to meet this changing technological climate. Though Google wants to be everyone's preferred route to monetize their content online, print on demand, new devices, or other digital collections could significantly alter the landscape for digital books. The settlement's long-term benefits for publishers are uncertain because the market's long-term opportunities are unclear.

Google Books itself could be made to better serve the parties and the public by adding limits to the settlement or conditions on approval. As Hadrian Katz argued at the fairness

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<sup>135</sup> Google, Brief in Support of Motion for Final Approval of Amended Settlement Agreement, 11 February 2010, 3, [http://thepublicindex.org/docs/amended\\_settlement/google\\_final\\_approval\\_support.pdf](http://thepublicindex.org/docs/amended_settlement/google_final_approval_support.pdf).

<sup>136</sup> US DOJ, Statement of Interest (2010), 10–11.



hearing, one condition that would “realize all the benefits... [and] solve virtually all the problems” would be to limit the settlement “to those who willingly participate in it”: that is, make it opt-in.<sup>137</sup> The notable problem Katz’s recommendation does not solve is that an opt-in settlement will ensure, just as the current copyright regime does, that orphan works remain primarily inaccessible. Alternatively, the DOJ suggested limiting the term of Google’s licence for unclaimed works to some number of years, after which the market for digital works and access services could be reassessed and either renewed by the Registry or extended or revised by the court.<sup>138</sup> The settlement appears to grant Google a licence for the term of copyright, after which it could continue to use the texts, now in the public domain. The settlement does not contemplate how Google Books might itself go “out of print” and see its licence revert, although it is non-exclusive and does not bar authors and publishers from using other digital collections at the same time. A time-limited licence for all works might reassure rightsholders that they are not locked into a contract that future technological or legislative developments might render less fair. Electronic rights are only just being defined, yet Google obtains a relatively open and generous licence for very small fees. Google itself pays only for the works it digitized before 5 May 2009, and may pay as little as US\$60—less than the list price of a UBC Press hardcover, and not quite the price of two paperbacks. For works yet unscanned, Google will not pay any fees to digitize them. The revenues that Google shares with rightsholders come through Google, but are drawn from libraries and individuals. As digital uses are fleshed out, it may make more sense to divide electronic rights: a right to digitize, a right to aggregate, one to use in non-consumptive research (computational analysis or search tools), one to sell the work in electronic form, one to sell print products derived from the electronic form.<sup>139</sup> Although rightsholders can always exclude their works from any form of sales through the settlement, they may not be able to revoke or separate these other electronic rights.

The court might also impose caps on profitability to prevent price-gouging and protect users should Google one day sell its assets to another entity. Regulations to prevent monopoly

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<sup>137</sup> Hadrian Katz, representing the Internet Archive, remarks in *Fairness Hearing*, 92–93.

<sup>138</sup> US DOJ, *Statement of Interest* (2010), 24–25.

<sup>139</sup> These divisible electronic rights were outlined by Rowland Lorimer, personal communication, 20 March 2010.

could define terms by which Google must license its scans to third party resellers. A Google monopoly could play out another way: if Google commands enough of the market, it could drive prices down, even below cost, to dissuade competition or non-compliant partners—its pre-set price tiers start at US\$1.99, and the settlement’s vision for collection-wide pricing proposes 41 percent of all books priced under US\$5 and only 19 percent priced over US\$10.<sup>140</sup> These prices are much lower than those the existing publishing industry requires and may fail to sustain many creators and producers. The settlement offers Google, and the BRR, considerable power to shape the market. Publishers, authors, and in the end readers may be unable to withstand the market that suits Google.

While any of these conditions could improve the digital landscape for publishers and authors, more meaningful solutions—and ones likely to also tend the public interest in the face of copyright’s controls, as well as spark international dialogues—will be found in copyright reforms via legislative channels.

#### LEGISLATIVE SOLUTIONS FOR LEGISLATIVE PROBLEMS

The complaint against Google involves important issues in copyright law, fair use or fair dealing, and digital publishing, but a class action settlement does not further the public, legal resolution of any of them. Instead, Google and the plaintiffs create a private contract: unsettling and “arguably corrosive” to democracy.<sup>141</sup> Specifically, rightsholders who do nothing or who remain unaware of the settlement’s effects may unwittingly give up rights in a way that, according to all the laws other than the settlement agreement, cannot occur. It is not surprising that the settlement, which covers controversial legislative territory, should excite such a broad spectrum of disagreement among its many potential participants. There is a range of opinions from publishers, authors, librarians, and legal scholars: some copyright progressives object because the settlement provides too-limited access, some because it provides too much.

The case proceeded to settlement not only because the broad commercial ambitions of

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<sup>140</sup> ASA, section 4.2(c)(ii)1. Rightsholders may set their own prices, but absent specific instructions Google’s defaults will apply.

<sup>141</sup> Pamela Samuelson, “Google Book Settlement as Private Copyright Reform,” presentation at Copyright Culture, Copyright History, 6 January 2010, <http://www.slideshare.net/naypinya/samuelson-gbs-as-copyright-reform>; Samuelson, “Google Book Search and the Future,” 34.

the parties stretched copyright, but because copyright legislation cannot now address the questions this digitization project raises. The current copyright regime has accorded owners generous term lengths, but in removing the formality of registering copyright, it leaves would-be users with no practical recourse to find those owners. Crippling transaction costs, for orphan works if nothing else, shut off public access. One reform might be shorter copyright terms: these would still support innovation, but would not persist past their useful lives to clutter the paths of those who would build on that innovation. Shorter copyright terms would also render this settlement much less contentious simply by transferring more works to the public domain sooner and removing the rightsholders from the negotiation, but it would be difficult for some rightsholders to adjust their expectations and their business models' dependence on long terms of exclusive exploitation and withstand any temporary financial hardship that could impose. For some, such hardship would leave permanent effects.

If term reduction is too dramatic a change, at the very least progressive orphan works legislation would stimulate competition to Google and open the field to public, non-profit collections. It is hard to defend the value of copyright protection that, by unintentional default, locks so many works away from any uses. Copyright extension, as James Boyle outlines, imposes a reduction in social welfare or public value while providing little additional real value to the creator.<sup>142</sup> Some period of protection will encourage the labours of invention, but it seems unlikely that the slight potential value of fifty- or seventy-year terms as opposed to, say, thirty-year terms will affect the creator very often. Many works' commercial lives expire well before their thirtieth year, let alone fifty years after the author's death. Those additional years will always take something away from the public.

Term reduction might also be mitigated and complemented by requiring creators and producers to register their copyright but allowing them to renew its term. Those who want and are able to extract commercial value would enjoy the protections of copyright, but works whose commercial value was spent could easily be used and appreciated for their cultural, historical, and educational values. The orphan works problem, and the need for orphan works legislation, would disappear. Such a system might require a clearer articulation of moral

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<sup>142</sup> Boyle, *The Public Domain*, 225–27.

rights than what US laws currently include. It would certainly bring with it new challenges: the lack of automatic protection will impose a burden on rightsholders; some rightsholders might be taken advantage of and find their labours exploited by others. These spectres should not overshadow the failings of present copyright legislation, which itself is not immune to similar problems of its own. A default of improved access with the option of control, rather than a default of control with the option of public or fair use, may better suit the technological climate that intellectual property works now inhabit. Once practices and expectations are realigned, such a system could be as effective as the current one, though subject to different particular vulnerabilities. Copyright reform along these lines seems unlikely, since automatic protection with no formality (that is, no requirement to register) is one of the fundamental principles of the Berne Convention, itself now “the foundation of modern copyright law” in most countries.<sup>143</sup>

Litigation in this case could contribute to improving interpretations of fair use and perhaps resolve some of the ambiguity of those provisions, but if the parties implement a settlement, everyone—libraries, publishers, authors, competitors to Google, the public—is denied this resolution. It is telling that the Authors Guild and Association of American Publishers were keen to expand Google’s licence and overlook the purported infringement. Samuelson claims that she and many other legal scholars have examined the situation and believe the fair use argument is sound; Lessig concurs, though he cautions litigation was no sure thing, since “courts have been known to reach the wrong conclusion in copyright cases.”<sup>144</sup> Even if the court concluded Google’s actions were not fair use, it is hard to imagine that this interpretation would stem the digital threats to rightsholders’ traditional commercial interests. A settlement, however, offered Google and the plaintiffs much more control in crafting a digital update to copyright protections than they could have expected in the legislative process. For the parties, if not for the public, the settlement is the safe choice.

The settlement represents, as any settlement must, a number of compromises for publishers, authors, libraries, and readers. But it also staves off the more frightening

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143 McCausland, “Googling the Archives,” 379.

144 Samuelson, “Google Book Search and the Future,” 5n31; Lessig, “For the Love of Culture,” 3.

compromise that publishers and authors may soon find themselves forced to make. The settlement carves a recognizable model of rights, permissions, and licences into the wildly unknown territories of digital publishing. Google, behemoth of the online world, with a vast network of incremental ad revenues threaded through it, may be the best bet publishers have at monetizing their works online. Rightsholder revenues will likely be modest for most, but digital publishing has so far rarely posted high returns (except for those who provide the access, the platform, or the devices to reach it); any publishing, for most who pursue it now, rarely leads to high returns. In the short term, the settlement spares publishers from the need for, and deprives them of, a useful blueprint to develop their own business models or holistically address the underlying rights sharing issues digital possibilities raise. But it also lets publishers run a large-scale experiment using primarily backlist or out-of-print titles, with the option to add current, in-print titles to the mix when they like. Perhaps out of new possibilities and demonstrable usage patterns, the future of publishing will emerge.

Legislation can and should be adjusted over time, but it should also take a long-range view of its subject: law-making should not be done lightly. Legislation sets regulatory standards that endure, though it tends to be clearer after the fact whether those standards were well or ill chosen. Whatever the outcome of the settlement, it does not absolve legislators of continuing to update copyright laws to reflect the needs and practices of both those who create and produce expressions of ideas as well as the public interest that attends, and builds on, these ideas. Sally McCausland, in her discussion of the settlement, orphan works, and mass digitization, observes, “The Google scheme inherently relies on regulatory intervention—in this case via the class litigation rules—to underpin it. The copyright system itself is a legal intervention in the market, which is in a constant feedback loop responding to new technologies and the uses they permit.”<sup>145</sup> Copyright legislation is neither neutral, natural, nor static: it is a device crafted by governments to both protect and serve all the individuals who make up the public. When it ceases to function appropriately, we must demand—and allow—that it change.

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<sup>145</sup> McCausland, “Googling the Archives,” 389.

## Conclusion

The Google Books settlement proposes to accomplish certain things in a relatively efficient and practical manner, namely the mass digitization of books and the rescue of orphan works from their current invisibility. However, criticisms of the settlement abound: on legal grounds, from the technicalities of class action validity to the settlement's revision of the fundamental legal basis for copyright; on economic grounds, such as whether it creates a monopoly or compensates all parties fairly; and on cultural or moral grounds, including its weak requirements of Google as cultural steward and the precedents the settlement could set for the ongoing development of copyright law and modes of public access. Rightsholders contemplating the settlement should recall that the Authors Guild and the Association of American Publishers went from articulating a specific infringement complaint to appointing themselves agents—for their own members, but for many more individuals and entities who are not members of these organizations—in negotiating a huge parcel of digital rights. The reception of the settlement thus far makes it clear that not all rightsholders feel their interests are well represented in the settlement agreement.

Authors, especially those whose books are out of print, have expressed various responses to the settlement and must appraise for themselves whether its benefits outweigh its risks, costs, or perceived wrongs. Economic interests will play a role, but so will authors' desires for audience reach or public reputation; the priority of these possibly conflicting interests will vary from individual to individual. Publishers are not solely motivated by economic interests either. Many build their lists with goals other than profit: they want to effect cultural change, advance public knowledge, or support and contribute to the creation of beautiful, powerful works. But a publishing house is also a business, with rights to perhaps hundreds of titles;

in this context, many publishers may be reluctant to dismiss the settlement's financial and other incentives. The settlement retains a role for publishers in creating an online distribution model. It also offers certain commercial opportunities that may make financial sense from a pure business perspective—although time will tell if whatever revenues a rightsholder earns justify the administrative burden of maintaining claim information.

If they have not opted out, publishers should register their claims before the 31 March 2011 deadline so as to maximize their economic benefits and receive the one-time cash payment for each book Google digitized without authorization. Publishers should then evaluate their strategies for selling books online: once they opt in, rightsholders still must decide how they want to participate in the settlement or collaborate with Google. The settlement offers a convenient platform for selling into every library in the US, and for reaching individual US consumers, but the revenues from these sales may be relatively modest. Publishers must consider their other options for promoting or selling backlist titles in particular. The settlement does not affect any book published after 5 January 2009, and while publishers may have their own plans to create digital formats for recent and upcoming releases, limited resources might mean that older titles do not warrant special efforts. At the same time, highly specialized titles may command high sales prices so long as they are simply discoverable online, in which case the publisher may prefer to sell e-books or print copies itself, using Google to generate traffic but not to broker sales. Other titles may show better revenue potential from incremental usage fees through the institutional subscriptions.

If a publisher decides the incremental income of the settlement's three revenue models—online text ads, institutional subscription fees, and consumer purchase sales—are not appealing, that publisher could remove its books completely, exclude them and retain the ability to experiment with the revenue models at a later date, or even consider alternative agreements with Google. Large publishers may be able to negotiate individual agreements, but for the many small and medium sized enterprises contemplating the settlement, the Partner Program is a viable alternative. The Partner Program offers limited revenue models—only ad revenues—but also does not require as vigilant management since Google can only use the scanned book in the ways the publisher instructs: no default licences apply based on

commercial availability or other criteria. Although the Partner Program avoids the risk of Google unexpectedly applying a default licence, a publisher that collaborates with Google through the Partner Program is barred from the institutional subscription or consumer purchase options. However, another advantage of the Partner Program is that any revenues earned are only divided between Google and the rightsholder, and do not support the operations of the Book Rights Registry.

For maximum flexibility and control, a publisher might opt in to the settlement, exclude books (and include them later if Google Books proves financially successful), and maintain an agreement under the Partner Program, which would allow the publisher to earn some revenues even while it waits to see how the settlement's other revenue models work in practice. Partner Program revenues—all of which are ad revenues—are derived from indexing a book to determine the presence of certain words or phrases and do not depend on selling access to the book's content.

A publisher can have a Partner agreement with Google and be a member of the settlement class. Individual books, however, can only be subject to one agreement at a time. Cash payment compensation is available, for a limited time, regardless of each book's governing agreement. To enjoy any other terms the settlement proposes, rightsholders can join the class at any time by registering their claims: there is no time limit to opt in. The settlement's terms and revenue models will apply to all books not covered by a separate agreement with Google, which means rightsholders should be free to make other arrangements with Google (like the Partner Program), or terminate those other arrangements and resort to the settlement agreement at any time.<sup>146</sup>

The settlement may be an efficient addendum to existing copyright practices and laws, and it may offer concrete economic benefits to individual rightsholders, but these practical advantages may not be sufficient to establish the settlement as a fair and appropriate solution to copyright's shortcomings or the challenges of digitization. The settlement may serve

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<sup>146</sup> If a book was removed from the settlement—the permanent designation, stronger than exclusion—Google might decline to digitize it again under the same terms. However, the settlement explicitly provides for unlimited changes between include and exclude; this flexibility is the main advantage exclusion has over removal. Partner Program agreements can be terminated by either the publisher or Google, and the settlement by default encompasses all books whose rightsholders did not opt out.

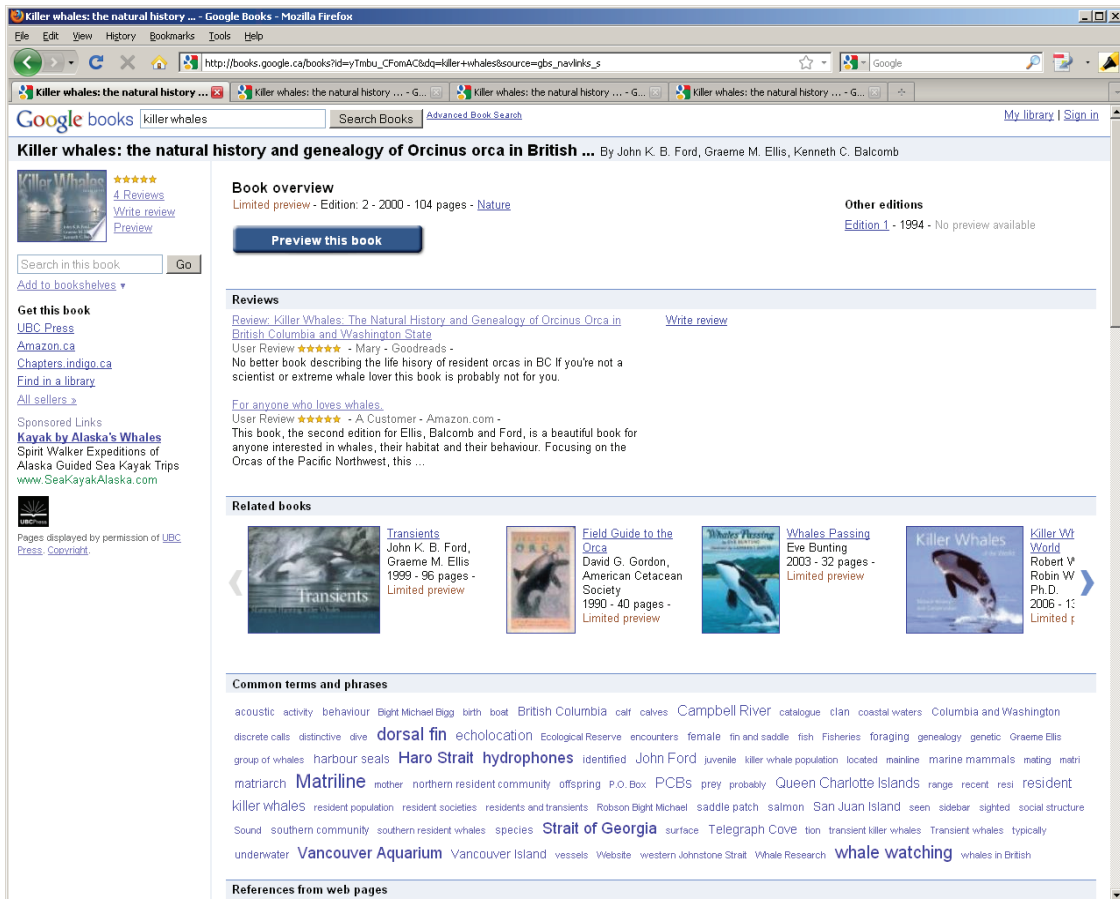


publishers' and authors' individual or immediate interests even as it erodes their collective and long-term ones. The public, too, has a significant vested interest in the subjects of the settlement—the books themselves, repository to centuries of knowledge and creativity—as well as the legal and cultural environment the settlement endorses. A detailed account of the settlement's economic and cultural costs and benefits is instructive, but more importantly the settlement highlights the structural and technological deficiencies of existing copyright law. Long copyright terms and the presumption of total rights protection have created a copyright regime that privileges the potential for commercial exploitation regardless of whether that exploitation is feasible, or desired by the creators themselves. This regime is also particularly ill-equipped to recognize digital possibilities. Whatever happens to this settlement, such tensions continue to strain copyright's rules.

A number of conditions on approval could address criticisms of the settlement, but perhaps the best way to ensure Google, publishers, and authors are all treated fairly is to pursue copyright reform, not private contracts, to address the legislative problems that the settlement tries to engage. Legislative changes with respect to intellectual property rights have been slow to reflect everyday technological realities. The existence of the settlement, and much of its reception, demonstrate that private interests and public appetites are eager to move beyond the limits of the current regulations. Copyright reform will be fraught with challenges of its own, but the existing legal framework—in Canada as in the US—is increasingly inadequate for accommodating common and emerging practices and capabilities: copyright law has swung out of balance. The settlement may serve as an early test bed for certain possibilities, including digital distribution and access, or the imposition of limited formalities on rightsholders. However, as a private contract, it is an insufficient guide for legislative development. The trouble with copyright does not affect Google alone. The public interest demands more broadly applicable solutions, and these will be achieved—eventually, and possibly with great difficulty—through copyright legislation. We may get copyright reform wrong, as arguably we have done in the past, but that fear should be allayed if we also recall that we have the power to revise our legislative interventions until we get them right.

# Appendix

## Google Book Search, Sample Screen Shots




Google Book Search record for the 2000 edition of *Killer Whales: The Natural History and Genealogy of *Orcinus orca* in British Columbia and Washington State*, by John K.B. Ford, Graeme M. Ellis, and Kenneth C. Balcomb. Google Books has offered both limited preview and no preview at different times; this screen shot indicates limited preview. UBC Press submitted the book to the Partner Program but has changed its preview preferences for this title. On the left, there is a “Get this book” link to UBC Press, a revenue-generating text ad, and the UBC Press logo.


Page 43 - assist in whale identification, we have prepared photographs in three size categories that reflect the body size of individuals: Calves and  
 Appears in 2 books from 1999-2000

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2000 - 104 pages -  
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Title [Killer whales: the natural history and genealogy of Orcinus orca in British Columbia and Washington](#)  
[Canadian electronic library](#)

Authors [John K. B. Ford](#), [Graeme M. Ellis](#), [Kenneth C. Balcomb](#)

Edition 2, illustrated

Publisher UBC Press, 2000

ISBN 0774806004, 9780774806002

Length 104 pages

Subjects [British Columbia](#)  
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**Book overview**  
 This book presents the results of more than 25 years of research on killer whales in Washington State and British Columbia. Intended for both whale watchers and researchers, this updated edition of the book first published in 1996 contains the latest information about killer whale natural history. It includes over 300 photographs of resident killer whales as well as a genealogical registry that enables readers to identify individual killer whales and their family groups. A special section includes suggestions for whale watchers.

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 Killer whales are clearly very accustomed to working close by power boats and their exhaust smoke and heating discharges in the vicinity. But sufficient sometimes take place and their other activities of death. Two females, the northern residents A1 and A2, were both seen...  
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Vancouver coastal waters Columbia and Washington distinctive dive dorsal fin echolocation Ecological Reserve encounters female fin and saddle Fisheries foraging genealogy genetic Graeme Ellis group of whales Haro Strait hydrophones identified John Ford juvenile marine mammals mating matr matr matr Matriline mature males mother northern resident community northern resident pods observed offshore offspring orca Orcinus PCBs prey probably Queen Charlotte Islands range recent resi resident killer whales resident population resident societies Robson Blight Michael saddle patch salmon San Juan Island sidebar sighted social structure sounds southern community southern resident whales species Strait of Georgia subpods surface Telegraph Cove three pods tion travel patterns typical underwater Vancouver Aquarium Vancouver Island Vancouver Island north vessels western Johnstone Strait Whale Research whale watching whales tend


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Killer whales: the natural history and genealogy of *Orcinus orca* in British Columbia and Washington State ... By John K. B. Ford, Graeme M. Ellis, Kenneth C. Balcomb

**Book overview**

Watching killer whales in the wild in British Columbia and Washington State has become a popular recreational activity in the last decade. Nothing quite matches the thrill of witnessing a pod of these immense creatures cutting through the waters of Johnstone Strait or listening to their strident underwater calls to each other in their own dialect. Because killer whales live at sea and spend most of their time underwater, they have been difficult to observe and study in the wild. In the 1970s, however, the late Michael Bigg and the authors of this book developed a technique that would revolutionize the study of killer whales. By photographing the dorsal fin and grey saddle patch at the base of the fin with their idiosyncratic markings, they found that killer whales could be individually identified and studied over a course of years. As they pursued this line of study into the 1980s and 90s, they discovered that the killer whale possessed a social life that was richer and more complex than anyone had imagined. This book presents the results of twenty years of killer whale research in British Columbia and Washington State. The authors are active researchers who are widely regarded as the world's foremost authorities on killer whales. Their book contains the latest information on killer whale natural history, suggestions on how, when, and where to best watch killer whales, and a catalogue of over 300 photographs of "resident" killer whales which identifies individual whales and their family groups. Intended for both whale enthusiasts and researchers, *Killer Whales* adds much to our knowledge of this remarkable creature.

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**Killer Whales on the Mainland**  
 the sea, of which the **killer whale** was a candidate. **Killer whales** remain an important component of Native traditions today. **Killer whales** have long been viewed with particular animosity by fishermen, who regarded the **killer whale** as a threat to their lives as well as their livelihood. In Norway, it was feared that **killer whales** were responsible for the deaths of fishermen. In North America in the 1970s, interest in viewing **killer whales** in the wild soon developed, and the first commercial whale-watching excursions aimed at this species began in the Johnstone Strait area of British Columbia in 1980. Today, **killer whales** are protected for their own sake, and **killer whales** in the wild in British Columbia and Washington State has developed into a popular recreational activity over a year decade. Nothing quite matches the thrill of witnessing a resident pod cutting through the waters of Johnstone Strait.

**Traveling**. A group of **whales** is considered to be traveling when it is swimming concurrently in one direction at a steady pace in a relatively tight formation, and there is no sign of feeding. Traveling **whales** tend to move at speeds of 3 knots or more, compared to the more leisurely pace of 1 knot or less when feeding. **Whales** are considered to be traveling when it is swimming concurrently in one direction at a steady pace in a relatively tight formation, and there is no sign of feeding. Traveling **whales** tend to move at speeds of 3 knots or more, compared to the more leisurely pace of 1 knot or less when feeding.

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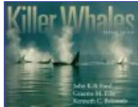
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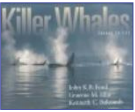
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