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I. INTRODUCTION

The sprawling Google Book Search litigation began as a dispute between the search engine colossus and a variety of authors and publishers over the legality of Google's book digitization effort, the Google Book Search project ("GBS" or "Google Book Search"), for the purpose of indexing paper collections and making them searchable on the Internet. However, through the metamorphic power of class action litigation, a dispute over mere indexing and searching has been transformed into a comprehensive agreement over the future of the book as a digital commodity. Understanding this transformation and its implications is the central ambition of this article.

The initial lawsuits filed against Google posed conceptual as well as practical questions for the administration of copyright law.[1] Google's massive digitization effort aims to promote digital access to paper-based collections that are relatively inaccessible. This goal, while laudable, appears to conflict with the rights and interests of authors and publishers and their decidedly pre-digital business models. The critical question in the litigation was whether intermediate copying of the kind pursued by Google should be considered a fair use as that term of art is understood in U.S. copyright law. Thus, for a time at least, it looked as though the Google Book Search litigation would address fundamental questions over the relationship between copyright law and copy-reliant technology.[2] It is hard to imagine higher stakes: if Google had lost the fair use argument, it might well have sounded the death knell for the legal strategy embedded in the current architecture of all Internet search technology.[3]

On October 28, 2008, Google announced that it had reached a settlement of the class actions brought by the Authors Guild and various publishers (the "Settlement").[4] The Settlement circumvents the critical fair use issues at the heart of the legal dispute, but it raises in turn some fundamental questions about the administration of copyright law. Specifically, the Settlement charts new territory in the resolution of copyright disputes through class action litigation.

The Settlement does much more than simply allow Google to continue within plausible fair use parameters, i.e., digitization accompanied by search and very limited

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1. *See* Class Action Complaint, Authors Guild, Inc. v. Google, Inc., 2005 WL 2463899 (S.D.N.Y. Sept. 20, 2005) (No. 05-CV-8136-DC) (highly publicized class action lawsuit brought by the Authors Guild); *See also* Complaint, McGraw Hill Cos. v. Google, Inc., No. 05-CV-8881, (S.D.N.Y. Oct. 19, 2005), 2005 WL 2778878 (a less publicized but equally important suit on behalf of the Association of American University Publishers, the McGraw-Hill Companies, Pearson Education, Penguin Group (USA), Simon & Schuster, and John Wiley & Sons).

2. *See generally* Matthew Sag, *Copyright and Copy-Reliant Technology,* 103 Nw. U.L. Rev. 1607 (2009).

3. *See id.* at 1639–57.

4. David Drummond, *New Chapter for Google Book Search*, The Official Google Blog (Oct. 28, 2008, 7:14 AM), http://googleblog.blogspot.com/2008/10/new-chapter-for-google-book-search.html. At the time this article was published, the Google Book Search settlement, announced on October 28, 2008, was still subject to court approval. *See also* Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Oct. 28, 2008), *available at* http://thepublicindex.org/docs/settlement/settlement.pdf (settlement as originally proposed).

display of books. Instead, it transforms the Google Book Search universe into a vehicle for the direct electronic distribution of entire manuscripts through consumer purchases and institutional subscriptions. Controversially, the scope of works capable of electronic distribution includes not only those whose owners opt in, but rather all those whose owners fail to opt out.

The initial Settlement was followed in short order by a maelstrom of objections by foreign governments, academics, and individual authors.[5] Finally, after the U.S. Department of Justice (DOJ) added its own considerable objections, the parties agreed to revise the deal in late 2009.[6] The Amended Settlement Agreement, filed on November 13, 2009, addresses some, but by no means all, of the objections raised by the DOJ and other critics of the original deal.[7] Oral arguments in the final fairness hearing regarding the Amended Settlement Agreement were held before the U.S. District Court for the Southern District of New York on February 18, 2010.[8] At the time of this article's publication, no decision has been issued by the district court. If the Amended Settlement Agreement is ultimately approved by the court, it will end four years of uncertainty and clear the way for Google to continue to digitize millions of copyrighted library books and further develop the Google Book Search project. The question remains, however: Should the Amended Settlement Agreement be approved?[9]

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5. *See* Brandon Butler, *The Google Book Settlement: Who is Filing and What are they Saying*, Ass'n of Research Libraries (Sept. 28, 2009), http://www.arl.org/bm~doc/googlefilingcharts.pdf. The Settlement prompted the filing of hundreds of objections by September 2009. *Id.*

6. Statement of Interest of the United States Regarding Proposed Class Settlement at 27, Authors Guild, Inc. v. Google, Inc., Case No. 05-CV-8136-DC (S.D.N.Y. Sept. 18, 2009) [hereinafter DOJ Statement], *available at* http://thepublicindex.org/docs/letters/usa.pdf.

7. This article will refer to the "settlement" in general in lower case and to the specific settlements and related settlement agreements in upper case (respectively, the "Settlement" and "Amended Settlement," and the "Settlement Agreement" and "Amended Settlement Agreement"). Differences between the Settlement Agreement, *supra* note 4, and the Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/Amended-Settlement-Agreement.pdf, will be noted where relevant.

8. Order Granting Preliminary Approval of Amended Settlement Agreement at 4, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 19, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/order_granting_prelim_approval.pdf.

9. Robert Darnton, *Google & the Future of Books*, N.Y. Rev. Books, Feb. 12, 2009, at 9, *available at* http://www.nybooks.com/articles/22281; James Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books,* 2009 Am. Const. Soc'y & L. and Pol'y 1; *see also* Paul N. Courant, *Scholarship and Academic Libraries (and Their Kin) in the World of Google*, First Monday, Aug. 7, 2006, http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1382; James Grimmelmann, *How to Fix the Google Book Search Settlement*, 12 J. Internet L. 10, 10–11 (2009); Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?* (U of Chi. L. & Econ., Olin Working Paper No. 462, 2009), *available at* http://ssrn.com/abstract=1387582; Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Booksearch Settlement*, 52 Comm. of the Ass'n for Computing Machinery 28 (2009); Siva Vaidhyanathan, *My Initial Take on the Google-Publishers Settlement*, The Googlization of Everything (Aug. 31, 2010, 11:18 AM), http://www.googlizationofeverything.com/2008/10/my_initial_take_on_the_googlep.php.

In both its original and amended forms, the settlement agreement is a complicated document with far reaching implications. The settlement is also subject to many different frames of analysis. Antitrust experts have questioned whether the market for online book searching will become more or less competitive in light of the settlement as well as how the broader Internet search market will be affected by it.[10] Class action experts have questioned whether the Amended Settlement Agreement is procedurally and substantively fair, adequate, and reasonable pursuant to the case law relating to Federal Rule of Civil Procedure 23 ("Rule 23").[11] Librarians speculate on what the settlement portends for the future of their institutions and, indeed, for the future of the book as a physical medium for the communication of knowledge.[12] From a social welfare perspective, the immediate question is simply whether society as a whole is better off with the settlement than without it.[13]

How, then, should we evaluate the proposed settlement? We could compare the Google Book Search project that will result from the settlement to some free equivalent service provided of the Library of Congress or a similar government agency. However, mass digitization has clearly not been a priority for the Library of Congress in the past, and it is unclear to what extent Google's own efforts at book digitization could actually impede subsequent digitization efforts by government or non-government actors. Alternatively, we could compare the settlement negotiated by the parties to a legislative solution that clarified rights and liabilities with respect to book digitization or perhaps created some kind of safe harbor. This would no doubt be a useful vein of inquiry; however, without a definitive legislative proposal, it is difficult to make this comparison in the abstract, and one risks comparing the actual settlement to an idealized, well-written, unbiased, capture-free legislative solution.

This article takes a different approach, comparing the Amended Settlement Agreement to the most likely outcome of the litigation it attempts to resolve. This counterfactual approach is worth exploring because it allows us to concentrate on the merits of the Amended Settlement Agreement per se, rather than the merits of GBS more broadly. Many critics have been struck by the divergence between the Google Book Search universe envisioned under the Settlement and the initial GBS project,

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10. *Compare* Picker, *supra* note 9 at 13–16 (raising several potential antitrust objections to the Settlement), *with* Mark A. Lemley, An Antitrust Assessment of the Google Book Search Settlement (July 8, 2009) (unpublished working paper), *available at* http://ssrn.com/abstract=1431555 (finding antitrust objections to the Settlement generally unpersuasive). *See also,* DOJ Statement, *supra* note 6, at 2 (noting that while the DOJ did not reach firm conclusions about the antitrust implications of the Settlement, it nonetheless raised sufficiently serious concerns to recommend against the Settlement).

11. DOJ Statement, *supra* note 6, at 2. The district court has considerable discretion in determining whether a settlement is fair and reasonable. *See* Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 801 (3d Cir. 1974). Nonetheless, the DOJ has recommended that the court undertake "a particularly searching analysis" as to whether the requirements of Fed. R. Civ. P. 23 have been met in this case. DOJ Statement, *supra* note 6, at 2.

12. Darnton, *supra* note 9.

13. Note that it is possible for a settlement to be both welfare-improving and yet still inadequate under the criteria of Rule 23. To this extent, the legal issue for the court diverges from the basic social policy question of the costs and benefits of the settlement.

which focused on search, not distribution. The Settlement contains a set of defaults that will allow Google to make substantial displays of, and to sell electronic versions of, so-called orphan works.[14] Neither of these uses would be permissible under fair use. Striking as these differences are, there are a number of significant similarities between the likely fair use outcome and the basic framework of the settlement. However, the similarities have been overlooked because the fair use issues in relation to GBS have been largely misunderstood. Google was never likely to receive the court's unqualified approval for its massive digitization effort.[15] Instead, the most likely outcome of the litigation was that book digitization would qualify as a fair use so long as copyright owners were given the opportunity to opt out of inclusion in the book database and that opportunity was made freely available at a nominal cost.[16]

Assuming that any fair use ruling would have been conditioned on the provision of an opt-out, many of the terms of the Amended Settlement Agreement do not differ significantly from the most likely outcome of the litigation. Essentially, the opt-out that fair use would likely have required has been replaced by the ability of copyright owners to opt out of the class action as well as the significant opt-out and modification opportunities within the Amended Settlement Agreement itself. The aspects of the Amended Settlement Agreement that allow Google to continue to operate its book search engine substantially in its current form should not be controversial; they essentially mirror the fair use counterfactual. The initial digitization of books, the processing and analysis of metadata, and the basic reporting functions of the book search engine were likely to constitute fair use, and these are also allowed under the terms of the Amended Settlement Agreement. It is not surprising that, as soon as the Settlement was announced, the Google Book Search debate shifted from the merits of digitization to issues of commoditization and control. These are the points of contention where the Settlement and the Amended Settlement differ sharply from the predicted fair use ruling.

This article is organized as follows: Part II assesses the extent to which Google's assertion of fair use would have trumped the copyright owners' claims of infringement if the claims had been litigated in full rather than settled. Part III reviews the essential features of the Amended Settlement Agreement in considerable detail. Part IV then compares the Amended Settlement Agreement to the likely outcome under the fair use doctrine. Part V offers some concluding observations.

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14. The U.S. Copyright Office uses the term "orphan works" to describe the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner. *See* U.S. Copyright Office, Report on Orphan Works 15 (2006), *available at* http://www.copyright.gov/orphan/orphan-report.pdf.

15. *See infra* Part II.

16. *See infra* Parts II.B.1, II.B.4–5. Some commentators will surely disagree that this is the *most* likely outcome. To those skeptics, I would say that, at a minimum, it is the most favorable fair use decision for which Google could reasonably have hoped.

II. THE COUNTERFACTUAL—WHAT IF THERE WERE NO SETTLEMENT?

A. The Google Book Search Project

The Google Book Search project is an attempt to build a comprehensive search engine that will allow full text searching inside millions of books.[17] Google has been obtaining the raw data for this search engine in electronic form from a variety of book publishers since 2004.[18] However, because most books published over the last few hundred years are not available in electronic form, Google has also been working with various libraries to digitize their paper collections shelf-by-shelf, page-by-page—a painstaking, time-consuming, and expensive process.[19]

Once a book is digitized, Google can treat it the same way it treats an HTML web page. Google stores the digitized volumes on its computers and performs intense data analysis in order to generate what is essentially a library card catalogue system for the digital age. Once digitized and analyzed, a book is then made available in response to user search queries. In its current form, a search performed using Google Book Search returns either limited bibliographic information about a book, small snippets of text from a book, a limited preview which displays some substantial sections of a book, or, if a book is not subject to copyright in the United States, it makes the entire book available for digital download.[20]

Standing alone, the standard way that the Google Book Search engine reports search results is unlikely to amount to copyright infringement for two principal reasons. First, the basic bibliographic information that a Google Book Search provides, such as title, author, and subject matter, are all facts clearly not subject to copyright protection. Through the idea-expression distinction, copyright law protects the expressive elements of the author's work while guaranteeing subsequent authors the necessary breathing space to make their own contributions by adding to, re-using, or re-interpreting the facts and ideas embodied in the original work.[21] Copyright law clearly distinguishes between facts and their expression and it is well settled that data is not subject to copyright protection: one can extract and reproduce facts, names, and dates from a newspaper article, or ideas and processes from an instructional text, without infringing the author's copyright.[22]

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17. Bob Thompson, *Search Me? Google Wants to Digitize Every Book. Publishers Say Read the Fine Print First,* Wash. Post, Aug. 13, 2006, at D1.

18. *See* Edward Wyatt, *Google Adds Library Texts to Search Database*, N.Y. Times, Nov. 3, 2005, at C11.

19. *See id.* This component of Google Book Search is called the Google Books Library Project. Note that this article does not address whether Google's practice of making digitized versions of books available to participating libraries could itself amount to copyright infringement.

20. *What You'll See When You Search on Google Books*, Google Books, http://books.google.com/googlebooks/screenshots.html (last visited Sept. 30, 2010).

21. 17 U.S.C. § 102(b) (2006 & Supp. 2010) (providing that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work").

22. Feist Publ'g, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991); *see also* Baker v. Selden, 101 U.S. 99 (1879).

Second, the very brief snippets or quotations that Google Book Search displays are, in all likelihood, too brief, too fragmented, and too insubstantial to constitute a reproduction of an entire copyrighted book. Although the Copyright Act of 1976 prohibits certain forms of reproduction, the actual threshold of infringing reproduction is left undefined by the Act.[23] Thus, the question of how much copying is too much turns on common law tests of what is usually referred to as "substantial similarity."[24] Where a fragment of the original has been copied exactly, courts determine whether the copying amounts to infringement "by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."[25] The snippets of text Google displays in response to a search query are very small and thus are unlikely to be seen as taking a quantitatively or qualitatively significant part of the original work. Google Book Search also provides extended preview displays of various books; however, these are all subject to express licenses from the relevant copyright owners, usually through one of Google's Publisher Partner Agreements.[26] Google Book Search also offers complete access to works known to be in the public domain.[27]

B. Copyright Infringement or Fair Use?

Lawyers for the Authors Guild and the plaintiff publishers have argued that even if the search results which Google Book Search reports to users do not violate the Copyright Act—a point they do not concede—scanning millions of copyrighted library books in order to build that search engine in the first place certainly does.[28] The copyright owner has an exclusive right to reproduce his or her work in copies under the Copyright Act.[29] Digitally scanning a book and storing that scan on a computer hard drive where it can be retrieved and reprinted amounts to making a copy in the ordinary sense of the word.[30]

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23. *See* 17 U.S.C. § 106 (2006 & Supp. 2010) (setting out the exclusive rights of the copyright owner).

24. "Substantial similarity" means protectable similarity, not merely the similarity that may prove that work B was actually copied from work A. *See* Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1992) (citing Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975)); Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 131 (2d Cir. 2003) (citing Rock Entm't, Inc. v. Carol Publ'g Grp. Inc., 150 F.3d 132, 137–38 (2d Cir. 1998)).

25. Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004) (citing Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1 (9th Cir. 1987)); *see also* Jarvis v. A&M Records, 827 F. Supp. 282, 289–90 (D.N.J. 1993); 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03(A)(2)(a) (2010).

26. *See Google Books Partner Program*, Google Books, https://books.google.com/partner/ (last visited Aug. 27, 2010).

27. *What You'll See When You Search on Google Books*, *supra* note 20.

28. *See* First Amended Class Action Complaint, Authors Guild, Inc. v. Google, Inc., No. 05-CV-08136-JES (S.D.N.Y. July 24, 2006), 2006 U.S. Dist. Ct. Pleadings LEXIS 1863 at 2.

29. 17 U.S.C. § 106(1) (2006 & Supp. 2010).

30. "Copies" are defined under the Act as "material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated." *Id.* § 101.

Google's primary counterargument to this charge of infringement is that its new technology is protected by the fair use doctrine.[31]

The fair use doctrine plays a vital role in balancing "the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[32] Fair use is a flexible standard that limits the scope of copyright protection and renders certain actions relating to copyrighted works, non-infringing.[33] Accordingly, incidental copying in the service of quotation, criticism, illustration, comment, parody, and simple clarification have long been recognized as fair use.[34]

The balancing function of the fair use doctrine is critically important when the copyright owner withholds permission for reasons that we as a society find unacceptable such as to stifle parody, criticism, or social debate.[35] However, the doctrine is not limited to situations involving the suppression of dissenting opinions. Fair use is necessary even when copyright owners are purely commercially motivated, because licensing and other private ordering mechanisms do not provide a solution for high exchange costs, high information costs, and strategic behavior. Therefore, the fair use doctrine is particularly important in situations where the costs of obtaining permission outweigh the benefits of the use.[36]

While judicial application of the fair use doctrine is often regarded as highly fact-specific and uncertain,[37] courts routinely frame their fair use decisions in terms of four non-exhaustive statutory factors. These factors are (1) the purpose and character of the defendant's use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as

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31. *See* Answer, Jury Demand, and Affirmative Defenses of Defendant Google, Inc. at 7, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136 (S.D.N.Y. Nov. 30, 2005); Answer, Jury Demand, and Affirmative Defenses of Defendant Google, Inc. at 8, McGraw-Hill Cos. v. Google, Inc. No. 05-CV-8881 (S.D.N.Y. Nov. 8, 2005). This is by no means Google's only answer to the allegations of copyright infringement raised by the plaintiffs.

32. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

33. *See* 17 U.S.C. § 107.

34. *See* U.S. Copyright Office, Register's Report on the General Revision of the U.S. Copyright Law (1961), *available at* http://ipmall.info/hosted_resources/lipa/copyrights/Register%27s%20Report%20on%20the%20General%20Revision%20of%20the%20U.S.pdf.

35. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

36. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case aud Its Predecessors*, 82 Colum. L. Rev. 1600, 1608 (1982).

37. *See* Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (describing fair use as one of the most troublesome doctrines in the whole law of copyright); *but cf.* Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2591 (2009) (suggesting that the unpredictability of the doctrine may be overstated).

a whole, and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.[38]

1. *The Purpose and Character of the Use*

The first fair use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[39] The case law under the first factor is dominated by two considerations: whether the use is transformative and whether the use is commercial.[40] According to the Supreme Court's most recent fair use decision, *Campbell v. Acuff-Rose Music, Inc.*, the first factor turns primarily on "whether and to what extent the new work is 'transformative.'"[41] A transformative use is one that, compared to the original creation, "adds something new, with a further purpose or different character."[42] Transformative uses are protected by the fair use doctrine because they lead to the creation of new works that do not substitute for the author's original expression.[43] For example, parodies are considered to be transformative because they shed light on an existing work while at the same time creating something new.[44] A claim of transformative use is most obvious when the work itself is literally transformed; however, in many cases courts have held that other uses that do not literally change the work are nonetheless sufficiently different to constitute fair use.[45]

Google can point to significant precedents in relation to similar technology where the courts have found that intermediate copying constitutes fair use.[46] In a recent decision regarding plagiarism detection software, the Fourth Circuit held that

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38. In reality, the Section 107 factors are neither complete, nor are they individually or cumulatively determinative. Even the notion that there are four factors is misleading: beneath the statutory factors lies an amalgamation of interconnected meta-factors, sub-factors and presumptions. *See* Limitations on Exclusive Rights: Fair Use, 17 U.S.C. § 107 (2006 & Supp. 2010); *but cf.* Bond v. Blum, 317 F.3d 385, 394 (4th Cir. 2003) ("These factors are not meant to be exclusive, but rather illustrative, representing only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses." (citations omitted)); *cf.* Universal City Studios, Inc. v. Sony Corp. of America, 480 F. Supp. 429, 448 (C.D. Cal. 1979) ("The factors are illustrative, not definitive.").

39. 17 U.S.C. § 107(1).

40. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 597–608 (2008).

41. 510 U.S. 569, 579 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

42. *Campbell*, 510 U.S. at 579.

43. *Id.*

44. *Id.*

45. For example, in *Perfect 10, Inc. v. Amazon.com, Inc.*, the Court of Appeals for the Ninth Circuit held that "[e]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work." 487 F.3d 701, 721–22 (9th Cir. 2007) (citing Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–19 (9th Cir. 2003)). *See also* Field v. Google Inc., 412 F.Supp.2d 1106, 1117–19 (D. Nev. 2006); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006).

46. *See supra* notes 47–49 and accompanying text.

copying and archiving student term papers was transformative because the papers were used "for an entirely different purpose, namely, to prevent plagiarism and protect the students' written works from plagiarism."[47] In several reverse engineering cases, courts have held that copying computer software in order to discover functional compatibility requirements is a fair use.[48] Likewise, in the context of visual search engines, the Ninth Circuit has held that using thumbnail versions of copyrighted photographs as part of a menu of search results is transformative and constitutes a fair use.[49] In *Perfect 10, Inc. v. Amazon.com*, the Ninth Circuit concluded that the use of these thumbnail photos may even be "*more transformative* than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work."[50]

There are good reasons to think that this view of transformative use would prevail in the Second Circuit where the Google Book Search case is being litigated. A number of significant cases from that circuit have declined to find a transformative use when the defendant has done no more than locate a new way to exploit the creative virtues of the original work.[51] However, the Second Circuit has recognized the need to extend fair use beyond artistic and critical transformations to situations where the defendant uses a copyrighted work in a different context to serve a fundamentally different function than the original.[52] Moreover, although the most relevant search engine precedents do not hail from the Second Circuit, both *Amazon* and *Kelly v. Arriba Soft Corp.* have been cited by U.S. district courts in the Second Circuit with apparent agreement on this very point.[53]

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47. A.V. *ex rel.* Vanderhye v. iParadigms, L.L.C., 562 F.3d 630, 638 (4th Cir. 2009) (citation omitted).

48. *See* Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); *see also* Sony Computer Entm't Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000). In *Sega Enterprises*, the Court of Appeals for the Ninth Circuit held that "Accolade copied Sega's code for a legitimate, essentially non-exploitative purpose," making its use essentially fair under the first factor. 977 F.2d at 1522–23. In *Sony Computer Entertainment*, a case with similar facts as to *Sega Enterprises*, the court concluded that the defendant's Virtual Game Station was transformative because it created a new gaming platform and was itself "a wholly new product." 203 F.3d at 606–07.

49. *Kelly*, 336 F.3d at 821; *Perfect 10*, 487 F.3d at 721, *amended by* 508 F.3d 1146 (9th Cir. 2007).

50. 487 F.3d at 721 (emphasis added) (citation omitted).

51. *See*, *e.g.*, On Davis v. The Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001) (holding the use of plaintiff's eyewear in a clothing advertisement not transformative because it was "worn as eye jewelry in the manner it was made to be worn"); Castle Rock Entm't, 150 F.3d 132, 142–43 (2d Cir. 1998) (holding that a Seinfeld quiz book was not transformative when its purpose was to repackage the television show Seinfeld to entertain Seinfeld viewers); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 79 (2d Cir. 1997) (holding that the copy of plaintiff's painting used as decoration for a television program's set was not transformative because it was used for "the same decorative purpose" as the original).

52. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) (finding transformative use when defendant's purpose in using copyrighted concert poster was "plainly different from the original purpose for which they were created" and "a purpose separate and distinct from the original artistic and promotional purpose for which the images were created").

53. *See* Warner Bros. Entm't Inc. v. RDR Books, 575 F.Supp. 2d 513, 541 (S.D.N.Y 2008) (finding that the defendant's use of the *Harry Potter* series in creating a "Lexicon" to the series was transformative); S.A.R.L

If Google Book Search is transformative, does it matter that it is also commercial? The short answer is "no." In its 1994 decision, *Campbell*, the Supreme Court clearly rejected the notion that commerciality by itself had any "hard presumptive significance."[54] Instead, the Court adopted a sliding scale for commercial use, arguing that because "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works . . . the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[55]

There are also a substantial number of cases where commercial use by an Internet search engine was deemed to be fair use in analogous circumstances. In *Kelly*, an image search case preceding *Perfect 10*, the Ninth Circuit ruled that the replication of copyrighted images in thumbnails would not substitute for the full-sized images.[56] The court in *Perfect 10* likewise concluded that Google's thumbnail representations were unlikely to interfere with the market for Perfect 10's original expression.[57] The court expressly rejected the application of any commerciality inference or presumption, noting that "this presumption does not arise when a work is transformative because market substitution is at least less certain, and market harm may not be so readily inferred."[58] In sum, the commercial nature of Google Book Search proves to be little more than a red herring in relation to the first factor of the fair use analysis.

Google's decision to give authors the ability to opt out of GBS should also have a significant impact on the "purpose and character of the use" in any fair use analysis. This opt-out flips the usual default rule from exclusion to inclusion. In essence, it allows Google to continue scanning books and incorporating them into the book search engine until it receives an instruction to the contrary from the copyright owner. Without such an opt-out mechanism, clearing rights for Google Book Search would prove to be a very expensive proposition indeed. How expensive? There are an estimated 18 million books in the combined collections of the libraries participating in Google Book Search through the Google Books Library Project.[59] Approximately 10.5 million of these books are unique—i.e., they are held by only one of the participating libraries.[60] It is estimated that slightly less than 20% of these unique

Louis Feraud Int'l v. Viewfinder, Inc., 627 F.Supp. 2d 123, 128 (S.D.N.Y. 2008) (finding that a reasonable fact finder could find the publication of unauthorized fashion photos highly transformative).

54. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994).

55. *Id.* at 579. As Barton Beebe notes, while commentators have assumed that the commerciality presumption was finally discarded in *Campbell*, it remains a tenacious meme in the court of public opinion. *See* Beebe, *supra* note 40, at 598.

56. Kelly v. Arriba Soft Corp., 336 F.3d 811, 815 (9th Cir. 2003).

57. Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 724 (9th Cir. 2007).

58. *Id.* (citing *Campbell*, 510 U.S. at 591).

59. Brian Lavoie, Lorcan Dempsey & Lynn Silipigni Connaway, *Anatomy of Aggregate Collections: The Example of Google Print for Libraries,* D-Lib Mag. (Sept. 2005), http://www.dlib.org/dlib/september05/lavoie/09lavoie.html.

60. *See id.*

works were published before 1923 and, thus, present no copyright issues.[61] That leaves about 8.4 million books with some potential copyright constraint. Even if the average clearance cost (the cost of determining the status of the book, finding the relevant copyright owners, and negotiating a license) was a mere $200 per book, the total cost of rights clearance, before any royalties have been paid, would be $1.68 billion.[62]

This explains why the opt-out is beneficial for Google, but how exactly does the opt-out provision make Google's fair use case stronger? The first thing to understand is that opt-outs are not that unusual. They are, in fact, common in a number of scenarios and particularly characteristic of copy-reliant technologies.[63] Traditional Internet search engines must navigate and assimilate information from literally billions of web pages. In theory, the software programs that crawl across the Internet could query every page for permission to enter, permission to copy, and permission to include in a search engine. If this were the case, a large number of Web pages would probably post the appropriate invitations in their HTML code; however, a large number would probably fail to do so, either through ignorance or indifference. In actuality, the Internet default rule of openness prevails, and the burden of opting out of search engine inclusion, indeed of accessibility in general, is placed upon those with minority preferences (i.e., those who wish to restrict access to their content). This state of affairs is generally accepted because those who wish to opt out are not substantially inconvenienced. Indeed, it only takes a few lines of code to activate the "robots exclusion protocol," which is the Internet equivalent of a "no trespassing" sign.[64] The robots exclusion protocol allows the Web site controller to exclude search engine robots altogether or to specifically tailor their permissions to suit their needs.[65]

Why should the choice between opting in and opting out make any difference at all? In a Coasean world (one with no transaction costs), the choice between an opt-in and opt-out default is entirely inconsequential.[66] As every student of the Coase Theorem knows, in a world without transaction costs, the specific allocation of costs and benefits is unimportant because individuals will bargain to an efficient outcome regardless of their initial entitlement.[67] Accordingly, if three out of four authors prefer to be included in the Google Book Search project and one-in-four prefers not to be, then either 75% of authors will opt in, or 25% of authors will opt out.

However, as every student of the Coase Theorem should also know, the absence of transaction costs is merely a thought experiment—in actuality, reallocation and

61. *See id.*

62. Sag, *supra* note 2, at 1662 (elaborating on these potential costs).

63. *Id.* at 1666–68 (identifying and discussing the significance of the emergence of copy-reliant technology).

64. *See* Sag, *supra* note 2, at 1667.

65. *See id.*

66. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

67. *See id.*

enforcement are often very costly.[68] Thus, in the real world, opt-out mechanisms such as the robots exclusion protocol can be extremely important in resolving problems that involve large transaction costs. Opt-out mechanisms should not be seen as displacing private ordering; on the contrary, they are the means of private ordering. When transaction costs are otherwise high, low-cost opt-out mechanisms can play a critical role in preserving a default rule of open access while still allowing individuals to have their preferences respected.[69]

In the context of the Google Book Search project, it seems likely that the opt-out makes the "purpose and character" of the use more fair, subject to three conditions: (1) a majority of copyright owners either favor, or do not object, to inclusion in the search engine; (2) the expected cost of proactively obtaining permissions is very high; and (3) the costs of taking advantage of the opt-out are sufficiently small such that the autonomy of the minority is preserved. It cannot be said with certainty that Google would have been successful in establishing these three elements, however it seems more likely than not.

2. *The Nature of the Copyrighted Work*

On its face, the second fair use factor, "the nature of the copyrighted work," suggests that "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[70] In general, the allowable scope of fair use is thought to be greater with respect to published works and factual or informational works, and narrower with regard to unpublished works and more expressive and creative works. The first of these distinctions appears to favor Google, as the overwhelming majority of library books are published.[71] As to the second distinction, the books being scanned by Google will occupy every conceivable point on the continuum between informational and expressive. Thus, this factor could tilt in Google's favor in some cases, while being neutral or adverse in others.

Nonetheless, the second factor was never likely to be particularly instructive for a court considering Google's assertion of fair use. The Supreme Court has noted that the second factor is rarely "likely to help much in separating the fair use sheep from the infringing goats in a parody case."[72] Subsequent decisions have confirmed that the utility of the second factor is limited where the creative work is being used for a

68. *See* Ronald H. Coase, Essays on Economics and Economists 11 (1994) ("I tend to regard the Coase Theorem as a stepping stone on the way to an analysis of an economy with positive transaction costs.").

69. Sag, *supra* note 2, at 1668.

70. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

71. *See* NXIVM Corp. v. Ross Inst., 364 F.3d 471, 480 (2d Cir. 2004) (noting that the parties did not dispute that, because the copyrighted work was unpublished, the second fair use factor favored the plaintiffs).

72. *Campbell*, 510 U.S. at 586.

transformative purpose.[73] Like so many other cases, the significance of the second factor would probably have been overwhelmed by other considerations.

3. *Amount and Substantiality*

The third factor that a court must consider in any fair use determination is "the amount and substantiality of the portion used [by the defendant] in relation to the copyrighted work as a whole."[74] The question of "how much copying is too much" is beguilingly simple. In truth, the third factor cannot be reduced to any simple mechanical quantification. There is simply no magic number in fair use cases because the extent of permissible copying varies according to the purpose of the copying and the effect of the copying on the rightsholder.[75] The key inquiry under the third factor is not simply how much of the copyright owner's work was used by the defendant, but rather what proportion of the work's expressive value was appropriated.[76] Transformative uses in general and non-expressive uses in particular, do not tend to substitute for the value of the author's original expression, and are thus regarded favorably under the third factor.[77]

Google can point to a significant body of precedent where total literal copying has been accepted as fair use. For example, in the seminal fair use case of *Sony Corp. of America v. Universal City Studios, Inc.,* the Supreme Court held that consumer time shifting of broadcast television constituted a fair use in spite of the fact that such time shifting clearly required complete as opposed to partial copying.[78] Likewise, in the recent case of *Bill Graham Archives v. Dorling Kindersley Ltd.*, the Second Circuit found that the complete reproduction of various Grateful Dead concert posters on a reduced scale as part of an illustrated Grateful Dead biography was protected by the fair use doctrine.[79] Reverse engineering cases such as *Sony Computer Entertainment,*

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73. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006); Blanch v. Koons, 467 F.3d 244, 257 (2d Cir. 2006).

74. 17 U.S.C. § 107(3) (2006 & Supp. 2010).

75. *Campbell*, 510 U.S. 569, 587 (1994).

76. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 Mich. Telecomm. Tech. L. Rev. 381, 390–91 (2005). Admittedly, this can render the test quite elastic. *See, e.g.*, Harper & Row v. Nation Enters., 471 U.S. 539 (1985) (finding 300 words of a Presidential biography substantial).

77. The distinction between expressive and non-expressive copying is discussed at length in Sag, *supra* note 2, at 1624. A non-expressive use is one in which no human actor will directly or indirectly appreciate the expressive qualities of the work. In addition to building search engine indices, examples include data-mining text to analyze its grammatical structure or similarity to another text.

78. 464 U.S. 417, 449–50 (1984).

79. 448 F.3d 605, 613 (2d Cir. 2006) (holding that total copying "does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image"). *See also* Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 804 (9th Cir. 2003) (holding that "entire verbatim reproductions are justifiable where the purpose of the work differs from the original"); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) (concluding that to copy any less than the entire image would have made the pictures useless to the story).

Inc. v. Connectix Corp. and *Sega Enterprises Ltd. v. Accolade, Inc.*, and Internet search engine cases such as *Kelly v. Arriba Soft Corp.*, *Perfect 10, Inc. v. Amazon.com,* and *Field v. Google, Inc.*, are even more favorable for Google.[80] In each of these cases, the relevant court determined that the total literal copying required by the search engine technology at issue was justified under the fair use doctrine. These cases appear to be exactly on point with respect to Google's book search engine.

4. *Market Effect*

The fourth fair use factor is "the effect of the use upon the potential market for, or value of the copyrighted work."[81] To determine whether Google's massive book scanning enterprise is likely to put a dent in the market for, or value of, the works being digitized necessitates defining *a priori* precisely what constitutes "the market." If this case had gone to trial on the issue of copyright infringement, Google would have no doubt argued that its library project, far from harming copyright owners, would benefit them enormously by stimulating demand for their books. The author and publisher plaintiffs may not have disputed this, but they would almost certainly have argued that the digital library Google is attempting to create constitutes a viable new market for their works.

How would a court determine if the scanning required to stoke the fires of Google's book search engine is part of the copyright market belonging to authors and publishers? Copyright owners have often claimed that new opportunities created by technological change are part of the intrinsic value of, or potential future market for, their works.[82] Sometimes these assertions are successful—e.g., *A&M Records, Inc. v. Napster, Inc.,*—and sometimes they are not—e.g., *Sony Corp. of America v. Universal City Studios, Inc.,* and *Recording Industry Ass'n of America v. Diamond Multimedia Systems*.[83]

As a conceptual point, it is self-evident that the "potential market" referred to in the statute cannot be taken to mean every possible use of the copyrighted work. If every use is part of the copyright owner's market, then every claimed fair use has a potential market effect and the inquiry becomes meaningless.[84] The law continues to

80. *See* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007); Field v. Google, Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000); Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).

81. 17 U.S.C. § 107(4) (2006 & Supp. 2010).

82. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882, 947–51 (2007).

83. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (holding that time-shifting broadcast television for later viewing is a fair use); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (rejecting the defendant's fair use argument in relation to unauthorized peer-to-peer file sharing of recorded music); *see* Recording Indus. Ass'n of Am. Diamond Multimedia Sys., 180 F.3d 1072 (9th Cir. 1999) (suggesting that creating digital music files from lawfully acquired CDs for use on a personal music player would be fair use).

84. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 n.17 (2d Cir. 1994) ("[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the

draw a distinction between that which might be licensed and that which must be licensed.[85] Therefore, a copyright owner cannot prove a market effect by demonstrating that if it wins the lawsuit, the defendant, and people like the defendant, will have to pay for permission. Likewise, a defendant cannot prove that there is no market effect by demonstrating that if it wins the lawsuit it will be under no obligation to pay the copyright owner, and thus there will be no market for the particular use at issue. This kind of circular logic proves nothing for either party. In order to determine whether there is a market effect, a court must determine whether the use in question is something that falls within the legitimate sphere of copyright owner control or not.[86] Courts will look to previous fair use cases to make this determination.

Although the fair use doctrine is frequently derided as leading to unpredictable outcomes, there are actually a number of clear principles that emerge from the case law and are relevant to the analysis. It is clear that the rights of the copyright owner are not strictly limited by past exploitation.[87] In other words, just because the copyright owner has not ventured into a particular market in the past does not necessarily limit the owner from doing so in the future. It is also well established that speculative assertions of impending harm are insufficient.[88] Perhaps most importantly, there is now a rich body of case law illustrating that the kinds of market effects courts will recognize are limited in several important ways.

The first limiting principle is simply likelihood: "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[89] It is unlikely that authors would license political opponents, potential critics, or would-be parodists to make any substantial use of their works.[90] It is also unlikely that a market for a particular use would emerge if the costs of seeking permission outweigh the potential benefits of that use.[91] In either case, because no market is likely to emerge, there is no cognizable market effect. As has already been alluded to, Google would probably contend that there could not be a market for copyright permissions in the accumulation of data for a

secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.") (citation omitted). *See also* Leval, *supra* note 41, at 1124 ("[B]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.").

85. *See* Field v. Google Inc., 412 F. Supp. 2d 1106, 1121, n.9 (D. Nev. 2006) (noting that "[t]he Supreme Court has explained that the fourth fair use factor is not concerned with such syllogisms. Instead, it only considers the impact on markets 'that creators of original works would in general develop or license others to develop.'") (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994)). *See also,* Religious Tech. Ctr., 907 F. Supp. 1378, n.25 (N.D. Cal. 1995); Mattel Inc. v. Walking Mt. Prods., 353 F.3d 792, 806 (9th Cir. 2003).

86. Sag, *supra* note 76.

87. A&M Records v. Napster, Inc., 239 F.3d 1004, 1017 (9th Cir. 2001) (noting the copyright owner's right to develop alternative markets).

88. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 452 (1984).

89. *Campbell*, 510 U.S. 569 (1994).

90. *Id.* at 591–92.

91. Gordon, *supra* note 37.

comprehensive book search engine because the costs of proactively clearing rights would simply be too high.

The second limiting principle relates to the idea-expression distinction. As the reverse engineering cases aptly demonstrate, a copyright owner has no protectable interest in preventing the copying of un-protectable expression.[92] Google would likely argue that, although it is copying expressive works to build its library database, its use of those works is entirely non-expressive in the capture and processing phases—that is, the works are not copied for their expressive content, but rather to create a vast catalogue of metadata which enables the search engine to operate. As I have argued elsewhere, this kind of "non-expressive use" may well constitute its own distinct category of fair use.[93]

The third relevant limiting principle is that transformative uses do not usually have an effect on either the market for, or the value of, the copyrighted work.[94] Google would no doubt assert that its use is highly transformative because it provides an entirely new use for the original works and transforms concrete text into abstract metadata. As the Second Circuit noted in the *Bill Graham* case, copyright owners may not preempt exploitation of transformative markets by simply charging licenses for what would otherwise be fair use.[95]

Even assuming that the court were to conclude that the scanning for inclusion in a book search database was fairly within the copyright owners' notional market, the court would still need to consider the implications of the opt-out mechanism with which Google has promised to comply.[96] If authors have the right to determine whether their works become part of the book search engine, then the value of that right for each author equates to the compensation the author could demand in return for not withholding his or her works. For an individual book, the value of the right would be determined by the contribution that book makes to the search engine as a whole. With this conception of the market in mind, Google could quite plausibly maintain that a low-cost opt-out measure effectively negates any potential adverse market effect. After all, whether the system is opt-in or opt-out, the author should be able to realize the value of an individual work by offering to opt in, or by offering not to opt out.[97]

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92. Sag, *supra* note 76.

93. *Id.*

94. Castle Rock Entm't v. Carol Publ'g Grp., 150 F.3d 132, 145 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 591) ("[T]he more transformative the secondary use, the less likelihood that the secondary work substitutes for the original."). *See also* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006).

95. *Bill Graham Archives*, 448 F.3d at 615. Note that one can accept the reasoning of the *Bill Graham* case without necessarily endorsing its application to the facts of the case.

96. Amended Settlement Agreement, *supra* note 7 at § 17.33.

97. The assumption that the opt-out is truly low-cost in every salient dimension is essential to this conclusion.

If a low-cost opt-out makes no difference, why would any copyright owner object to the opt-out? There are two principle reasons. First, opting out may not be a low-cost proposition after all. The process might be difficult and time-consuming; it might also lead to uncertainty as to what other systems an author or copyright owner should be opting out of. In other words, even with zero monetary costs, the opt-out might impose substantial implementation and information costs. In the context of the settlement, many publishers have apparently complained that it is prohibitively expensive for them to determine whether they actually own the rights to a book in order to be able to opt in or out.[98]

Second, as the class action lawsuit illustrates, an opt-in regime gives active copyright owners the power to object on behalf of all copyright owners—a power which can be used to extract rents far exceeding the value of those copyright owners' individual contributions. The Authors Guild represents around 8000 U.S. authors, and yet it objects to Google's digitization project on behalf of millions of authors worldwide. An opt-in regime empowers copyright owners to act strategically to extract some of the surplus value in a joint enterprise contributed by authors who would most likely consent to the use of their works if asked and/or the independent investment of the defendant. While this might be a legitimate commercial strategy, it seems doubtful that a copyright owner's inability to extract rents beyond the value of her own contribution is cognizable as a relevant market harm under the fourth fair use factor. Although the analysis of the fourth factor is complicated, the balance of the argument seems to weigh in Google's favor.

5. *The Likely Fair Use Outcome*

Fair use is a flexible doctrine and the courts have shown a willingness to use it adaptively in the past to enable the emergence of new technology.[99] Google has a number of strong fair use arguments within the traditional four factor framework surveyed above. Google's position becomes stronger based on the assumption that any fair use ruling would be conditioned upon the effective provision of a relatively low-cost opt-out mechanism for copyright owners who do not want their works to be part of the Google Book Search database. It seems likely that, if the court were to rule in Google's favor, that ruling would be subject to this condition. Of course, the court could simply rule that digitizing library books in order to extract metadata constitutes fair use with or without the opt-out—but a narrower ruling confined to the specific facts of the case is usually more likely than a broad one.

The strength of Google's fair use argument notwithstanding, the only reliable axioms of copyright litigation are that it is uncertain and expensive. If it had allowed this case to proceed, Google would have been exposed to the possibility of a statutory

98. The author thanks Mr. Peter B. Hirtle for this observation. Conversation between Matthew Sag, Associate Professor, DePaul University and Peter B. Hirtle, Senior Policy Advisor, Scholarly Resources and Special Collections, Cornell University Library (on file with the author).

99. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999).

damages bill of billions of dollars.[100] In addition, an adverse precedent in relation to the Google Book Search project had the potential to undermine other key legal precedents in Google's favor with respect to its core search engine business.[101] In short, regardless of the strength of Google's fair use argument, there was a sound business case for settling with the plaintiff authors and publishers.

III. AN OVERVIEW OF THE GOOGLE BOOK SEARCH SETTLEMENT AGREEMENT, AS AMENDED

The Settlement Agreement was a complicated document consisting of 141 pages, 160 definitions, 17 separate articles, and 116 separate clauses, not including the substantial provisions contained within the 15 attachments.[102] The original Settlement Agreement was neither simplified nor shortened by the amendment process. Any attempt to summarize such an unwieldy document must necessarily be incomplete; nonetheless, the following sections attempt to identify and explain the most significant aspects of the Amended Settlement Agreement.

Google makes several significant financial concessions under the Amended Settlement Agreement, including one-time payments of over $100 million and a revenue-sharing agreement. In return for these concessions, Google receives the right to continue to operate its book search engine substantially in its current form. More importantly, the Amended Settlement Agreement establishes a platform for Google to explore substantial new revenue possibilities in cooperation with authors and publishers.[103] The Amended Settlement Agreement provides for extensive book previews to be made available through Google Book Search.[104] It also envisages new products and services that Google may offer, such as consumer electronic book purchases, institutional subscriptions, and various additional revenue opportunities that remain subject to negotiation.[105] These new features take the database well beyond the realm of mere indexing and identification, which serve to enhance the value of paper collections: some of these revenue models will directly substitute for paper-based media.

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100. The Copyright Act allows a plaintiff to opt for statutory, as opposed to actual, damages for the infringement of a registered work. Statutory damages awards range from a minimum of $750 to $30,000 per copyrighted work infringed. 17 U.S.C. § 504(c)(1) (2000).

101. Mark Lemley commented to the *Wall Street Journal*: "The consequences of a loss for Google are enormous. If the publishers were to actually prevail in this lawsuit, I think it would be essentially impossible to maintain a search engine." Mike Madison, *Google Print II*, MADISONIAN.NET (Oct. 20, 2005), http://madisonian.net/2005/10/20/google-print-ii/.

102. This preliminary summary of the operative terms of the Amended Settlement Agreement is not exhaustive and is no substitute for individually tailored legal advice. This article does not constitute legal advice, nor does it establish any attorney-client relationship.

103. *See infra* Part III.D.4.

104. Amended Settlement Agreement, *supra* note 7, § 4.3(b)(i)(1).

105. *Id.* §§ 4.1(d), 4.2, 4.7 (providing for the implementation of three additional models in the future: print on demand, file download, and a consumer subscription model).

The Amended Settlement Agreement establishes a set of new institutional arrangements governing the relationship between Google and the class action members. The three pillars of these new institutional arrangements are: the mechanics of the Amended Settlement Agreement itself; the newly created Book Rights Registry; and the Author-Publisher Procedures (APP). The main agreement contains a number of provisions that establish procedures and default rules governing Google's use of copyrighted works within the Google Book universe of products and services. The new Book Rights Registry is envisaged as a free-standing entity that will allow participating rightsholders to collectively exploit their works and receive payments for various uses by Google. Under the Settlement Agreement, the Registry was to stand in the shoes of inactive rightsholders and make certain decisions on their behalf, as well as facilitate the actions of active registered rightsholders. In response to criticisms about the handling of orphaned works and unclaimed funds, the Amended Settlement Agreement provides for an "Unclaimed Works Fiduciary" that will take over many significant Registry responsibilities with respect to unclaimed works.[106] Completing this new institutional triangle, the APP determines in many cases who controls the exploitation of a work within the Google Book Search universe and who benefits from that exploitation.[107]

The treatment of orphan works is the most contentious issue in relation to the settlement in both its original and amended forms. If the settlement is approved by the courts, it will increase public access to orphan works by presumptively including almost all works in most commercially significant uses. Orphan works will be digitized, indexed, made available for partial previews, sold as consumer purchases, and incorporated into institutional subscriptions. Under the original Settlement Agreement, the revenues attributable to orphan or unclaimed works would have flowed in part to the Registry and in part to registered authors and publishers. This apparent conflict of interests has been eliminated under the Amended Settlement Agreement, and significant protections have been added to ensure the fair treatment of the owners of unclaimed works.[108]

A. The Scope of the Settlement and the Amended Settlement

The scope of the settlement has been dramatically altered under the Amended Settlement Agreement. The effect of the original Settlement Agreement was sweeping. Although the plaintiffs in the underlying lawsuits represent only a small section of the

106. *See Id.* § 6.2(b)(iii). The Registry's power to act with respect to the exploitation of unclaimed Books and Inserts under the Amended Settlement Agreement will be delegated to an independent fiduciary. Subject to court approval, the Unclaimed Works Fiduciary will be appointed by a supermajority vote of the Board of Directors of the Registry and must be someone who is neither the author of a published book, nor an officer, director or employee of any book publisher. *Id.*

107. *See infra* Part III.F.

108. Amended Settlement Agreement, *supra* note 7, § 6.3(a)(i). The revised agreement now provides that after ten years, "any Unclaimed Funds shall be allocated proportionally to the United States, Canada, the United Kingdom and Australia," and that these funds will be disbursed to literacy-based charities and the reading public. The mechanics of the process are spelled out in some detail in the agreement. *Id.*

broader author and publisher communities, the Settlement embraced the vast majority of books published in the United States between 1923 and 2009 regardless of the nationality of the author or the language in which the book was written.

More precisely, the original settlement class consisted of rightsholders with a copyright interest in any book registered with the U.S. Copyright Office and published before January 5, 2009.[109] The class also included foreign rightsholders with a copyright interest in unregistered works published in the relevant period.[110] In its original form, the Settlement would have swept in innumerable foreign works that are protected by the U.S. Copyright Act without any requirement of registration or indeed publication in the United States. Many such foreign authors were unlikely to have realized that their rights in the United States were implicated by the settlement, especially if they had never even published their works in the United States.

Not surprisingly, as the potential for this U.S. class action settlement to affect the rights of foreign copyright owners became clear, so too did foreign opposition to the Settlement. Among the objectors were several individual foreign authors, the governments of France and Germany, and, finally, the DOJ.[111] The DOJ expressed a particular concern over the adequacy of representation of foreign rightsholders, which it found "difficult to square with the requirements of Rule 23 of the Federal Rules of Civil Procedure."[112] These voices of opposition prompted what is probably the most significant, and certainly the most drastic, change in the Amended Settlement Agreement. In a decisive act of legal amputation, the parties restricted the scope of the agreement to books published in the United States, Canada, the United Kingdom, or Australia.[113] It is estimated that this change will reduce the coverage of GBS by as much as 50%.[114]

The definition of books under the Amended Settlement Agreement expressly excludes periodicals, personal papers, calendars, sheet music and songbooks, as well as government works (which are not protected by copyright law in any event).[115] If Google intends to copy these works, it will need to negotiate with the relevant rightsholders individually, or continue to rely on the defense of fair use. By the same token, assuming Google's fair use defense is successful, Google has no obligation to

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109. Settlement Agreement, *supra* note 4, §§ 1.16(a)–(c); Amended Settlement Agreement, *supra* note 7, § 1.19 (setting January 5, 2009 as the date of the first notice of the class action settlement).

110. *See* Settlement Agreement, *supra* note 4, § 1.16.

111. *See, e.g.*, Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Sept. 8, 2009); Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Jan. 28, 2010); DOJ Statement, *supra* note 6.

112. DOJ Statement, *supra* note 6 at 5. *See* Fed. R. Civ. P. 23(e)(1)(C) (requiring that any proposed class action settlement must be found by the court to be "fair, reasonable, and adequate").

113. Amended Settlement Agreement, *supra* note 7, § 1.19.

114. Jonathan Band, *A Guide for the Perplexed Part III: The Amended Settlement Agreement*, Ass'n of Research Libraries 2 (Nov. 23, 2009), http://www.arl.org/bm~doc/guide_for_the_perplexed_part3.pdf.

115. Amended Settlement Agreement, *supra* note 7, §§ 1.19(i)–(vi).

remunerate those authors for their use because these works are not covered by the agreement. The Amended Settlement Agreement does cover independently copyrighted works within books that are defined as "inserts." Inserts include "forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other books, periodicals or other works."[116] The term "insert" is specifically defined to include tables, charts, and graphs, but to exclude illustrations and pictorial works generally, such as photographs, maps, or paintings.[117] These inserts are covered by the Amended Settlement Agreement only to the extent they are independently protected by the Copyright Act.[118] A copyrighted insert in a book that is in the public domain is also covered under the Amended Settlement Agreement.[119]

Public domain works are not affected by the agreements.[120] In spite of the settlement's apparent breadth, three significant limitations are worth noting. First, the settlement only covers the past; Google will be required to negotiate with authors and publishers for all future works. Second, the settlement does not release Google from any liability with respect to foreign copyrights, and Google may still be liable in other jurisdictions in which Google Book Search is accessible. Third, as has already been noted, the universe of books covered by the settlement is now confined to books published in the United States, Canada, the United Kingdom, or Australia. The current GBS database is already dominated by works in the English language; that domination now appears set to continue.[121]

Broadly speaking, the settlement gives Google the right to continue to operate Google Book Search along its current lines, but with some important modifications. Prior to the settlement, Google allowed minimal access to books, except where the book was in the public domain or was subject to a specific agreement with one of Google's "publisher partners."[122] This resulted in three basic tiers of access: a "snippet" view by default; various levels of extended preview determined by agreement with the relevant copyright owner; and full access for public domain works.[123] The same

116. *Id.* § 1.75(i).

117. *Id.* §§ 1.75(ii)–(iv)(1). The original agreement included children's book illustrations and musical notations, such as notes on a staff or tablature, but these are now excluded under the Amended Settlement. *See* Settlement Agreement, *supra* note 4, §§ 1.72(ii)–(iii).

118. To be covered, an insert must have been either registered as a stand-alone work or as part of another registered work from which it was excerpted. Amended Settlement Agreement, *supra* note 7, § 1.75.

119. *Id.* § 1.75(b).

120. *Id.* §§ 1.19(iv), 2.2(i). (The "Amended Settlement Agreement neither authorizes nor prohibits, nor releases any Claims with respect to, (i) the use of any work or material that is in the public domain under the Copyright Act.").

121. For example, a general search on the subject of "History" yields 2100 books in French, 2047 books in German, 21,600 in English, and 24,371 in all languages. Search on the Subject of "History," Google Books, http://www.google.com (search conducted Jan. 14, 2010). This ten to one ratio is not uniform across subject areas.

122. *Google Books Settlement Agreement*, Google Books, http://books.google.com/googlebooks/agreement/ (last visited Sept. 20, 2010).

123. *Id.*

basic tiers of access remain under the Amended Settlement Agreement with the addition of a "No-Display" option.[124] In addition, the Settlement Agreement envisages new services, including a "Consumer Purchase" model, "Institutional Subscriptions," and various other additional revenue opportunities that remain subject to negotiation between Google and rightsholder representatives.[125]

On one hand, the settlement gives rightsholders substantial individual flexibility to determine their own preferred level of access to their works, as well as the ability to effectively opt out of the GBS altogether. On the other hand, the settlement sets many of the default positions very favorably for Google, effectively giving it a broad license from the otherwise silent owners of orphan works.

B. The Registry and the Unclaimed Works Fiduciary

The creation of the Book Rights Registry (the "Registry") was a critical feature of the original Settlement.[126] The Registry acts as both an information intermediary and a collecting society. In a letter to members, Authors Guild President Roy Blount Jr. referred to the Registry as "the writer's equivalent of ASCAP," which is the American Society of Composers, Authors, and Publishers.[127] However, the powers of the Registry will extend far beyond those of a typical copyright licensing society. The Registry is structured as a not-for-profit entity representing the interests of rightsholders in connection with the settlement. The powers of this new Registry are quite broad. The Registry will be authorized to act on behalf of rightsholders, as set forth in the Amended Settlement Agreement.[128] It will also have other responsibilities articulated in the Amended Settlement Agreement and the Registry's (as yet unwritten) charter.[129] The Amended Settlement Agreement also notes that the Registry will have "such other responsibilities . . . as the Board of Directors of the Registry may determine are consistent with the Registry's functions and are not inconsistent with the Amended Settlement Agreement."[130]

One of the fundamental concerns about the Registry was that, by virtue of its composition and functions, it would have less than adequate incentives to safeguard the interests of owners of unclaimed works.[131] The parties have attempted to address

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124. Amended Settlement Agreement, *supra* note 7, §§ 4.3(a)–(b), 3.2.

125. The scope of these new revenue models has been narrowed by the Amended Settlement as discussed below. *See infra* Part III.D.2.

126. *See* Settlement Agreement, *supra* note 4, art. VI.

127. Message from Roy Blount, Jr., President, The Authors Guild (Oct. 28, 2008), *available at* http://www.authorsguild.org/advocacy/articles/member-alert-google.html. "ASCAP . . . licens[es] and distribute[es] royalties for the non-dramatic public performances of their [members'] copyrighted works." *About ASCAP*, ASCAP, http://www.ascap.com/about/ (last visited Oct. 5, 2010).

128. Amended Settlement Agreement, *supra* note 7, § 6.1(a).

129. *Id.* § 6.1(g).

130. *Id.*

131. *See* DOJ Statement, *supra* note 6, at 12–13.

these concerns by creating an Unclaimed Works Fiduciary (the "Fiduciary") to represent the interests of unregistered rightsholders—who are, by definition, not otherwise represented. The creation of this new fiduciary corrects this basic structural imbalance in the settlement's original institutional framework.

The original Settlement Agreement protected the interests of registered authors and publishers by ensuring equal representation for each on the Registry's Board of Directors.[132] Furthermore, each act of the Board required the approval of a majority of the Directors, including at least one representative of the author subclass and one representative of the publisher subclass, as defined in the agreement.[133] Under the original Settlement Agreement, the Registry was allowed to represent the interests of either all authors or all publishers, in each case as a subgroup, but was prohibited from representing any further particularized subgroups regarding any matter under the Settlement Agreement.[134] The Registry was expressly banned from working with any subgroup of rightsholders to exclude their books from particular uses or advocating that any subgroup of rightsholders decrease its participation in the settlement in any manner.[135] These initial safeguards were primarily directed at the interests of registered rightsholders. It was always unlikely that anyone on the Registry's board would have directly represented the interests of the owners of orphan works—a major concern from the perspective of class action fairness.

At least partly addressing this structural imbalance, the Amended Settlement Agreement transfers significant Registry responsibilities to the Fiduciary. The most significant of these reallocated responsibilities are probably the power to approve new revenue models and the power to determine book classification.[136] In addition, the Fiduciary replaces the Registry in the sections of the Amended Settlement Agreement dealing with specific prohibitions pertaining to unclaimed works, including prohibitions on display, linking, textual alteration, book annotations, and advertising content.[137] The Registry's power to act with respect to the preview uses—to permanently adjust the preview-use setting for a particular book in exceptional circumstances—has also been delegated to the Fiduciary under the Amended Settlement Agreement.[138] The Fiduciary also now has the right to approve any alterations to the pricing bins for settlement controlled pricing for unclaimed books and the power to approve reduced-price consumer purchases pertaining to unclaimed books.[139]

132. Settlement Agreement, *supra* note 4, § 6.2(b)(ii).

133. *Id.*

134. *Id.* § 6.2(b).

135. *Id.*

136. Amended Settlement Agreement, *supra* note 7, §§ 3.2(e)(i), 4.7.

137. *Id.* §§ 3.10(a)–(c).

138. *Id.* § 4.3(g).

139. *Id.* §§ 4.2(c)(i), 4.5(b)(ii).

The Registry envisaged in the settlement will own and maintain a rights-information database linking books to their appropriate authors and publishers.[140] The Registry will receive considerable assistance from Google in this regard. Under the Amended Settlement Agreement, Google must supply to the Registry, and update regularly, a list of all books that it has digitized, the name of any library to which it has given a digitized copy of a book, a list of books sold, usage data, claims process data, library scans, and any additional information necessary for the Registry to perform its obligations.[141] In return, the Registry must provide to Google a list of all books claimed by a rightsholder and a list of all registered rightsholders.[142] The Registry and Google will provide each other with information bearing on the copyright status of works.[143]

In addition to transferring significant powers to the Fiduciary, the Amended Settlement Agreement also addresses a potentially significant conflict of interest that arose under the original Settlement Agreement. The Registry is charged with the mission of locating rightsholders, receiving payments on their behalf, and distributing those payments in accordance with the Amended Settlement Agreement.[144] Consequently, as the Registry locates and identifies rightsholders, it will reduce the number of works that are effectively orphaned. Some have questioned whether the Registry has the correct incentives to do this, given that it effectively profits from unclaimed funds.[145] In general, the Registry must promptly distribute funds to known rightsholders as it receives them.[146] However, the Settlement Agreement allowed the Registry to use any funds unclaimed after five years to defray its operational expenses.[147] Unclaimed funds would also have been dispersed on a proportional basis to rightsholders.[148] The DOJ, among others, was sharply critical of this short time period and apparent conflict of interest in which identified rightsholders and the Registry each profited from the exploitation of unclaimed works.[149] The Amended Settlement Agreement now provides that after ten years, any unclaimed funds will be allocated proportionally to organizations based in the United States, Canada, the United Kingdom, and Australia, and that these funds

140. *Id.* § 6.1(b).

141. *Id.* § 6.6(a). Google will also pay $34.5 million to the Registry in order to fund its start up and provide for its operational costs. *Id.* §§ 5.2, 6.4(a). In addition, Google will provide technical assistance with respect to the design, development, and maintenance of the Registry. *Id.* § 6.4(b).

142. *Id.* §§ 6.6(c)(i), (iii).

143. *Id.* § 6.6(e).

144. *Id.* §§ 6.1(c)–(d).

145. A perception that the Registry was dragging its heels in this regard may have invited further antitrust scrutiny from the DOJ and additional class action lawsuits on behalf of the owners of orphan works.

146. Amended Settlement Agreement, *supra* note 7, § 6.1(d).

147. Settlement Agreement, *supra* note 4, § 6.3(a)(i).

148. *Id.*

149. DOJ Statement, *supra* note 6, at 5.

will be disbursed to literacy-based charities and the reading public.[150] In sum, the Amended Settlement Agreement does a great deal to address potential conflicts of interest and to safeguard the interests of the owners of unclaimed works—whether it does enough is one of the primary issues that the court will have to decide in relation to the class action fairness hearing.[151]

The Amended Settlement Agreement does nothing to diminish Google's unique position in relation to the exploitation of orphan works. However, it does change the institutional framework in ways that may become significant if orphan works legislation is ever enacted. Two ironies are worth considering here. The first irony of the settlement is that, whereas a fair use ruling would have substantially mitigated the orphan works problem for all potential entrants into the field of digital book searching, the Amended Settlement Agreement only solves that problem for Google—thus Google is better off compromising than winning in this respect.[152] Indeed, it is Google's potential orphan works monopoly that has attracted some of the sharpest criticism. Professor Pamela Samuelson argues that "the settlement would, in effect, give Google the exclusive right to commercially exploit millions of orphan books."[153] The Internet Archive, a non-profit organization founded to build an Internet library, also protests that the Settlement "effectively limits the liability for the identified uses of orphan works of one party alone, Google, Inc."[154] Professor James Grimmelmann concludes that "Google's extraordinary market power under the settlement will come from its unique lock on orphan works."[155]

The second irony is that considerations of class action fairness have prevented Google from divesting itself of this orphan works monopoly. The Settlement Agreement contemplated that the Registry might, at some stage, have the power to negotiate licenses of orphan works to third parties; however, neither the original nor the Amended Settlement Agreement contain an express grant of authority to that effect.[156] Extending the agreement in that fashion would have raised even more questions about the appropriateness of the class action. From a competition law perspective, it would be desirable if some entity had the power to license orphan works to third parties under terms similar to those that apply to Google. However,

150. *See* Amended Settlement Agreement, *supra* note 7, § 6.3(a)(i). The mechanics of the process are spelled out in some detail in the Amended Settlement Agreement. *Id.*

151. The fairness hearing regarding the Google Book Settlement was held in the U.S. District Court for the Southern District of New York on Thursday, February 18, 2010. Judge Chin had not yet issued a ruling at the time this article went to press.

152. *See, e.g.*, Picker, *supra* note 9.

153. Samuelson, *supra* note 9, at 4.

154. Letter from Hadrian R. Katz on behalf of the Internet Archive to The Honorable Denny Chin, S.D.N.Y. (April 17, 2009) (requesting a pre-motion conference in *Authors Guild, Inc. v. Google, Inc.*), *available at* http://www.scribd.com/doc/14308286/Internet-Archive-Intervention-Google-Book-Search.

155. Grimmelmann, *supra* note 9, at 11.

156. Settlement Agreement, *supra* note 4, § 6.2(b); Amended Settlement Agreement, *supra* note 7, § 6.2(b)(i).

empowering the Registry or even the Fiduciary in that fashion would mean using a lawsuit between A and B (the plaintiffs and Google) to create obligations between C and D (unrepresented authors and Google's future competitors). Such a result is not impossible under Rule 23, however it would almost certainly have increased the risk that the court would reject the settlement.[157] The broader the scope of orphan works exploitation allowed under the Amended Settlement Agreement, the more difficult it is to satisfy the requirement of adequate class representation. Allowing the Registry to license orphan works to third parties would have addressed some of the competition law concerns pertaining to the agreement, but it was a bridge too far in terms of class action law. Section 6.2(b) of the original Settlement Agreement provided that "[t]he Registry will be organized on a basis that allows the Registry . . . to the extent permitted by law, to license Rightsholders' U.S. copyrights to third parties."[158] Under the Amended Settlement Agreement, this—as yet unrealized—power is placed in the hands of the Fiduciary with respect to unclaimed books and inserts.[159] While the Amended Settlement Agreement does not appear to give the Registry or the Fiduciary the necessary authority to license orphan works to third parties, it does leave the door open to the extent that such powers may be conferred through some other source, such as future orphan works legislation. It is also noteworthy that the Most Favored Nation clause in the Settlement Agreement, which would have blunted the Registry's incentives to license third parties, has been removed. Nonetheless, until Congress actually addresses the issue of access to orphan works, Google will retain the unique ability to commercialize these books.[160]

C. Financial Terms of the Settlement

The immediate cost of the settlement for Google will exceed $100 million. Google will transfer a minimum settlement fund of $45 million to the Registry to be distributed among the class members whose books have been digitized prior to the Opt-Out Deadline.[161] Class members will receive at least sixty dollars per book and

157. *See* DOJ Statement, *supra* note 6. Interestingly, the DOJ itself acknowledges that a forward-looking settlement with a properly defined and adequately represented class of copyright holders may be appropriate. However, the DOJ questions whether the interests of the owners of orphan works have been adequately represented under the existing settlement. *Id.*

158. Settlement Agreement, *supra* note 4, § 6.2(b).

159. Amended Settlement Agreement, *supra* note 7, § 6.2(b)(i).

160. What remains to be seen is whether Google's unique access to these orphan works rises to the level of a barrier to entry in any relevant market. To begin with, the economic significance of the alleged orphan works monopoly is quite speculative. Furthermore, whatever that significance is now, it should be declining. The settlement and the establishment of the Registry provide an incentive and a means for copyright owners to reclaim active ownership of their works—thus effectively de-orphaning them. Finally, although the Registry will not have the right to license orphan works to third parties, it will still be in a position to manage the rights of a large number of active authors and copyright owners.

161. Amended Settlement Agreement, *supra* note 7, § 2.1(b) (defining the "Opt-Out Deadline" as the deadline fixed by the court to opt out of the Settlement in accordance with Rule 23).

fifteen dollars per insert.[162] Google will also pay $34.5 million to fund the launch and the initial operations of the Registry[163] and $30 million to pay the plaintiffs' attorneys fees and costs.[164] Thus, Google will pay at least $109.5 million under the Amended Settlement Agreement regardless of the revenue it generates from its book-related products and services authorized under that agreement.

On first impression, Google has agreed to a 30/70 revenue split with rightsholders for advertising and purchase revenues attributable to works covered by the Amended Settlement Agreement.[165] It entitles rightsholders to 70% of "Net Advertising Revenues" and "Net Purchasing Revenues"; however, these terms are defined with a built-in 10% deduction for Google's operating costs.[166] It is important to note that the revenue split does not apply to works outside the scope of the settlement, such as public domain works. Nor does it apply to initial search result pages that feature more than one work.[167]

The Amended Settlement Agreement also allows Google and individual rightsholders to renegotiate the revenue split applicable to any revenue model for any commercially available book.[168] If such negotiations are unsuccessful, either party may opt to exclude the book from one or more revenue models.[169]

D. Uses and Permissions Under the Settlement

1. Book Search: Digitization and Display

The settlement avoids resolving whether the digitization and non-expressive use of copyrighted books is permissible under copyright law. Instead, the settlement grants Google a very broad license in relation to its book search program. Google's permitted uses under the settlement go well beyond the most favorable fair use that could plausibly be imagined. In some respects, however, the terms of the Amended Settlement Agreement closely mirror the likely outcome of the lawsuits that the settlement is designed to avert.

The most important way in which the settlement mirrors the likely fair use ruling is in the centrality of the copyright owners' right to opt out. As discussed previously, the most likely result of the copyright litigation avoided by the settlement would be a

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162. *Id.* § 5.1(a).

163. *Id.* §§ 5.2(c), 5.3(b).

164. *Id.* § 5.2(c).

165. *Id.* §§ 4.5(a)(i)–(ii).

166. *Id.* §§ 1.89–1.90. The provision allowing this 10% deduction to be offset pursuant to the unclaimed funds provision has been removed from the Amended Settlement Agreement. This is significant from a Rule 23 perspective because active authors no longer profit directly from the exploitation of orphan works and misclassified public domain works.

167. Google does not currently advertise on these menu pages.

168. Amended Settlement Agreement, *supra* note 7, § 4.5(iii).

169. *See id.* §§ 3.5(b), 3.7(e).

finding in favor of fair use, conditional on the effective provision of a relatively low-cost opt-out mechanism. The ability of rightsholders to opt out is also a key feature of the settlement. Not only can copyright owners opt out of the class action settlement altogether,[170] but under the Amended Settlement Agreement itself they can opt out of inclusion in the book search database or particular elements thereof.[171] As detailed below, the Amended Settlement Agreement gives individual rightsholders substantial flexibility to control the use of their works by Google, to determine their preferred level of public access and, in some cases, to control pricing. The division of benefits and control between authors and publishers is governed by the APP.[172]

The Amended Settlement Agreement authorizes Google to digitize books and inserts obtained by Google from any source and to use that digitized information in accordance with the Agreement. This license applies to all books and inserts covered by the Amended Settlement Agreement; however, up until March 9, 2012, section 3.5(a)(i) of the Amended Settlement Agreement allows rightsholders to direct Google not to digitize a book or to remove a book from the GBS database if it has already been digitized.[173] With the exception of works that have been removed pursuant to section 3.5(a)(i), all covered works are subject to digitization and may be listed in an initial search results page. The extent of the information accompanying that listing depends on a host of factors beginning with the Display/No-Display classification.

Much of the Amended Settlement Agreement revolves around the distinction between "Display" and "Non-Display" uses and the accompanying categorization of books as either "Display" or "No-Display." Non-Display Uses are uses that do not display expression from digital copies of books or inserts to the public.[174] The display of bibliographic information and important data about a book, such as which pages match a particular search query; the book's key terms and chapter headings; and

170. *Id.* § 17.33.

171. A rightsholder may choose to opt out of the settlement prior to the "Supplemental Opt-Out Deadline," the deadline fixed by the court to opt out of the settlement pursuant to Rule 23. The Settlement does not authorize or permit the use of books for which all rightsholders opt out. The Settlement also does not release any claims for such books. *Id.* §§ 1.156, 17.33.

172. *See infra* Part III.F.

173. The consequences of removal depend on the date the direction is given. If it is on or before April 5, 2011, the work will be removed entirely. Requests made between April 5, 2011 and March 9, 2012 will result in the book not being accessible to Google, but digital copies may still be provided to libraries for certain purposes. *See* Amended Settlement Agreement, *supra* note 7, § 1.126.

174. Amended Settlement Agreement, *supra* note 7, § 1.94. It is worth noting here that "expression" is defined in the Amended Settlement Agreement as anywhere between three and ten contiguous words in which a person has a copyright interest under § 106 of the Copyright Act, without regard to the fair use doctrine and other statutory defenses embodied in §§ 107 through 122 of the Copyright Act. "Expression" remains subject to the limitation of substantial similarity (an implicit limit on § 106) and the idea-expression distinction as embodied in § 102(b) of the Copyright Act. Technically, it is open for Google to argue that displaying a snippet that is non-infringing, either because it is not a substantial copy or because of the idea-expression distinction, falls within the scope of "non-display uses" under the Amended Settlement Agreement. However, the structure of the agreement indicates that the parties intended for snippets to be covered as a "display use." *Id.* § 1.52.

library collection information are all considered to be "Non-Display" uses.[175] In addition, the use of digital copies of books for Google's internal research and development purposes is also a Non-Display use.[176] Thus, whether a book title appears as part of the initial menu of search results responding to a user query does not depend on its classification as either Display or No-Display but, critically, on the extent of information accompanying the book's basic bibliographic information.[177] If a book has been classified as a Display book, its listing will also be accompanied by a brief "snippet" of about three to four lines of text from the book.

The distinction between Display and No-Display works becomes more apparent on the individual "Online Book Pages."[178] Once a user selects a particular book as the object of his investigation, he will be directed to an Online Book Page dedicated to that book. In the case of No-Display books, the Online Book Page will simply contain bibliographic information and data about a book consistent with the definition of Non-Display Uses. The Online Book Page for a Display book, in contrast, will feature up to three "snippets" of three or four lines of text, per search term, per user.[179] In general, the Display books will also permit an extended preview of the work.

The Amended Settlement Agreement sets out three different types of "Preview" modes applicable to books. If a work is subject to the "Standard Preview," the pages selected for display will depend upon the relevant user query. For non-fiction works, the default Standard Preview is limited to no more than 20% of the book's pages and no more than five adjacent pages, not including the book's table of contents, title page, copyright page, or index.[180] The default page limits for works of fiction are set at 5% of the work and no more than fifteen adjacent pages, with the additional stipulation that the final 5% and the final fifteen pages of the work must be blocked.[181]

The above are merely the default settings. Under section 3.5(b)(i) of the Amended Settlement Agreement, a rightsholder may exclude a book or group of books from one or more of the Display Uses.[182] In addition, section 3.2(e)(i) allows the rightsholder to change the classification of a book or group of books from Display to No-Display at any time, which amounts to a complete opt-out from all Display Uses. Rightsholders also have the option of selecting a "Fixed Preview" or a "Continuous Preview" as an

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175. Amended Settlement Agreement, *supra* note 7, § 1.94.

176. *Id.*

177. *Id.*

178. An Online Book Page is any page dedicated to a single book. Amended Settlement Agreement, *supra* note 7, § 1.100. Advertising on such pages is subject to the revenue split. *See id.* § 2.1(a).

179. *Id.* §§ 1.100, 1.147.

180. *Id.* § 4.3(b)(i)(1) (stipulating that the preview must omit at least two pages before and after the relevant set of adjacent pages).

181. *Id.* "Also note that unless approved by the Registry or the Rightsholder, Google will not offer to users copy/paste, print or Book Annotation functionalities as part of Preview Uses." *Id.* § 4.3(b)(i)(3).

182. *Id.* § 3.5(b)(i). In case there was any doubt, section 4.3(a) also provides that a rightsholder may direct Google or the Registry not to allow previews. *Id.* § 4.3(a).

alternative.[183] Under a Continuous Preview, Google is authorized to display up to 10% of pages without the adjacent page limitations of Standard Preview.[184] Under the Fixed Preview mode, an initial selection of no more than 10% of the work is made available for preview, and this selection will not vary from user to user depending on the search being performed. In all three modes, Standard, Continuous, and Fixed, a rightsholder may choose to increase the percentage of the work made available up to 100% of the work.[185]

2. *Beyond Book Search*

The Amended Settlement Agreement also envisages a number of extensions to the product and service offerings of GBS, including consumer purchases of electronic books, institutional subscriptions for corporations and universities, and new or additional revenue opportunities—a concept left ill-defined in the Settlement Agreement but now substantially clarified by the Amended Settlement Agreement.

The Amended Settlement Agreement allows Google to offer access to Display books to the general public as "Consumer Purchases."[186] This system would allow users to view, copy and paste, and print books within certain limits. The ability to copy and paste is limited to no more than four pages with a single copy/paste command. Printing would be limited to no more than twenty pages per print command. However, it is notable that the Amended Settlement Agreement does not appear to place any obligation on Google to prevent an entire book from being printed in twenty-page increments, though, as a security measure, printed pages will include a copyright watermark.[187] Under the Consumer Purchase model, users will be able to make book annotations for their personal use and share those annotations with a limited number of persons, subject to limitations.[188]

The Consumer Purchase model envisages two pricing options: either a specified price determined by the rightsholder (which may be no price at all), or a "Settlement

183. Amended Settlement Agreement, *supra* note 7, § 4.3(c).

184. *Id.* § 4.3(c)(iii).

185. *Id.* § 4.3(b)(i)(2). The Amended Settlement Agreement simply states that "[r]ightsholders may increase the percentages in Fixed Preview, Standard Preview and Continuous Preview." *Id.* Presumably an increase to 100% would negate the adjacent page restrictions. However, unless the rightsholder has authorized display of 100% of the pages of a Book in Preview Use, Google is obliged to block access to at least 5% of the pages of a Book. *Id.* § 4.3(d).

186. *See id.* § 4.2.

187. The Security Standard does require Google to monitor for and take steps to prevent simultaneous logins from different locations using the same account. Amended Settlement Agreement Attachment D, § 3.9.2, Authors Guild, Inc., v. Google, Inc., No. 05-CV-8136-JES (S.D.N.Y. Nov. 13, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/SettlementAttachments/Attachment-D-Security-Standard.pdf.

188. Amended Settlement Agreement, *supra* note 7, § 3.10(c)(ii)(5)(a). Annotations are not to be shared with the general public. Annotations will only be accessible to persons authorized to view the book, and will be limited to twenty-five persons, all of whom must be identified individually by the user. *See id.* § 3.10(c)(ii)(5)(a).

Controlled Price" determined by a pricing algorithm developed by Google.[189] The pricing algorithm would be designed to maximize the revenue accrued to each individual rightsholder, rather than Google's total revenue.[190] In an apparent concession to the DOJ's concerns about price-fixing, the Amended Settlement Agreement provides that the pricing algorithm will be designed to achieve the optimal price for each individual book "without regard to changes to the price of any other book."[191] In theory, the decisions that Google makes under the pricing algorithm would be the same decisions that a well informed copyright owner would make on her own on a book-by-book basis, without taking into account trade-offs between books or collusion with other copyright owners.[192] Rightsholders may also change their choice of pricing option at any time.[193]

The agreement defines a set of initial pricing bins: $1.99, $2.99, $3.99, $4.99, $5.99, $6.99, $7.99, $8.99, $9.99, $14.99, $19.99, and $29.99; however, these are subject to renegotiation by Google and the Registry (and subject to the approval of the Fiduciary).[194] The projected allocation of works for Consumer Purchase to these initial pricing bins is illustrated in Figure 1.

The Amended Settlement Agreement also provides that a rightsholder may direct the Registry to make its books available at no charge pursuant to a Creative Commons or similar license, in which case such a book may also be available without the restrictions that otherwise apply to consumer purchases (as these would violate the terms of many Creative Commons licenses).[195]

In addition, the Amended Settlement Agreement contemplates offering schools, universities, and corporations the option of an Institutional Subscription to Google's catalog of digital books.[196] These Institutional Subscriptions would allow online access to, and viewing of, the full contents of all Display Books in the Google Books database—unless of course the rightsholder opts out of that particular use.[197]

189. *Id.* §§ 4.2(b)(i)(1)–(2).

190. *Id.*

191. *Id.*

192. *See id.* § 4.2(c)(2)(ii)(2) ("The Pricing Algorithm . . . will be designed to operate in a manner that simulates how an individual Book would be priced by a Rightsholder of that Book acting in a manner to optimize revenues in respect to such Book in a competitive market, that is, assuming no change in the price of any other Book.").

193. *Id.* § 4.2(b)(ii).

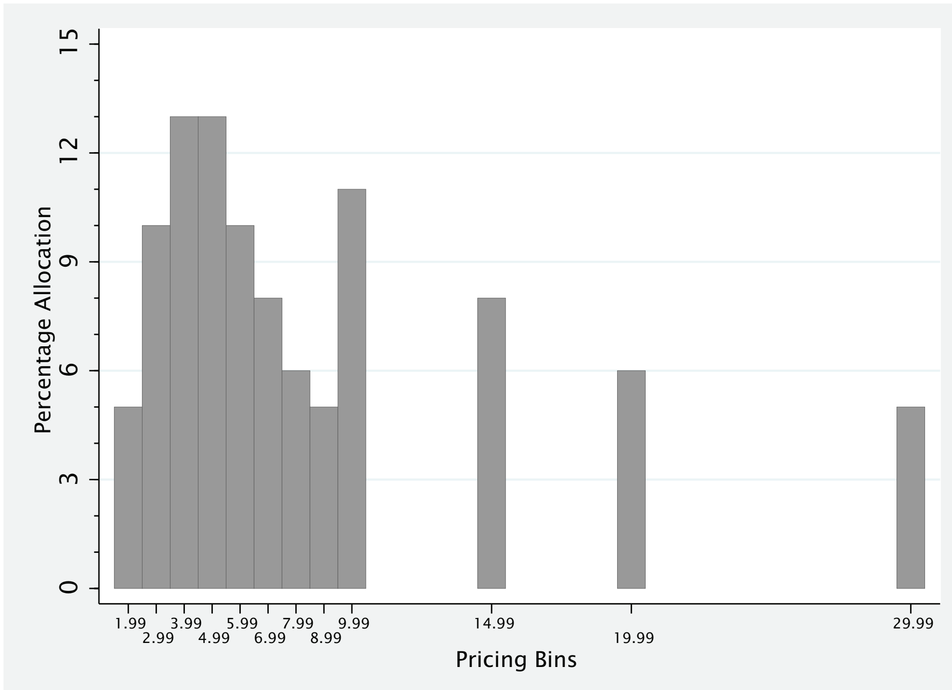
194. *Id.* § 4.2(c)(i). The Amended Settlement Agreement also sets out procedures for renegotiating the number and content of the pricing bins after three years and then periodically every four years. *Id.*

195. *Id.* § 4.2(a)(i). The Creative Commons is a non-profit organization based in the United States that provides a set of free license agreements emulating certain features of "open source" or "copy-left" licenses popular in the field of computer software. A typical Creative Commons license allows the free copying and modification of the underlying work subject to a right of attribution and the requirement that any derivative work also be licensed under the terms of a similar Creative Commons license. *See generally* Creative Commons, http://creativecommons.org (last visited Sept. 2, 2010).

196. Amended Settlement Agreement, *supra* note 7, § 4.1(d).

197. *Id.*

Figure 1. Consumer Purchase Pricing Bin Allocation



Institutional Subscriptions would enable users to view, copy and paste, and print pages of a book, and may enable Book Annotations.[198] Like the Consumer Purchase model, the copy/paste functions are to be limited to up to four pages with a single copy and paste command. Printing is to be limited to no more than twenty pages with one print command.[199] The shared annotation feature would operate differently for Institutional Subscriptions than for Consumer Purchases. Here, users would be limited to sharing with instructors and students in a single academic course; in connection with such course during an academic year; or with students of the same course in subsequent academic years.[200] Employees of the subscriber would also be

198. *Id.*

199. *Id.* § 4.1(d). Like the Consumer Purchase model, Google would include a visible watermark on pages printed from the Institutional Subscription Database. The watermark will identify the material as copyrighted and display encrypted session-identifying information which can be used to identify the authorized user that printed the material or the access point from which the material was printed. These watermarks will not obscure the content of the printed pages. Again, there does not appear to be any obligation on Google's part to prevent users from printing entire books in twenty-page increments. The Security Standard does require Google to take commercially reasonable steps to verify that users are affiliated with an institution with an active subscription. Amended Settlement Agreement Attachment D, *supra* note 188, at 16.

200. Amended Settlement Agreement, *supra* note 7, § 3.10(c)(ii)(5)(e).

allowed to use the annotations in connection with a discrete work project during the course of that project.[201]

The financial terms of the proposed Institutional Subscriptions have proven controversial. Robert Darnton, the Director of the Harvard University Library, argues that without competition, Google's Institutional Subscriptions will follow the path of academic journals:

> Once a university library subscribed, the students and professors came to expect an uninterrupted flow of issues. The price could be ratcheted up without causing cancellations, because the libraries paid for the subscriptions and the professors did not.
>
> . . . Owing to the skyrocketing cost of serials, libraries that used to spend 50 percent of their acquisitions budget on monographs now spend 25 percent or less. University presses, which depend on sales to libraries, cannot cover their costs by publishing monographs. And young scholars who depend on publishing to advance their careers are now in danger of perishing.[202]

A chilling prospect indeed.

Professor Darnton will not find much comfort in the terms of the Amended Settlement Agreement. The agreement provides that the pricing strategy for Institutional Subscriptions "will be governed by two objectives: (1) the realization of revenue at market rates for each book and license on behalf of rightsholders, and (2) the realization of broad access to the books by the public, including institutions of higher education."[203] The agreement further explicates: "Plaintiffs and Google view these two objectives as compatible, and agree that these objectives will help assure both long-term revenue to the Rightsholders and accessibility of the Books to the public."[204] This, of course, makes no sense. These twin objectives—maximizing revenue and maximizing public access—can only be consistent up to a point. At the end of the day, Google and the Registry will have to choose one or the other as the primary objective.

It seems clear from the Amended Settlement Agreement that Google plans to divide up the market into segments to facilitate price discrimination. Pricing for Institutional Subscriptions will be determined in reference to comparable third-party products and services; the scope of books available; the quality of the scan; and the features offered as part of the Institutional Subscription.[205] Subscription prices will also vary depending on the size of the institution (calculated on a full-time equivalent basis) and on the nature of the institution.[206] Pricing is likely to vary across broad categories such as corporations; institutions of higher education (with multiple sub-

201. *Id.* § 3.10(c)(ii)(5)(e).

202. Darnton, *supra* note 9, at 10.

203. Amended Settlement Agreement, *supra* note 7, § 4.1(a)(i).

204. *Id.*

205. *Id.* § 4.1(a)(ii).

206. *Id.* §§ 4.1(a)(iii)–(iv).

divisions based on the Carnegie Classifications for Institutions of Higher Education within the United States); schools (K–12); government; and the public.[207] The Amended Settlement Agreement prohibits remote access without Registry approval for these last three categories. As the Amended Settlement Agreement itself notes, segmenting the market in this way will make it easier to reconcile the conflicting objectives of maximizing revenue and maximizing public access. The Amended Settlement Agreement also contemplates a different form of price discrimination based on offering specialized versions of the Institutional Subscription Database.[208] Google is required to ensure that the price for access to the entire Institutional Subscription Database will be less than the sum of the prices for access to any discipline-based specialized collections.[209]

The settlement allows Google to provide not-for-profit Higher Education Institutions and Public Libraries, as defined in the agreements, with limited free access under the "Public Access Service."[210] This free public access is limited to one terminal per library building for libraries; one terminal per 4000 students for schools qualifying as Associate's Colleges under the agreement; and one terminal per 10,000 students for all other schools of higher education.[211] The Amended Settlement Agreement provides that the Registry, acting in the interests of all rightsholders, may authorize one or more additional terminals in any library building under whatever conditions it may deem appropriate.[212] In addition, the Settlement Agreement also provides that the Registry and Google may agree at some future date to make additional terminals available to one or more public libraries or not-for-profit higher education institutions, either for free or for an annual fee.[213] In addition to viewing these works electronically, the Amended Settlement Agreement provides that page-by-page printing may be allowed from these terminals at a per-page fee to be determined by the Registry.[214]

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207. *Id.* § 4.1(a)(iv).

208. *Id.* § 4.1(a)(v).

209. This aspect of the pricing policy may invite antitrust scrutiny. In 1984, the Second Circuit held that blanket licenses do not restrain trade if alternative means of acquiring performance rights are "realistically available." Buffalo Broad. Co. v. Am. Soc'y of Composers, 744 F.2d 917, 927 (2d Cir. 1984). The court further held that the only valid test of whether the program license is too costly to be a realistic alternative is whether the price for such a license is higher than the value of the rights obtained. *Id.* at 926. Thus, case law suggests that setting higher prices for program licenses that push consumers towards a blanket license is permissible. However, if the terms of the ASCAP consent decree are any guide, the DOJ may take a different view. The consent decree requires that the total license fee for a per-program or per-segment license must approximate the fee for a blanket license where all of the user's programs contain ASCAP-licensed music. Proposed Second Amended Final Judgment, United States v. Am. Soc'y of Composers, No. 41-1395 (WCC), § VIII(B) (S.D.N.Y. 1997).

210. Amended Settlement Agreement, *supra* note 7, § 4.8(a)(i).

211. *Id.* §§ 4.8(a)(i)(1)–(2).

212. *Id.* § 4.8(a)(i)(3).

213. *Id.* § 4.8(a)(iii).

214. *Id.* § 4.8(a)(ii).

A feature of the Amended Settlement Agreement that will no doubt be of interest to universities, copy shops, and copyright collecting societies is the potential to directly link the Google book database to copy shops. The Amended Settlement Agreement provides that the Registry and Google may agree to make a commercial public access service available to copy shops and other entities for an annual fee per concurrent user and a fee per printed page.[215] It is too early to tell whether this might lead to a reduction in the cost of course packets.

3. *The Research Corpus*

The Amended Settlement Agreement provides for the creation of a "Research Corpus" for non-consumptive and non-commercial research by certain qualified users.[216] The Research Corpus consists of all digital copies of books made in connection with the Google Library Project, other than digital copies of books that have been removed from the Research Corpus pursuant to section 3.5 or withdrawn pursuant to section 7.2(d)(iv) of the Amended Settlement Agreement.[217] A rightsholder may withdraw its book from the Research Corpus if the book is commercially available as of January 5, 2009 (the "Notice Commencement Date") or becomes commercially available within two years of that date.[218] However, the book will be returned to the Research Corpus if it ceases to be commercially available after that two-year period.[219] Books removed pursuant to section 3.5 are also withdrawn from the Research Corpus.

Use of the Research Corpus is limited to "Non-Consumptive Research," which means research involving computational analysis of a book or a set of books that does not involve the use or display of substantial portions of a book to understand the intellectual content presented therein.[220] The term "non-expressive use" has been used to denote the same concept.[221]

Commercial exploitation of algorithms developed while performing non-consumptive research is permitted under the Amended Settlement Agreement.[222] However, the use of data extracted from specific books within the Research Corpus to provide services that compete with services offered by the rightsholder of those books or by Google is prohibited.[223] Direct, for-profit, commercial use of information extracted from books in the Research Corpus is prohibited without the express

215. *Id.* § 4.8(b).

216. *Id.* §§ 7.2(d)(i), (iii).

217. *Id.* § 1.132 (providing that books removed after April 5, 2011 will remain part of the Research Corpus).

218. *Id.* §§ 1.97, 7.2(d)(iv).

219. *Id.* § 7.2(d)(iv).

220. *Id.* § 7.2(d)(vi)(1).

221. *See generally* Sag, *supra* note 2 (exploring the doctrinal implications of non-expressive use).

222. Amended Settlement Agreement, *supra* note 7, § 7.2(d)(x).

223. *Id.* § 7.2(d)(ix).

permission of the Registry and Google.[224] But researchers may report the results of their Non-Consumptive Research in scholarly publications whether these are commercial or not.[225] The Amended Settlement Agreement contains a detailed set of provisions for evaluating research proposals and monitoring the activities of qualified researchers.[226]

Generally, qualified researchers will be academics affiliated with libraries and universities. In addition, suitably accredited researchers affiliated with universities, U.S. not-for-profit research organizations (such as a museums, observatories, or research laboratories), or U.S. governmental agencies will be permitted to use the Research Corpus.[227] An individual who does not meet these criteria may become a "Qualified User" by demonstrating that she has the necessary capability and resources to conduct non-consumptive research.[228] For-profit entities may only become qualified researchers if both the Registry and Google give their prior written consent.[229]

The Non-Consumptive Research contemplated in the Amended Settlement Agreement may be valuable to Google's competitors. While competitors cannot directly extract information from books in the Research Corpus, they should benefit from research pertaining to the research corpus generally. Therefore, while Google Book Search will clearly have spillover benefits for Google, it also seems likely that the Research Corpus has the potential to benefit both Google and its competitors. The more open the access to the Research Corpus, the less weight should be given to the claim that Google's control of the book search database gives it an advantage over competitors in adjacent fields, such as an Internet search more generally.

4. *New (or Additional) Revenue Models*

The Settlement contained what amounted to an agreement to agree with respect to an open-ended set of new revenue models. The Amended Settlement Agreement limits the permissible revenue models to the following three additional models: print-on-demand, file-download, and a consumer-subscription model.[230] The print-on-demand model would allow purchasers of books to obtain a print copy of a non-commercially available book distributed by third parties.[231] The file-download

224. *Id.* § 7.2(d)(viii).

225. *Id.* § 7.2(d)(vii).

226. *Id.* § 7.2(d)(xi).

227. *Id.* §§ 1.123, 7.2(d)(xi)(2).

228. *Id.*

229. *Id.*

230. Custom pay-per-page publishing for course materials in the educational and professional markets; downloadable PDF versions of books (separate from consumer purchases); and products comprised of summaries, abstracts and/or compilations of books were excised from the list of new revenue models. *Compare* Settlement Agreement, *supra* note 4, § 4.7, *with* Amended Settlement Agreement, *supra* note 7, § 4.7.

231. Amended Settlement Agreement, *supra* note 7, § 4.7(a). This provision also notes that a book's availability through such a print-on-demand program would not, in and of itself, result in the book being classified as commercially available. *Id.*

service envisaged in the Amended Settlement Agreement would permit books purchased by consumers to be downloaded in file formats appropriate for use on electronic book reading devices, mobile phones, portable media players, and other electronic devices. The consumer subscription model would essentially be an individual version of the institutional subscription model. [232]

In addition to narrowing the range of new revenue models, the Amended Settlement Agreement requires the agreement of the Fiduciary instead of the Registry for the application of these new models to unclaimed books.[233] The Amended Settlement Agreement also requires that the revenue split for the print-on-demand and file-download models be the same as that for consumer purchases and that the revenue split for consumer subscriptions be the same as that for institutional subscriptions.[234] The Settlement Agreement left these economic terms nebulously defined.

E. Book Classification

The Amended Settlement Agreement contains a complicated web of default settings, modification provisions, and opt-out rights. For copyright owners who are actively managing their works, the most important provisions of the Amended Settlement Agreement will be those that allow them to customize how their works are used. However, the default settings embodied in the Amended Settlement Agreement are extremely important because they control how the vast majority of works that are not being actively managed (e.g., orphan works) will be made available through the GBS. The default settings are consequential because large numbers of authors and publishers are unlikely to take advantage of the numerous opt-in and opt-out provisions sprinkled throughout the agreement.

The Amended Settlement Agreement defaults may also be significant in setting the expectations of active rightsholders because they define a new status quo and baseline for negotiation. A number of the significant default positions and customization opportunities have been noted in the preceding analysis. What remains to be discussed is the all-important question of book classification.

Google will initially classify all books as either commercially available or not commercially available as of January 5, 2009.[235] This classification in turn determines, at least initially, whether a book is a Display Book or a No-Display Book.[236] The Amended Settlement Agreement sets out the process for determining whether a

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232. *See supra* text accompanying notes 197–210.

233. *Compare* Settlement Agreement, *supra* note 4, § 4.7, *with* Amended Settlement Agreement, *supra* note 7, § 4.7. The Amended Settlement Agreement now requires the Registry to give registered rightsholders and the Fiduciary at least sixty days notice prior to Google offering any additional revenue model and the right to exclude books under their control from such additional revenue model. Amended Settlement Agreement, *supra* note 7, § 4.7.

234. Amended Settlement Agreement, *supra* note 7, § 4.7.

235. *Id.* §§ 1.97, 3.2(b).

236. *Id.* § 3.2(b).

book is commercially available in significant detail.[237] Broadly speaking, to be classified as commercially available, a book must be offered for sale as new through one or more customary channels of trade in the United States, Canada, the United Kingdom, or Australia.[238] Google is required to make this commercial availability determination based on an analysis of third-party databases and information publicly available on the Internet.[239] The Amended Settlement Agreement recognizes that these sources of information may contain errors. To the extent that the information available from multiple sources is in conflict, Google is required to make its availability determination in a manner that is reasonably designed to minimize the overall error rate. The Amended Settlement Agreement also allows rightsholders to provide information directly to Google that a book is commercially available. Google must act on this notification within thirty days unless it reasonably believes that the information is inaccurate.[240] A rightsholder can also notify Google directly or indirectly through the Registry of any mistaken classification in either direction.[241] When no information is available from these sources, the book will be classified as not commercially available.[242] This same initial determination of whether a book is commercially available will be used to initially classify books as "in-print" or "out-of-print"—a classification which can then be altered by the terms of the APP set forth in the agreement.[243]

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237. *Id.* § 3.2(d)(i).

238. *Id.* § 1.31.

239. *Id.* § 3.2(d)(i).

240. *Id.*

241. *Id.* § 3.2(d)(iii). Disputes regarding the determination of whether a book is commercially available are subject to the dispute resolution procedures pursuant to Article IX of the Amended Settlement Agreement. *Id.* § 3.2(d)(iv).

242. *Id.* § 3.2(b)(i). In the event that the database contains multiple versions of the same work, all versions will be treated as commercially available so long as one of those versions is subject to copyright and is commercially available. *Id.* § 1.31. Likewise, if a public domain book is commercially available with an insert (such as a foreword or preface) that is subject to copyright protection, "then any earlier edition of such Book that contains such Insert is also deemed to be Commercially Available." *Id.* § 3.2(d)(i)(2). Note that foreign language translations, abridged versions, and versions with different forewords or additional annotations are treated as separate books under the settlement. Likewise, even though a hardcover book and a soft cover book may contain the same principle work, they are nonetheless considered different books under the settlement agreement if they have different ISBNs. *Id.* § 1.113. Note also that,

> [a]t any time after one (1) year from the Final Approval Date, Google shall have the right to request that the classification of a Book be changed to a Display Book if Google believes that the Book is not Commercially Available at that time, or if Google believes that a mistake was made in initially determining the Book to be Commercially Available.

Id. § 3.2(e)(2).

243. *See* Amended Settlement Agreement, *supra* note 7, § 3.2(d)(ii); *infra* Part III.F.

In general, in-print books that cease to be commercially available will be reclassified as out-of-print.[244] If the Registry re-classifies a book as out-of-print, it will direct Google to change the book's classification to Display Book.[245] However, if the Registry reclassifies a book as in-print, the Registry will direct Google to change the classification of the book to a No-Display Book only upon the express request of the rightsholders of the book.[246]

These classifications are only the starting point. Regardless of the initial classification, an individual rightsholder, the Registry, or, in the case of unclaimed books, the Fiduciary, can change a book's classification and, therefore, alter the rights and permissions associated with that book. Section 3.2(e)(i) of the Amended Settlement Agreement allows an individual rightsholder to change the classification of a book or group of books from Display to No-Display at any time; this amounts to a complete opt-out from all Display Uses.[247] While only rightsholders can make a book less available, individual rightsholders, the Registry, and now the newly created Fiduciary, can also initiate a change in the opposite direction to make a work more available.[248] In light of the Fiduciary's exclusive authority to change the classification of unclaimed books, and assuming that registered rightsholders will act on their own behalf, it is unclear exactly why and when the Registry would exercise its now limited powers under section 3.2(e)(i).[249] It bears repeating that, in addition to changing the No-Display to Display classification of a book, a rightsholder may direct Google to exclude a book, or a portion thereof, from any one or more Display Uses, revenue models, or the book annotation sharing feature.[250] This direction may be given at any time.[251]

The process for identifying books in the public domain is also an important part of the settlement. The Amended Settlement Agreement contains a safe harbor for Google with respect to books that it mistakenly classifies as public domain. To take advantage of the safe harbor, Google must follow a specific process for determining

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244. Attachment A to Amended Settlement Agreement at §§ 3.3(a), (b), Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/SettlementAttachments/Attachment-A-Author-Publisher-Procedures.pdf. Either an author or a publisher may challenge the classification of a book by filing a notice with the Registry. *Id.*

245. Amended Settlement Agreement, *supra* note 7, § 3.2(d)(ii) (subject to any Change Requests by Rightsholders under § 3.2(e)(i)).

246. *Id.*

247. *Id.* § 3.2(e)(i). Under the Amended Settlement Agreement, the Fiduciary will initiate such change requests on behalf of unclaimed books, but will be apparently subject to the one-way ratchet. *Id.* Similarly, the Registry's ability to Adjust Preview Use Settings in § 4.3 of the Agreement has now been delegated to the Unclaimed Works Fiduciary. *Id.* § 4.3(g).

248. *See id.* §§ 4.3(e)(v), (g).

249. *Id.* § 3.2(e)(i).

250. *Id.* § 3.5(b)(i).

251. *Id.*

whether a book is in the public domain.[252] The process is not mandatory, but it must be followed for the safe harbor to take effect.

Under current U.S. copyright law, a work will become part of the public domain when either the term of copyright protection expires or upon its creation if the work is a U.S. government work. In addition, in the past it was possible for a work to enter the public domain because it was published without the appropriate copyright notice or because the copyright owner failed to renew his registration. Although these formalities are no longer a part of the current Copyright Act, they still affect the copyright status of works published in the past.[253] The extraordinary length of copyright protection and the extraordinary legal and factual complexity of determining whether a work is in the public domain significantly diminish the usefulness of the public domain as a cultural resource. One of the anticipated public benefits of the settlement is that it creates strong incentives for Google to correctly identify which works are in the public domain. However, as previously noted, one could question whether the Registry will be properly motivated to identify books as belonging to the public domain and thus outside of its control.

F. Author-Publisher Procedures

The APP section in Attachment A to the Amended Settlement Agreement plays a substantial role in determining who controls the exploitation of a work within the Google Book Search universe and who benefits from that exploitation.[254] The APP defines the central questions of who is regarded as a rightsholder under the Amended Settlement Agreement; who speaks for the work with regard to opting into or out of Display Uses; who determines the price of access to the work under the Consumer Purchase model; and how revenues from electronic distribution and advertising are allocated between authors and publishers.[255] Before reviewing these questions in detail, it is first necessary to navigate an obstacle course of threshold conditions and definitions to which the substantive provisions of the APP are keyed.

1. In-Print Versus Out-of-Print

The first determination required to make sense of the APP is the distinction between in-print and out-of-print. Article III of the APP sets out the ways in which Google and the Registry would initially classify books either in-print or out-of-print and how they will test and change that classification given a successful challenge by either the author or publisher of a book. Books that are commercially available, as that term is defined under the Settlement Agreement, are initially classified as

252. Attachment E to Amended Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Nov. 13, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/SettlementAttachments/Attachment-E-Safe-Harbor-Public-Domain-Process.pdf.

253. *See* 17 U.S.C. § 104A (2006 & Supp. 2010).

254. Attachment A to the Amended Settlement Agreement, *supra* note 244, §§ 2.1–2.2.

255. *Id.* §§ 5.1, 5.4–5.5.

in-print under the APP.[256] Conversely, books that are not commercially available are initially classified as out-of-print. Either of these classifications is subject to challenge by the author or the publisher (or their respective representatives on the Board of Directors of the Registry) under two additional tests for determining a work's in-print/out-of-print status.[257] If a book meets either of the two tests, it will be classified as in-print; otherwise, it will be classified as out-of-print. [258]

Confusingly, the first reclassification test combines two distinct contractual concepts—reversion of rights to the author and the status of the book as in-print under the relevant author-publisher contract.[259] If the author-publisher contract does not provide for reversion to the author under any circumstances, the book is regarded as in-print regardless of whether it is commercially available or not.[260] If the author-publisher contract does provide for reversion, the question then becomes whether the book is in-print under that contract.[261] This test is confusing because it implicitly assumes that all author-publisher contracts use a work's in-print/out-of-print status as the sole trigger for reversion of rights to the author. In fact, author-publisher contracts vary widely depending upon the relative bargaining strengths of the parties, the previous experiences of both the author and publisher, and the era in which the contract was executed. To address this potential problem, the APP provides that a book will not be considered "in-print" if the contract provides for reversion of rights to the author and all of the criteria for reversion have been met.[262] Nonetheless, the problem of determining whether the book is in-print (or should have reverted) under the terms of the author-publisher contract remains.

Disputes between authors and publishers as to whether rights to a book have reverted are commonplace. Contracts drafted before electronic distribution and print-on-demand became significant issues and are unlikely to be easily interpreted in this respect. For example, it is unclear whether a single book published and shipped upon-demand to a book store means that it is "available for sale either from stock, from publisher's warehouse, or in the field," thus making it in-print according to many publishing contracts.[263] The APP does not answer this question, but it does provide some assistance in interpreting other terms of author-publisher contracts that may be used to trigger reversion of rights to the author. The APP provides that if the determination of in-print status under the contract is based on revenues, and more than 50% of the revenues come from the Google Book Search revenue models under

256. *Id.* § 3.1.

257. *Id.* §§ 3.2(a)–(b).

258. *Id.*

259. *Id.* § 3.2(a)(i).

260. *Id.*

261. *See id.* Note that "the Book may be 'in-print' even if the contract does not use the term 'in-print.'" *Id.*

262. *See id.* § 3.2(a)(i)(3).

263. 3-41 Entertainment Industry Contracts FORM 41-1 (outlining standard terms in author-publisher contracts).

the Amended Settlement Agreement, then those revenues will not be used to determine whether the requirements for reversion are met.[264] An equivalent principle applies to determinations based on units sold.[265] The APP also provides that mere inclusion of a book in a database or search results will not provide sufficient proof that a book is in-print according to the settlement.[266]

The second reclassification test for challenging a book's in-print/out-of-print status relates to future publications. Specifically, the APP provide that a book will be considered in-print if, consistent with its contractual rights, the publisher publicly announces to the trade "that it has undertaken concrete steps to publish an existing or new edition of that book, and such edition is published within twelve months of the announcement."[267] It is unclear whether a book would be retrospectively reclassified as out-of-print if the publisher's announced intention to publish within twelve months does not, in fact, come to fruition. It is also unclear how many copies must be published and in what form in order for a book to be considered in-print. Presumably, the announced publication would have to meet the contractual threshold for determining whether a book is in-print.

2. *Author-Controlled Books*

In addition to the in-print/out-of-print classification discussed above, the APP contains separate provisions determining whether a book is to be classified as "Author-Controlled."[268] This classification is important because it allows the author alone to direct the exploitation of a book by Google, including decisions about removal, exclusion, changes in Display Uses, and pricing. This classification also means that the author receives 100% of the revenue from the book.

Section 4.1 of the APP sets out the procedure to be applied in determining whether any book for which the rights have not reverted to the author should nonetheless be classified as Author-Controlled. The procedure does not apply to a work-for-hire or a work "for which the author-publisher contract does not provide for reversion of rights to the author under any circumstances."[269] Although this process may be broadly consistent with various author-publisher agreements, where it is not consistent, it effectively overwrites the contractually mandated procedures in such agreements.

To obtain the Author-Controlled classification with respect to a book, an author must first have sent a request for reversion to the publisher in accordance with the relevant author-publisher contract.[270] If the publisher does not respond at all or did

264. Attachment A to the Amended Settlement Agreement, *supra* note 244, § 3.2(a)(i)(1).

265. *Id.* § 3.2(a)(i)(2).

266. *Id.*

267. *Id.* § 3.2(a)(ii).

268. *Id.*, art. 4.

269. *Id.* § 4.1.

270. *Id.* § 4.1(a).

not respond within either (i) ninety days, or (ii) the applicable period defined by the contract, the author may send a "Change Status Notice" to the Registry, with a copy to the publisher.[271] That notice must affirm that the author believes the book is no longer in-print and that the response period has expired; the author must include a copy of the previously sent request for reversion and applicable author-publisher contract.[272] It appears that if the relevant contract gives the publisher a "reasonable period" (or some other unspecified period) to respond, an author could rely on the specification of ninety days in the APP as defining that previously undefined period.

When the Registry receives an author's notice, it must escrow all subsequent revenues from the book.[273] If the publisher does not respond to the Change Status Notice within 120 days, the Registry will deem the book to be Author-Controlled.[274] If the publisher disputes the Change Status Notice within the requisite 120 days, the parties will look to the Registry for a decision.[275] When reviewing the issue, either party can ask the Registry to review the in-print/out-of-print status of the book according to Article III of the APP.[276] The Registry will also review the evidence as to whether the rights have reverted according to the terms of the author-publisher contract and, if the conditions for reversion have been met, deem the book Author-Controlled.[277] The Registry will distribute the escrowed revenues according to its determinations on the issues of Author-Control and the in-print/out-of-print status of the book.[278]

Article IV of the APP gives authors an alternative mechanism under which to exercise their contractual rights of reversion. Prior to the settlement, an author would have had to rely solely on her contractual remedies; but under the APP, authors now have the option of sending a petition through the Registry. If the publisher fails to respond, the author automatically prevails.

3. *Who Controls the Exploitation of the Work?*

Having surveyed the nuances of the in-print/out-of-print classification and the separate but related classification of author-controlled works, it is now possible to address the substantive questions that arise between authors and publishers—who controls the exploitation of the work under the settlement and who benefits from that exploitation? The first issue is defining exactly who constitutes a rightsholder

271. *Id.* § 4.1(b).

272. *Id.* §§ 4.1(b)(i)–(iii).

273. *Id.* § 4.1(c).

274. *Id.*§ 4.1(d).

275. *Id.* § 4.1(e).

276. Attachment A to the Amended Settlement Agreement, *supra* note 244, § 4.1(e)(i).

277. *Id.* §§ 4.1(e)(ii)–(iii).

278. *Id.* §§ 4.1(e)(iii)–(v). If both an author and publisher claim or register a book under section 13.1(c)(ii)(2)(B) of the Amended Settlement Agreement, the Registry will notify both about the conflicting claims and the protections provided under Article IV of the APP. *Id.* § 4.2.

under the Amended Settlement Agreement. This depends on whether the work is considered a work-for-hire under U.S. copyright law; whether the book is in-print or out-of-print; whether the book is Author-Controlled; and whether the rights have reverted to the author. Beginning with the scenario most favorable to the author, if a work is out-of-print and the rights have reverted to the author, the author will be considered the sole rightsholder.[279] In addition, if the work is deemed to be "Author-Controlled" (which means that it should be out-of-print), the author will be considered the sole rightsholder.[280] If the rights in an out-of-print book have not reverted to the author, and the work is not deemed to be Author-Controlled under Article IV, both the author and the publisher shall be considered rightsholders.[281] For in-print books, both the publisher and the author are considered to be rightsholders under the terms of the Amended Settlement Agreement.[282] The only way the publisher gets to be the sole rightsholder is if the book in question qualified as a work-for-hire under U.S. copyright law at the time it was initially authored.[283]

The APP outlines procedures for resolving conflicting instructions between joint rightsholders; these procedures vary depending upon whether the book is in-print or out-of-print.[284] The upshot of these procedures is that, in the event of a conflict over permissions and levels of access, the most restrictive direction will prevail.[285] Specifically, the APP assumes that publishers will make the first move in defining the acceptable uses of books in-print.[286] Authors are then given a thirty-day window to object to some or all of the Display Uses requested by the publisher.[287] If an author fails to respond within thirty days, the Display Uses requested by the publisher will prevail subject to section 3.5 of the Amended Settlement Agreement.[288] This is an important caveat. Section 3.5 of the Amended Settlement Agreement allows rightsholders to exclude a book (or part of a book) from any one or more, or all, display uses, revenue models, or the book annotation sharing feature at any time.[289] Section 5.3 of the APP provides that any time the author and the publisher of a book issue conflicting directions to the Registry for an in-print book pursuant to section 3.5, the more restrictive directions, as to removal, exclusions, changes in display uses

279. *Id.* § 6.1(b).

280. *Id.*

281. *Id.* § 6.1(c).

282. *Id.* § 5.1.

283. *Id.* §§ 5.1(a), 6.1(a). If a book is a work-for-hire, only the publisher is considered a rightsholder for purposes of directing removal, exclusion, changes in display use, or level of access for any revenue model.

284. *Id.* §§ 5.3, 6.1(c).

285. *Id.* §§ 5.3, 6.1(c).

286. *Id.* § 5.1(a).

287. *Id.*

288. *Id.*

289. Amended Settlement Agreement, *supra* note 7, § 3.5(b)(i).

or levels of access, will control.[290] Thus, even if an author misses the thirty-day response window, she still retains a substantial say in the display uses and revenue models affecting her work.

The joint control provisions for out-of-print works are not an exact mirror of the rules for works in-print. To the extent that the publisher retains rightsholder status in an out-of-print book (i.e., if the rights have not reverted to the author and the work is not Author-Controlled), both the author and the publisher can direct "[r]emoval, exclusion, [and] changes in Display Uses and/or levels of access for any Revenue Model;" however, the publisher must articulate a "good reason" for its directions. [291] Such reasons include "legal, technical, editorial, policy, commercial or economic considerations."[292] But note that reducing access to one book in order to benefit another by reducing competition is not a "good reason."[293] Once again, "[i]f, at any time, an Author and the Publisher of a Book issue conflicting directions to the Registry regarding the uses authorized for such Out-of-Print Book, the more restrictive directions as to levels of access will control." [294]

The rules applicable to pricing also depend on the in-print/out-of-print status of the work. For books in-print, so long as "the Publisher and Author agree to authorize one or more Display Uses," then the publisher has the right to determine the pricing of the book for Consumer Purchase.[295] Authors cannot directly control the price of an in-print book, but they can use their power to exclude a book from one or more of the display uses to get some accommodation from publishers. While this strategy may be effective for authors who simply disagree with their publisher as to the optimal price point for a work, it will not give significant leverage to authors who would like their works to be available for free or subject to a Creative Commons license; withholding their work from the reading public would undermine these aims. It is also worth noting that while publishing contracts rarely give authors any input into pricing decisions, to the extent that an author has such a contractual right, the Settlement appears to vitiate it for works in-print.

If both the author and the publisher are considered rightsholders with respect to an out-of-print work, either party may set the price applicable to Consumer Purchases. The Registry will act on the most recent notification received, subject to the timely objection of the other party. In the event of such an objection, the higher of the prices specified will prevail unless or until an agreement between the parties can agree to a new price.[296] Again, this highest common denominator approach to pricing for out-of-print works may contradict an expressed term of some author-publisher

290. Attachment A to the Amended Settlement Agreement, *supra* note 244, § 5.3.

291. *Id.* § 6.1(c).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* § 5.4.

296. *Id.* § 6.2(c)(ii).

contracts and is likely to frustrate authors who would like to make their works more freely available through the Google Book universe.

4. Who Benefits from the Exploitation of the Work?

The APP controls the allocation of revenues generated under the settlement's various revenue models between authors and publishers.[297] This includes the initial cash payments to class members whose books and inserts have been digitized. If a book, either in-print or out-of-print, was created as a work-for-hire, the Registry will remit 100% of revenues to the publisher.[298] The authors of works-for-hire will not actually be parties to the settlement because they do not have a copyright interest in the work.[299] Thus, for whatever it is worth, these authors are not bound by the terms of the Amended Settlement Agreement.

The remaining provisions relating to the allocation of revenues depend upon a book's in-print/out-of-print status. For in-print books, the Registry will make all payments to the publisher and the publisher is then expected to pay the author based upon the royalty rate in their contract or other agreement.[300] Most authors who object to their allocation under this provision may initiate a dispute under Article VII of the APP; however, the authors of "Educational Books"—books primarily intended for sale to educational markets for use in educational programs—do not get this benefit.[301] Assuming that Article VII applies, once the Registry is notified of a dispute, it will suspend payments until the matter is resolved.[302] Either party may submit the dispute to the Registry for arbitration under section 9.3 of the Amended Settlement Agreement if no amicable resolution can be achieved.[303] In any such arbitration, the arbitrator will look first to the terms of the written contract, and will only look to extrinsic evidence if the contract does not contain conclusive language.[304] While these provisions may be consistent with many author-publisher contracts, they are clearly inconsistent with agreements that do contain merger clauses or provide for

297. *Id.* § 5.5.

298. *Id.* § 6.2(b).

299. Amended Settlement Agreement, *supra* note 7, § 1.13.

300. Attachment A to the Amended Settlement Agreement, *supra* note 244, § 5.5.

301. *Id.* § 1.3.

302. *Id.* § 7.2(a).

303. *Id.* § 7.2(b).

304. *Id.* §§ 7.2(c), 7.3 (giving power to the Registry to set filing fees in order to avoid financially burdening the Registry); *Id.* § 7.3(a) (instructing that for disputes between Authors and Publishers, the party submitting the dispute to the arbitrator must pay a filing fee of $300, $150 of which will be refunded if such party is the prevailing party); *Id.* §§ 7.3(b)–(c) (stating the Registry will set fees for disputes among non-Publisher rightsholders, and all other costs will be borne by the Registry); *Id.* § 10.1 (stating that if an in-print book was published under an author-publisher contract executed prior to 1992 that has not been amended to expressly address electronic rights, the arbitrator's ruling as to the allocation of revenues for electronic rights will also apply to other uses of that book in any other Google programs that are the same or substantially identical to that Display Use).

mandatory arbitration. Some authors may see these procedures as overly restrictive or favorable to publishers.

The allocation of revenue for out-of-print books does not appear to rest on the terms of the relevant author-publisher contract, presumably because a large number of author-publisher contracts would contain no such provision. If the relevant rights have reverted to the author, or if the book is deemed to be Author-Controlled, the Registry will remit 100% of revenues to the author.[305] Otherwise, if an out-of-print book was first published prior to 1987, the Registry will pay 65% of revenues to the author and 35% to the publisher.[306] Revenues are to be divided equally between authors and publishers of out-of-print books published during or after 1987.[307] There is no indication in the agreement as to why the year 1987 was chosen for this purpose. Both authors and publishers may take issue with this fixed payment schedule. These fixed percentages may be at odds with prior author-publisher arrangements or understandings regarding royalties, and may be grossly out of proportion as to the amounts agreed upon in the publishing agreement.

The assumption up to this point has been that all of the relevant rightsholders are registered with the Registry. However, in all likelihood, a substantial number of authors and publishers will fail to register at least some of their titles. Potential rightsholders must register their interest in a work in order to receive any payments under the Amended Settlement Agreement.[308] The mechanics of registration are not burdensome for any particular book, but they might prove challenging for publishers with poor record keeping and/or extensive back-catalogues.

In order to register, claimants must provide their contact information, social security number or equivalent, and an attestation of their good faith belief of ownership of a copyright interest in the book or the insert that is the subject of the claim.[309] To claim an interest in relation to a book, a claimant must identify whether she is the author, publisher, heir, successor or assignee, or other type of rightsholder of the book and whether such book is a work-for-hire. A claimant must also provide sufficient information to identify the book: either the title of the book and the name(s) of the author(s) and/or editor(s); or the book's ISBN.[310] Claimants must also state their belief that the book is either: not a "United States work," as defined in 17 U.S.C. § 101; or that the book was registered with the U.S. Copyright Office by the Notice Commencement Date.[311] In addition, publisher claimants must state that they are either "highly confident" that the rights to the book have not reverted to the

305. *Id.* § 6.2(a).

306. *Id.* § 6.2(c)(i); *see also id.* § 6.2(c)(iii) (stating the publication year is determined by the earliest copyright year that appears in the book, or if none is listed, then the first year of publication of the book).

307. *Id.* § 6.2(c)(ii).

308. *Id.* § 13.1.

309. *Id.* § 13.1(a).

310. *Id.* § 13.1(c).

311. *Id.*; 17 U.S.C. § 101 (2006 & Supp. 2010).

author based upon the individual book contract; or they are "confident," that the rights to the book have not reverted based upon the type of book or type of contract for the book.[312] In contrast, authors and their successors in title are merely required to state either that the book "has or has not reverted" or that they "do not know" whether such book has reverted.[313]

The timing of a claimant's registration is consequential. Although rightsholders may register to participate in the settlement at any time, to be eligible for a cash payment pursuant to section 5.1 of the Amended Settlement Agreement, which provides for cash payment to class members whose works have been digitized, a rightsholder must register within one year of the Notice Commencement Date.[314] Furthermore, rightsholders effectively abandon any revenues attributable to their works that are unclaimed after ten years. The unclaimed funds provision of the Amended Settlement Agreement provides that revenues, other than subscription revenues, that are not claimed within ten years will be distributed to literacy-based charities and the reading public.[315]

5. *Some Implications of the APP*

In many respects, the APP simply streamlines the incorporation of existing contract terms between authors and publishers into the framework of the Google Book Search Settlement. This is essential to the coordinating function of the settlement and the day-to-day operation of the Registry. The provisions of the APP are unlikely to be controversial in situations where rights have clearly reverted back to the original author, or where the original author has no rights at all because the work was made-for-hire. However, where the existing author-publisher contract arguably gives both parties some control over the exploitation of the work, or simply fails to make any provision for electronic rights, the APP effectively amends that contract.

Whether the APP fills a contractual void or overwrites provisions on an existing contract, it will inevitably disadvantage some authors and some publishers. These new terms do not appear to systematically disadvantage either authors or publishers, but there may well be individual authors or publishers who would strenuously object to them. The public may also be disadvantaged by the conservative nature of the APP because, in a range of scenarios in which both authors and publishers maintain an interest in the work and have conflicting preferences, the APP takes a lowest common denominator approach and provides for the most restrictive access at the

312. Amended Settlement Agreement, *supra* note 7, § 13.1(c).

313. *Id.*

314. *Id.* § 13.4.

315. *Id.* § 6.3(a)(i)(3). The mechanics of the process are spelled out in some detail in the Amended Agreement. Note that under the terms of the Settlement Agreement these funds would have been distributed to the Registry itself to defray its operating expenses and then to the registered rightsholders in order to offset the ten percent deduction for Google's operating costs built into the net advertising revenues and net purchasing revenues. *Id.* §§ 1.89–1.90, 2.1(a).

highest price. In the aggregate, these disadvantages are probably offset by the greater efficiency and increased public access facilitated by the APP.

IV. EVALUATING THE SETTLEMENT IN LIGHT OF THE FAIR USE COUNTERFACTUAL

As discussed in Part I, if Google's fair use defense had been put to the test, the most likely outcome would have been that the digitization of library books for inclusion in a book search database constitutes a fair use so long as the final product—the search results displayed to end-users—is not infringing and so long as copyright owners are provided with a low-cost mechanism to withdraw their books from the database. It must be stressed that this was just one possible outcome; the case could have been resolved on terms much less favorable to Google. Nonetheless, this counterfactual gives us a useful basis upon which to evaluate the Amended Settlement Agreement.

To make this comparison properly requires an analysis of more than just the initial rights and freedoms created by such a fair use ruling. It also requires some investigation of how Google and copyright owners would have negotiated in the shadow of such a ruling. The hypothetical court decision should be seen as a beginning, not an end. In other words, there is a difference between the "fair use ruling" and the subsequent moves the players would make in a "fair use world."

Under the hypothetical fair use ruling, Google would have the right to continue to make non-expressive uses of printed library books by digitizing and analyzing these works. It would also have the right to continue to report such results in relation to these books, provided that the search results did not amount to a substantial copy of any particular work. As such, the fair use ruling would not have allowed any substantial previews, with the exception of works in the public domain that are, of course, unrestricted. In addition, the hypothetical fair use ruling would not, by itself, have provided a single cent of revenue for any copyright owner.

Now consider how the fair use world compares to the Amended Settlement Agreement. In a fair use world, Google's basic digitization, analysis, and reporting would continue, except that some copyright owners would presumably opt out of the database altogether. Structurally, this is essentially the same as the class action settlement. In a fair use world, on the other hand, the display of brief snippets of text as part of a menu of search results would continue to be non-infringing provided that it did not cross over the threshold of substantial similarity. The Settlement is similar in this regard, except that rather than relying upon the somewhat imprecise copyright law concept of substantial similarity, the length of the permissible snippets is expressly and narrowly defined in the Settlement Agreement.[316] Under the Settlement, or in a fair use world, some copyright owners would probably opt out of snippets. Of course, copyright owner decisions on whether to opt out will depend on the perceived benefits and burdens of inclusion or exclusion from the Google universe, and these, in turn, are influenced by whether other copyright owners are likely to remain within the Google Book Search universe.

316. Amended Settlement Agreement, *supra* note 7, § 1.55.

The Amended Settlement Agreement permits Google to engage in a significant range of uses beyond fair use. In addition to allowing book previews, the Amended Settlement Agreement also envisages new services, including a Consumer Purchase model, Institutional Subscriptions, and additional revenue opportunities that remain subject to negotiation between Google and the rightsholders.[317] These new features take the GBS database well beyond the realm of mere indexing and identification that enhances the value of paper collections. Electronic book purchases and corporate and educational subscriptions will allow for the complete electronic distribution of books that substitutes entirely for paper-based mediums.

It is likely that, in a fair use world, some copyright owners would have expressly allowed Google to make more substantial uses of their works, including the display of substantial previews and possibly even the kinds of activities envisaged under the additional revenue models allowed for in the Settlement. However, the number of copyright owners who would have taken such action remains uncertain. A key difference between the Settlement and the fair use world hypothesized here is that the Settlement makes it much easier for rightsholders to opt in to expansive uses of their works. Indeed, many of the defaults established by the Settlement do not even require that a rightsholder opt in; rather, they place the burden on the rightsholder to opt out. The Settlement sets a default position that allows significant previews of out-of-print or not-commercially-available books. It also subjects most of these works to Consumer Purchases and Institutional Subscriptions—uses that potentially substitute for existing paper collections rather than merely complimenting them.

The Settlement also contains a number of mechanisms through which rightsholders, the Registry acting on behalf of rightsholders, and the Fiduciary acting on behalf of unregistered copyright owners, can increase the extent of the previews they allow. Beyond the specific extensions provided for in the agreement, one of the key differences between the fair use world and the Settlement is the institutional framework created by the agreement.

The Amended Settlement Agreement creates a new set of institutional arrangements that will govern the relationship between Google and the copyright owners covered by the settlement. The three main elements of this new institutional framework are the Settlement Agreement itself, the creation of a collective rights management organization called the Book Rights Registry, and the APP. Compared to a fair use ruling, the settlement gives copyright owners a greater degree of flexibility to manage the types of uses that are made of their works and the degree to which their works are made available for preview and display.[318] While in theory copyright owners would still have been able to contract around a fair use ruling, their ability to do so easily and effectively is greatly enhanced by the machinery put in place by the Settlement.[319] By establishing clear mechanisms and default rules, the

317. *See supra* Part III.A.

318. *See supra* Part III.D.1.

319. *See supra* Part III.D.1.

settlement effectively lowers transaction costs for individual copyright owners in a number of ways.

The Book Rights Registry established under the Settlement is designed to allow rightsholders to exploit their works individually and collectively. The Registry would function as a collective rights institution to facilitate rightsholder actions and stand in the shoes of inactive rightsholders. The Amended Settlement Agreement transfers significant Registry responsibilities to the Fiduciary—a role that was created in response to concerns about the adequacy of representation of the owners of orphan works.

Another key institutional feature of the settlement is the APP, which plays a substantial role in determining who controls the exploitation of a work within the Google Book Search universe and who benefits from that exploitation.[320] These procedures enhance the coordinating function of the Settlement by streamlining the incorporation of existing author-publisher contractual terms into the framework of the Google Book Search universe. However, where an existing author-publisher contract gives both parties some control over electronic exploitation, or simply fails to make any provision for electronic rights, the APP effectively overwrites those contracts. These new terms do not systematically disadvantage either authors or publishers, but there may well be individual authors or publishers who would strenuously object to them. Although these procedures allocate control and beneficial ownership between authors and publishers, they exist primarily for the benefit of the Registry and Google. The APP provides a mechanism for incorporating existing author-publisher contractual terms into the Google administrative framework. It also specifies new contractual terms that fill critical gaps and ambiguities in a number of legacy publishing agreements. The APP provides a set of mechanisms through which the Registry can reconcile potentially conflicting directions regarding the electronic exploitation of a registered work. It also provides the Registry with a formula for allocating revenues between authors and publishers in situations where many existing contracts make no adequate provision.

The Settlement establishes contractual mechanisms for rightsholders to specify their preferences and creates an important institution in the form of the Book Rights Registry to facilitate rightsholder decision-making and collective negotiation. The Amended Settlement Agreement supplements the Registry with a Fiduciary to better safeguard the interests of unregistered rightsholders. This institutional framework allows for all of the same transactions that might occur in a fair use world, but at a significantly lower cost of transacting. The expectation in a fair use world is that some authors would profit from opting into more extensive uses or from promising not to opt out of the basic uses. Nonetheless, the opportunities for copyright owner remuneration under the Settlement appear to be much more significant because the revenue generation potential of the new Google Book Search universe is so much greater.

The most controversial point of departure between the settlement and the likely fair use outcome relates to the accessibility, commoditization, and control of orphan works. The settlement gives Google and the public significantly greater access to

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320. *See supra* Part III.F.

orphan works. Although there is no strong fair use argument for allowing substantial previews of up to 20% of a book's content, the settlement makes this "Standard Preview" the default for most types of books.[321] This default setting ensures a much greater level of access to orphan works than could have been possible by merely relying on fair use and other defenses to copyright infringement. More controversially, orphan works will be commoditized as Consumer Purchases and Institutional Subscriptions.

The issue of orphan works is complicated by the ambiguity and elasticity of the term itself. Orphan works are works for which the copyright owner cannot be readily identified and located by someone who might need permission to use the work.[322] The ambiguity here pertains to how much effort a user should be expected to exert to track down wayward rightsholders and negotiate with them. The owners of some copyrighted works will never be identifiable with reasonable certainty either because initial authorship is ambiguous or because the copyright ownership has been passed along a chain of title too complex to unravel. In contrast to these "pure orphans," there are "contextual orphans," works for which the copyright owner could be found, but for which the expenses of so doing is prohibitive or unjustifiable based on a cost-benefit analysis. Potential users of both *pure* and *contextual* orphan works often choose not to use or display such works out of concern that they may be subject to injunctions and statutory damages if the owner of an orphan work subsequently comes into the picture and sues for infringement.

The orphan works problem is particularly acute for library and archive digitization projects, and the predicament has been exacerbated in recent years due to both supply-side and demand-side considerations.[323] On the supply-side, the extension of the term of copyright protection, the elimination of formalities such as notice and registration, and the retroactive restoration of some foreign works previously in the public domain have all increased the domain of copyright protection at the expense of the public domain.[324] At the same time, digitization has increased the demand for access to more obscure works. Tracing the ownership of copyright requires more than just tracking down the original author—copyrights are transferred by the operation of certain statutory provisions, private contracts, corporate mergers, divestitures and bankruptcies, and as part of estates. As the Library Copyright Alliance notes:

> A person seeking permission to use an older work needs to untangle the complicated history of mergers and acquisitions of the original publisher to identify the corporation that now might own the rights to the work. This corporation, however, might not have adequate records concerning all the

321. Amended Settlement Agreement, *supra* note 7, § 4.3(b)(i); *see also supra* Part III.D.1.

322. U.S. Copyright Office, Report On Orphan Works 34, 71 (2006).

323. *See, e.g.*, *Orphan Works*, Library Copyright Alliance, http://www.librarycopyrightalliance.org/orphan.htm (last visited Sept. 30, 2010).

324. Sam Li, *Orphan Works Reply Comment*, U.S. Copyright Office 1, 3, http://www.copyright.gov/orphan/comments/OW0572-Li.pdf (last visited Oct. 4, 2010).

> works to which it holds title. And since the person typically is seeking to use the work for at most nominal compensation, the corporation has no incentive to invest adequate resources in locating the records concerning the work.[325]

Google's initial approach to the difficulty of proactively clearing rights with millions of different authors and their descendants was to rely on the fair use doctrine and the ability of copyright owners to opt out. This was not only a perilous legal strategy but also significantly limited the types of uses Google could make of orphan works. The settlement, in contrast, gives Google an express license from the owners of orphan works, albeit a license that remains subject to substantial opportunities for active copyright owners to modify key terms or opt out of key uses altogether.

One of the most pronounced criticisms of the Settlement Agreement was that it would create an "orphan works monopoly."[326] The core of this allegation is that, while a fair use ruling in Google's favor would have unblocked access to orphan works for a broad class of users, the Settlement Agreement only solved the orphan works problem for Google.[327]

The Amended Settlement Agreement does nothing to alleviate this situation because to do so would risk over-stepping the limits of class action law. From a competition law perspective it would be desirable if the Registry had the power to license orphan works to third parties under terms similar to those which apply to Google. However, empowering the Registry in that fashion would mean using a lawsuit between A and B to create obligations between C and D—a result that is difficult to align with even a relaxed approach to Rule 23.

Although it is true that the agreement creates no fair use precedent, the distinct set of legal entitlements that will vest in Google if the Amended Settlement Agreement is approved will only translate into a monopoly if they establish a barrier to entry. The Amended Settlement Agreement may not constitute a barrier to entry because in some respects Google's competitors will have the advantage of learning from Google's experience. Although only Google can fully commoditize orphan works, the Registry, created at Google's expense, provides Google's competitors with an easier route to reaching an agreement with a large and diverse group of active copyright owners. Moreover, the Amended Settlement Agreement defines an effective benchmark of reasonable terms and conditions that would-be competitors may seek to emulate.[328]

In sum, the carefully negotiated Settlement provides a much more elaborate institutional framework than would have emerged following a fair use ruling in Google's favor. It almost certainly allows for more efficient exploitation of printed

325. Miriam M. Nisbet, *Orphan Works Reply Comment*, U.S. Copyright Office 2 (Mar. 25, 2005), http://www.copyright.gov/orphan/comments/OW0658-LCA.pdf.

326. *See, e.g.*, Grimmelmann, *supra* note 9; Samuelson, *supra* note 9; *see, e.g.*, Picker, *supra* note 9. *See also* DOJ Statement, *supra* note 6, at 7.

327. Picker, *supra* note 9.

328. The counterfactual analysis undertaken here is an essential predicate to resolving these antitrust questions, although that task itself is beyond the scope of this article.

library books. In addition, whereas a fair use ruling would have effectively unblocked access to existing works for the limited purpose of digitization, indexing, and searching, the Settlement provides more access to existing works through electronic consumer purchases, the Institutional Subscription Service, and other products and services yet to be developed. It should not be overlooked that the Settlement provides for initial cash payments by Google to the copyright owners and a fairly generous revenue sharing agreement, neither of which would have been required under a fair use ruling.[329] On the other hand, whereas a fair use precedent would have cleared a significant legal obstacle for all potential entrants to the book search field, the Settlement only licenses Google.

V. CONCLUSION

The outcome of the final fairness hearing that will determine the fate of the Google Book Search Settlement remains unknown as this article goes to press. It is easier to summarize the issues at stake in the Google Book Search Settlement than it is to predict the outcome of this protracted and sprawling dispute. There is no doubt that approval of the settlement will yield enormous cultural, intellectual, and educational benefits. It will expand access to millions of out-of-print books for all readers; it will also facilitate a revolution in access for print-disabled persons and users in remote locations without immediate geographic access to the nation's marquee research libraries. In addition to the promise of greater access and better searching and browsing, there is also the possibility of the GBS catalogue being linked to an open platform e-book reader that overcomes many of the disadvantages of the proprietary models. From the perspective of authors and publishers, the GBS settlement promises new ways to profit from out-of-print works, as well as the possibility that increased access will draw in new readers and open up new niche markets.

However, there are also anxieties attendant with the settlement and its implications for authors, publishers, universities, and the reading public. While it is clear that the e-book has arrived, no one knows what this actually portends. Publishers fear the twin evils of Napsterization and disintermediation. Like the recording industry before them, publishers are concerned that their role in the economy will be undermined by consumer disregard for copyright law and the availability of digitized books on file-sharing networks. Authors worry about this economic harm, and they express more intangible concerns about a loss of control in the manner of exploitation of their works. Publishers also apprehend that authors and online booksellers may cut them out of the distribution chain altogether. Even if they retain their centrality in the book economy, there are signs that the e-book market will not tolerate the premium pricing strategies that enable publishers to charge an average cover price of twenty-six dollars for a new hardcover—a disquieting

329. *See supra* Part II.B.

proposition for an industry used to occasional blockbusters offsetting non-performing investments.[330]

While publishers and authors may be distressed about lower prices and diminished sales; libraries, educational institutions, and academics fear high prices, especially once access to the GBS database via institutional subscriptions comes to be seen as indispensable.[331] This concern is compounded by the anxiety that libraries will shed their expensive paper collections too quickly in reliance on the Institutional Subscription model and then regret that de-accessioning as the true cost of institutional subscriptions becomes apparent. Once access to Google's online and searchable archive goes from being a luxury to a necessity, library budget constraints may well accelerate the process of de-accessioning in order to pay for that access. From a reader's perspective, the current Google Book Search architecture raises questions about privacy and anonymity. Some also fret about the erosion of traditional first sale rights associated with paper copies and the risks of concealed censorship in light of the fact that the Settlement authorizes Google to exclude books from the GBS database for editorial reasons.

Superimposed over all of these points of contention are the various competition law and class action law related objections raised by the DOJ and numerous other parties. The nub of the class action objection is that the settlement is too broad in scope and too future-oriented to be approved under Rule 23. While it is true that the settlement umbrella covers a diverse range of interests, it should be noted that one of the main benefits of the Settlement is that it creates an institutional architecture that gives copyright owners, at least those who choose to register, enormous control over the use and exploitation of their works. In other words, it allows for a diversity of interests among registered rightsholders by enabling almost infinite individuation corresponding with the diversity of rightsholder interests. Nonetheless, the question remains whether class members who are unlikely to register—the owners of orphan works—have been adequately notified or represented.

Transcending these basic questions of civil procedure, there is also a lingering feeling that the application of the class action mechanism in this context is fundamentally undemocratic. Respected copyright academic Pamela Samuelson argues that the use of a class action settlement to restructure markets and to reallocate intellectual property rights is corrosive of fundamental tenets of our democratic society.[332] The sense that the settlement has displaced an essentially legislative

330. Motoko Rich, *Steal This Book (For $9.99)*, N.Y. Times, May 17, 2009, § WK, at 3 (noting that publishers are caught between authors who want to be paid high advances and consumers who believe they should pay less for a digital edition, largely because the publishers save on printing and shipping costs).

331. *See, e.g.*, Letter from Pamela Samuelson, Professor of Law & Information, Univ. of Cal., Berkeley Law, to The Hon. Denny Chin, S.D.N.Y., (Sept. 3, 2009), *available at* http://thepublicindex.org/docs/letters/samuelson.pdf (objecting to the GBS settlement on behalf of sixty-five academic authors and researchers on the basis that prices for institutional subscriptions are unconstrained under the Settlement Agreement).

332. *See generally* Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, (UC Berkeley Pub. Law, Working Paper No. 1683589), *available at* http://ssrn.com/abstract=1683589.

function with a collusive private agreement is further heightened by the de facto orphan works monopoly that will result from the agreement.[333] Critics argue that if the Settlement is approved in its current form, it will serve as a precedent for entrepreneurial class action lawyers to transform legitimate disputes over specific issues into pervasive industry reorganizations.[334] It could be argued in defense of the Settlement that it does not, in fact, usurp the legislative balance of copyright by altering any fundamental right of copyright owners over commercial copying and distribution; rather, it merely alters the mechanisms for asserting such rights in a way that is likely to benefit authors, publishers, and readers alike. In addition, in view of the lamentable history of copyright reform in the United States and the slow progress of the Copyright Office's orphan works agenda, it is arguable that the challenge of unblocking access to orphan works could only be met through a class action settlement.

Optimistically, one might predict that, if the Amended Settlement Agreement is rejected, Congress will enact comprehensive and effective orphan works legislation and public sector digitization initiatives will flourish in place of the Google initiative. It seems just as likely, however, that rejection of the settlement would prove to be a lost opportunity. It might eventuate that Google was the only entity, public or private, with the vision, technology, and financial resources to undertake this massive and bold digitization effort.

333. *Id.* at 31–34.

334. *Id.* at 51.