

# **Class Notes from IIF Session on The Google Book Search Settlement March 30, 2009 Harvard Law School**

## **Contents**

- Guest Presentations
  - Mr. Jeffrey P. Cunard
  - Mr. Allan A. Ryan
  - Professor John G. Palfrey
- Responses and Class Discussion
  - Live Discussion
  - Online Discussion (Berkman Question Tool)
- Prepared Questions
  - Descriptive
  - Normative

## **Guest Presentations**

### **Mr. Jeffrey P. Cunard**

- This is an actual litigation, and it is important to remember that fact.
- Principle copyright holders want to uphold the current copyright system. Copyright is a permission-seeking regime, whereas Google proceeded without asking permission (and then claimed fair use).
- Benefits of the settlement:
  - Allow copyright owners to use new methods to exploit books past current commercial life (i.e., out-of-print books).
  - Allow people to find/discover/have access to millions of rare books that are currently available only in a limited number of research libraries.
  - Revenue split of 63% is healthy and reasonable to rights holders; the publishers are largely happy with it.
  - Establishment of the Books Rights Registry (BRR), a rights registry in publishing, which be useful going forward.
  - Another useful goal is to get people used to reading books online.
- Who was actually at the table:
  - Plaintiff & Defendant in Litigation.
  - Libraries were at the table for most of the negotiation.
    - Google acted as an intermediary for most of the time.
    - There was also direct discussion with large, participating libraries.
  - The public interest was taken into account in various ways:

- Copyright owners are a part of the reading public
- Terms mandating access for the visually impaired
- Pricing principles for the institutional subscription
- Public access service for public libraries is a gift
- Everyone with internet can use the search function and see snippets

### **Mr. Allan A. Ryan**

- Disclaimer: NOT here representing Harvard or Harvard Business Publishing (HBP) or anyone else other than himself.
- Mr. Ryan's Background and Perspective
  - As director of Intellectual Property at HBP, he enforces copyright against pirates and infringers.
  - He has also authored his own works.
  - He is "all over the map" on copyright issues. For example, he has written copyright language for Berkman Center, whose advocacy of openness may be seen to conflict with his interests as a publisher and author.
- Mr. Ryan's views on Google Book Search (GBS)
  - Upon learning of GBS in December 2004, his initial reaction was that it was a great idea and would be a tremendous resource.
  - Then, he became aware of grumbling from publishers that Google was copying without permission.
  - At first, considered the copying to be *de minimis*, because Google was only making one secure copy of each book, but later he found the arrangement more troubling.
    - The agreement between Google and libraries whose books were being digitized said that Google would not be responsible for anything that the library did with the digital files Google provided in return for cooperation.
    - Library fair use includes allowing all library users to make copies. This definition was legislated with respect to walk-in photocopiers ,but now "users" could include anyone logging onto library website.
    - Thus, he sees a frightening potential for a huge amount of circulation.
    - Furthermore, Google has been noncommunicative about the service.
  - He never took Google's fair use claim seriously.
    - GBS goes 0 for 4 on the statutory fair use factors: Google was copying the entire work, it was not a transformative use, the use was for commercial gain (Google is not a 501(c)(3) organization), and the use will likely have an effect on the market.
    - It was just a fig leaf for Google to justify its actions.
- Mr. Ryan's views on the settlement: It's good.
  - It preserves the interests of teaching, learning, scholarship, etc. that were the original inspiration (for publishers) in responding to Google.
  - The compensation structure provides for a fair return to authors (in particular, authors of out-of-print books).
  - It makse fair and beneficial use of the public domain.
  - Publishers can make it work, and it could be a huge step forward for them.

### **Professor John G. Palfrey**

- Disagrees with many of the above statements.
- The Good News: a net increase in access to information.

- Lots of positive outcomes for lots of people. Specifically, individual library terminals in each small or large public library in U.S. and special accommodations for disabled people.
- Would have signed up for the deal if he were a publisher.
- Has his hat off to Google for pulling off such a powerful agreement for the next generation.
- Specific Worries: much in common with Grimmelman, especially the library-specific concerns.
  - Some concerns depend on the kind of library in question:
    - For small, local town libraries (like Carnegie libraries), GBS access is good.
    - For larger library systems (like the NY Public Library), GBS access raises tough questions.
      - If you have one terminal, where do you place it?
      - Is that better than nothing?
    - For University libraries, this private agreement will make public law that affects their rights.
      - Will it have a negative effect on individuals under copyright law?
      - What can library users do with this information in this format?
      - How will it impact orphan works and other unsettled issues?
  - What will this do for research? Research governed by a single private party (or a handful of them) is troubling.
  - As Darnton notes, pricing might be extortionate over time. Pricing is specially a concern for big libraries; their budgets are being cut, prices going up, and they are trying to buy books in both print and electronic formats.
- A more general concern (Palfrey's own): The settlement *de facto* precludes anyone else from doing anything comparable to GBS any time soon.
  - This is good for Google, but it is potentially problematic that so much access to information will be subject to a choke point in hands of a extremely large and powerful corporation.
  - This is a curious mode of lawmaking by private parties.
- Suggestions for improving the settlement (apart from the procedural problems of achieving them):
  - Ensure the possibility of a meaningful competitive landscape -- make it more likely for second-comers to succeed.
  - Control of the workings of the BRR should have some meaningful public voice in it -- a provision for public oversight of the registry.
  - Add a sunset provision as a term of the settlement agreement -- each library library negotiate for periodic review.
- Bottom-Line Problem: We have not yet worked out what the digital world will look like or what we want from it.

## **Responses and Class Discussion**

### **Live Discussion**

- **Cunard:** Re: "meaningful competitive landscape" concerns, this is a non-exclusive agreement. If a library has rights to these works, it can give them to ANYONE to digitize. (Anther group used to be digitizing public domain works.) Libraries still can digitize themselves or give to others to digitize, but they must have the rights --

so the question is how do you get those rights (which are not part of the special benefits of libraries)? Choose between either the world he described or the world in which nobody gets to see more than snippets. There are no alternatives in between.

- **Zittrain** question on orphan works: This agreement removes the cloud of uncertainty for Google and libraries, but what about somebody else? Can they negotiate with the BRR, or do you have to be sued again to clear air?
- **Cunard** response: Yes. Through the class action mechanism, Google has gained the ability to scan these works without getting express permission. Absent legislation or a situation in which someone else starts scanning, gets sued, and enters another agreement, Google has an advantage. Google earned this advantage through initiative and huge upfront investment. Blogs suggest that a consortium of libraries might undertake a similar project, but they still have the copyright problem.
- **Palfrey**: Isn't that the problem, that the libraries can't do it and the corporation can?
- **Zittrain**: The most favored nations (MFN) clause creates an asymmetry -- orphan works are NOT spoken for regarding others in the future, but they ARE spoken for regarding Google in the future.
- **Cunard**: Libraries can't get copyright, so they can't solve the access problem, and the situation would just go back to nobody having access. The MFN clause only applies if another entity comes along and gets rights to all of the orphan works
- **Ryan**: Orphan works are not the same as out-of-print works.
  - Books published before 1923 are the only ones really in the public domain. All the rest (with a few exceptions for non-renewal) are under copyright. The category of books still under copyright is enormous, but the subcategory of in-copyright books that are still in print (those that can be bought new from publishers or bookstores) is relatively small. Most in-copyright books are out of print, BUT those aren't necessarily orphan works.
  - Orphan works are the ones that are in-copyright and out of print, AND you can't figure out who owns the copyright. (Legislation is pending to reduce the burden on people hunting down copyright owners.)
  - A good feature of the settlement is that each rights holder gets to decide how much of his text is displayed (for all in-copyright works, regardless whether they are in or out of print). It is good that the decision of how much to display rests with rights holder, but the catch is identifying the rights holders. (Identifying rights holders is a problem for lots of orphan works.) This is one of the great questions about the settlement still to be sorted out.
- **Question** for Palfrey: How close is this settlement to being acceptable? (Darnton said it's pretty close.)
- **Palfrey** refers back to the three points he made earlier (see above).
- **Cunard** clarification of BRR composition: Members are appointed by the Authors' guild and Publishers' Association, but the members they appoint do not have to be from their organizations or even members of the class.
- **Palfrey** to class: Imagine yourself five to ten years from now and ask if this is something that you want to have happen. He is not happy with this vision from the perspective of ordinary people, because it represents huge concentration of power in the hands of fast-movers.
- **Zittrain**: Two questions to help test this future vision:
  - (1) What if Google started putting everything into a kindle-like device? That again binds those works for which copyright owners can't be reached via the

BRR. Is it true that Amazon can't do that (they negotiate all their deals one at a time)?

- **Cunard:** That's basically right. The class would all get an opt-out notice for the new business model.
- (2) There are "gold copies" of all the books floating around -- these are the copies that libraries received in return for allowing their collections to be scanned. If libraries accept the single terminal, they take on further restrictions on those gold copies, right? How much leeway is there for the libraries to cooperate and do something cool with their gold copies?
  - **Cunard:** There is no extra round of restrictions for accepting the terminals.
- **Ryan:** How long until Congress steps in? For example, after the period of claims has expired, and there is still a huge class of unclaimed works, Congress could decide to stand *in loco parentis* for the orphan works. Is this too far-fetched?
- **Fisher:** It is time to shift our focus to larger themes. So far, we have been comparing the settlement to the status quo, and we've seen that lots of interests benefit. But we should try flipping it around, and comparing the settlement instead to some socially optimal outcome. If we can indentify that, then can measure the settlement against that (instead of the status quo) and figure out what we need to do to achieve it. (Or what congressional intervention might be necessary to do so.)
  - Proposed dream scenario: Digitize all books once. Compensate the organization that does the digitizing. Then, we want competition in providing search functions to be applied to this database. We want copyright owners to be able to opt out or be compensated. We want the money that compensates them to come from organizations and people who can pay for it. And, having collected and distributed that money, we want free access for everyone.
  - Is this the dream scenario? If yes, we are far from it. Could we come closer without violating 5th amendment? (Is there a takings problem in here?) Can we gain insight from analogies to telecommunication?
  - Basic idea: NOT to ask how good the settlement is compared to the world as it exists, but instead to ask the more demanding question of how does well (or poorly) it lives up to the dream.
- **Student:** The ideal should include global equality of access for all internet users.
- **Student:** Since these are U.S. copyright books in U.S. tax-supported institutions, gloabl access may not be justified.
- **Student:** Question for Cunard regarding the issue of Google's power: Is Google getting too powerful to be a force for public good in our society? Is that a valid concern for a Judge (apart from specific antitrust issues)?
- **Cunard:** The applicable standard for approving a class action settlement is "fair, reasonable, or adequate to rightsholders". Will a judge take broader social policy into account? We don't know; it probably depends on the judge.
- **Cunard:** Response to the international issues raised: The settlement applies to authors and publishers worldwide to the extent that they have any U.S. copyright interests. Google believes you can sweep these people in. Another question is how fair it is not to allow worldwide access. It is unlclear how one might extinguish U.S. authors' rights to display outside U.S. without a treaty or something along those lines.
- **Student:** The real bottleneck here is the tension between old copyright and new technologies. Should we rethink copyright?
- **Student:** Outdated publishing models (compared to new techonologies) are also part of the problem -- should we rethink those?
- **Ryan:** Consider what value publishers bring to the process. A publisher doesn't just disseminate the author's words. The publisher does editing, marketing, design,

production, and positioning of the book; all of this goes beyond mere dissemination of text. Recent technology advances are in modes for dissemination of text. One result is that people who don't need those other things that publishers provide (eg bloggers) have flourished. But would the quality of discourse suffer if publishers went out of business?

- **Palfrey:** Is Fisher's vision a utopia or a dystopia?
- **Zittrain:** It's basically what the framers had in mind.
- **Fisher:** Yes, but there are also special issues posed by this problem, including high initial cost.
  - **Zittrain:** It took an initial investment of \$100 million.
  - **Palfrey:** The annual budget for Harvard Law School is \$14.5 million.
- **Palfrey:** Libraries should have and would have cooperated to do something like this. But would the user experience be any different? The search algorithm and user interface would probably be worse, but the structure would probably be more public-oriented.
- **Student:** How much will this matter in 10 years? Will the publishing industry wind up with rampant file sharing like music industry with file sharing, such that copyright doesn't matter?
- **Student:** What if Google made their search algorithm open? Open API might get us a lot closer to the ideal by making competition feasible.
- **Student:** It is not clear that the public would be better off if libraries or Congress were in charge of book digitization.
- **Student:** Regarding open API, the entire data set, not just the search algorithms, would have to be available.
- **Nesson:** Google "EPIC 2014".
- **Ryan:** Response to the question about Google becoming too powerful: It's a very new company; even 10 years ago, knowing that it was a good search engine made you cool. Google is enormously powerful and influential, but it is not infallible.
- **Nesson:** What is being established is copyright library of bits. It doesn't matter if they're music bits or book bits. Look at the strategy of the RIAA for music, and the strategy of the Authors' Guild and publishers for books -- they are the same. A copyright environment is emerging that is policed at the margins by a three-strike rule. The interface with this library is the interface with net. Either you are an obedient user, or you are not on the net. This regime is manifested in a world in which people's rights are embodied in the concept of fair use, which they can't program. It's a fractal concept. This copyright library will be digital, written in code. We're looking at Googlezon; Google allying effectively with Amazon and all copyright holders. It's a duopoly of copyright holders and the search engine that delivers their material -- publishers and distributors of bits together, and they own the congress of the United States through lobbying. The idea that the public interest is being recognized by this deal (the 'gift' of one terminal per library, the treatment of orphan works, the 63/37 revenue split, etc.) is not right; really Google et. al. are capturing everything. This is a private deal for private interests, and these people will be controlling our net.
  - The real question on the table is whether we should intervene as are lawyers and citizens. We should not have had our discussion on the assumption that the deal would go forward as is.
- **Synthesis** by professors Zittrain and Fisher:
  - **Zittrain:** This class implicates not just our studying the issues but also recognizing that we are involved in them. We are parties. Shopping cart theft costs \$800 million a year, so Google's investment in book digitization is just a small slice of that. Harvard Law School spent \$37 million in 1993 renovating the library. What sets Google apart is a deficit in chutzpah and leadership and feeling like we have a seat at the table; it's not the money.

Google didn't even incorporate a subsidiary to do the digitizing (in order to shield the parent corporation from liability for potential copyright infringement)! It is strange that libraries didn't see this coming and try to do it themselves. Did they think it was above or below them? The libraries have gold copy disks -- what can we & should we do with them?

- **Fisher:** Possible interventions include congressional action, libraries acting as consortium, and others. There are big legal theory issues as well as big social questions looming.
- **Zittrain:** How did a snippet display quarrel turn into a settlement about full access?
  - **Cunard:** It was a joint idea that arose during the litigation and settlement negotiations.
- **Fisher:** Google just signed a deal on music rights today, too.

### **Online Discussion (Berkman Question Tool)**

- **(6 Votes)** (Seed Question) What are the most effective strategies for achieving desired changes to the system set up by the settlement? Should libraries demand side licenses? Citizens lobby congress? Entrepreneurs pursue competing technologies? Other creative suggestions welcome.
- **(5 Votes)** Is there a concern about institutionalizing a publishing model that would otherwise become obsolete? Will the deal create a path dependent commitment to aging dinosaurs instead of requiring them to adapt?
  - The rep for the publishers seems to be admitting as much. No way to adapt in post-xerox world.
  - 17 U.S.C. § 101: Institutionalizing obsolete technology in IP law?! Never! (<http://is.gd/pJOa>)
  - If publishing would otherwise become obsolete, why would this change things?
  - For academics, I'm for keeping going with the Harv/MIT trend of asking faculty works to be published on Creative Commons-like terms. Universities should all do this at least for scholarship.
- **(4 Votes)** Are lawyers legitimating the unchecked growth of an anti-privacy behemoth who will not stop until all of our DNA is searchable?
  - That's ridiculous.
  - It is not.
  - Yes we are.
- **(3 Votes)** (Seed Question) ASCAP and BMI operate under antitrust consent degrees. Is the BRR sufficiently analogous to these collective licensing organizations that antitrust monitoring should be imposed upon it as well?
- **(3 Votes)** (Seed Question) When digitized books are excluded from search or viewing services (either by rightsholders' request or by Google's editorial decisions), what reporting should be required? How should readers be informed of these omissions?
- **(3 Votes)** Some of the authors in the readings raised some interesting but rather breezy (that is, not something a lawyer would write) antitrust concerns; does anyone with an antitrust background think there is any good legal basis for these arguments?
  - It's hardly cut-and-dry, but the MFN clause triggers antitrust concerns. The antitrust and tech seminar has looked closely at this and there are strong args both ways.
  - yes -- we talked about it for two full classes in our antitrust and technology class. the concerns are huge from a variety of approaches.

- i.e., no one else has equal ability and resources to negotiate such a settlement and the google one is nonbinding to anyone else. so anyone else entering the market would face the same legal concerns.
- **(2 Votes)** (Seed Question) How might libraries persuade Google and the BRR to exercise their option of providing more public access terminals? Would a system that accounts for population and demand differences operate more fairly than the current one-terminal-per-library approach?
- **(1 Vote)** (Seed Question) Should legislative intervention or the use of administrative regulation be contemplated? Would an agency regime be preferable to the BRR?
- **(1 Vote)** (Seed Question) Is the complicity of libraries in surveillance measures protecting corporate security interests problematic? What alternatives would satisfy Google and rights holders while preserving libraries' neutrality and independence?
- **(1 Vote)** (Seed Question) Will the lack of a broad organizing principle and the fragmentation of works in Google Book Search have a negative affect on the ways users find and read texts? How might the user interface be changed to address these issues?
- **(1 Vote)** Might prof Palfrey's concerns about competition be resolved by an open api-which would generate quite a large amount of 3rd party activity?
- **(1 Vote)** To the extent that this removes some subset of the reasons to go to libraries, might it not take them below whatever use threshold justifies funding (i.e. is this a library killer)? If so, what does it mean to replace libraries with for profit databases?
  - If anything, this should enhance the use of libraries — few users will buy a full license to the database, but public libraries get one apiece.
  - Not sure lining up for the single terminal outweighs the ability to read 20% of books at home.
  - Not sure it is either. Not arguing it is. I don't agree that the two uses are competing.
  - what's wrong with killing libraries? we could put all the newspapers in them.
  - Ask the same question when you're unemployed, you can't afford a computer, newspapers no longer exist, and you need to find a job. Just because you don't use it doesn't mean nobody does.
  - So if the middle class stops doing (some of? most of?) its research in libraries and (aside from pleasure-lending) they become the province of the poor, are gov'ts still going to be willing to fund them?
  - Spend some time in a public library, and I think you'll find that the future is here. Computers are often the biggest draw, and it's not the "middle class" using them.
  - And their funding is being cut...
  - Actually, that's the point of federal "e-rate" funding. To provide internet access in libraries and schools for people on the wrong side of the digital divide.
- **(1 Vote)** Does our "public interest" ignore a broader international interest? What if people want to use these databases and subject them to machine translation to spread knowledge? What if people outside the U.S. are left out of reading?
- **(1 Vote)** Is it fair for a few lawyers and Google to decide the fate of so many authors?
  - What role does the law play in fairness?
  - Do you mean is it less fair than any other class action settlement?
  - Absolutely nothing. Unh. Say it again.
  - Authors (as individual creators) are arguably more unique than ordinary class action participants.
  - How does one measure uniqueness?



- The principle of an individual copyright recognizes uniqueness
- The principle of an individually vested cause of action in tort recognizes uniqueness, too.
- it is fair for google to do anything it wants to do. if you speak against it, you will be the first to perish when it takes over the world.
- **(1 Vote)** Darnton bemoans the fact that "we are allowing a question of public policy—the control of access to information—to be determined by private lawsuit." But isn't this how courts work? Or are the magnitude of the interests involved somehow different?
  - Is there some better time to bemoan it?
- **(0 Votes)** Will these books be open to both the Kindle and the Sony Reader or does Sony get a Free Ride too?
- **(0 Votes)** Does Google's growth rub up against fundamental policies and principles implicit in the structure which the American Constitution sets up for our society
  - If only we had a well-established way to bust some trusts

## **Prepared Questions**

### **Descriptive (prepared for guests):**

- From your perspective as \_\_\_\_, why are the parties agreeing to this settlement? Do you think they're right?
- How much room do you think there is for future change to the system instituted by the settlement (e.g., composition of the BRR)?
- What do you think would happen if Google goes out of business or discontinues the service? In particular, what would be done with the digital files, and how would outstanding search and viewing licenses be handled?
- How do you expect that pricing for the service will be determined, particularly for institutional subscriptions? What do you consider comparable services?
- From your perspective as \_\_\_\_, how useful is this service for readers? How will it change the way readers encounter texts?
- What burdens do you expect will fall on various libraries, from those that wishing to be "fully cooperating" with the project to those simply supporting a single free public access terminal? Will the cost of involvement be prohibitive for smaller or poorly-funded libraries?
- What role must libraries play in enforcing Google's security policy? Do you believe there is something about books or the Book Search service that raises specific privacy concerns as compared to other Google services?

### **Normative (seeded on the Berkman Question Tool):**

- When digitized books are excluded from search or viewing services (either by rights holders' request or by Google's editorial decisions), what reporting should be required? How should readers be informed of these omissions?
- Is the complicity of libraries in surveillance measures protecting corporate security interests problematic? What alternatives would satisfy Google and rightsholders while preserving libraries' neutrality and independence?
- How might libraries persuade Google & the BRR to exercise their option of providing more public access terminals? Would a system that accounts for population and demand differences operate more fairly than the one-terminal-per-library approach currently contemplated?
- Will the lack of a broad organizing principle and the fragmentation of works in Google Book Search have a negative affect on the ways users find and read texts? How might the user interface be changed to address these issues?

- Should legislative intervention or the use of administrative regulation be contemplated? Would an agency regime be preferable to the BRR?
- ASCAP and BMI operate under antitrust consent decrees. Is the BRR sufficiently analogous to these collective licensing organizations that antitrust monitoring should be imposed upon it as well?
- What would be the most effective strategies for achieving any desired changes to the system likely to be implemented by the settlement? For example, should libraries demand side licenses? Should citizens lobby congress? Should entrepreneurs pursue competing technologies? Other creative suggestions welcome.