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The Google Library Project and its international dimensions

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1) Introduction

The Google Library Project (GLP), one of the most colossal as well as debated projects of digital mega-owner Google, is in position to change the pivot of the copyright ecosystem by redefining the fair use doctrine and affecting digital copyright protection internationally. From one side, the opponents of Google's radical project confront with hesitance a plan based on the "so sue me" basis and demand that Google goes back to negotiating like any other publisher. From this conservative point of view, the existing copyright systems should be preserved, and can be adapted into the digital epoch. From another point of view however, there are those who believe in Google's good-will in pursuing something more than economic benefit; pursuing a higher cause such as the facilitation of the dissemination of knowledge online. The same people regard the demands for relying on the old ways as way beyond retro and underline that they cannot foster progress. The question remains: should a project that will undeniably multiply the educational and cultural benefits of worldwide circulation of books through the internet, in an era characterized by the digital dominion, be held back due to the inefficiency of copyright legislators to protect right holders thought the currently operating copyright system? In my opinion, the time has come when restructuring digital copyright protection can no longer be postponed.

2) The Google Library Project description

A) The Google Library Project was announced on December 2004. The Project being one of Google's most ambitious plans has been faced with both enthusiasm and skepticism as is every innovative idea that involves more than one stakeholder. The "Google Library Project" also referred to as the "scan first-ask later project" is a project promoting the creation of a digital library without the need of copyright licensing in its traditional sense, vigorously based on the fair use argument and the need to promote access to books in an environment which by nature was until now thought to undermine it. The digital library will be created by scanning books belonging to some of the world's largest American and International libraries[1] into Google's database which in exchange will give the libraries one digital copy of every work[2].

In response to every search query the user will be able to access the "snippet" related to the query and a few sentences before or after. If there are many snippets in the same book referring to the search query the user will only be able to access 3 of them at the maximum. This does not apply to books which are already in the public domain which shall be fully visible. Finally, the text of reference books will be scanned into the search database but the user will only receive bibliographical information in response to the query where the display of even snippets could harm the market for the work (ex. dictionaries)[3].Simultaneously, links will enable the user

[1] The libraries participating so far in the Project either partly or fully are :Bavarian State Library, Columbia University, Committee on Institutional Cooperation(CIC), Cornell University Library, Harvard University, Ghent University Library, KEIO University Library, Lyon Municipal Library, the National Library of Catalonia, The New York Public Library, Oxford University, Princeton University, Stanford University, University of California, University Complutense of Madrid, University Library of Lausanne, University of Michigan, University of Texas Austin, University of Virginia, University of Wisconsin-Madison, available at http://books.google.com/googlebooks/partners.html

[2] Commonly referred to as the library digital copy

[3] Jonathan Band, The Google library Project: both sides of the story, at 2(2006), *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification, 1* (2): 1-17

to locate and buy the book directly from the seller or publisher thus facilitating access to the entire content.

Google's effort to exploit digitally the book thesaurus scattered around the globe is divided in 2 projects: the Partner Program and the Library Project. However the differences between the 2 programs are substantial and have led to no reactions in view of the Partner Program. The principal difference is that in the Partner program, the publisher authorizes Google to scan the book and therefore digitization occurs pursuant to an agreement with the copyright owner .Moreover, in response to the user query, the user will be able to see the full page containing the term and a few pages before and after that versus the one to three "snippet" border line for the Google Library Project. In this sense the definition of "snippet" (or the length of the annotation shown in a KWIC (key word in content) display of content) has become an issue of capital importance as it is not a legal term and controversy could rise regarding its interpretation[4].

[4]," The owners have argued that "snippet" is not a legal term. Therefore, at some point in the future Google could start displaying larger portions of the indexed books, which could displace sales. Google responds that if it does change its policy in a manner that hurts sales, the owners can sue at that time. Since displaying some of a book's text in response to a search query implicates both the reproduction right and the display right, an owner will be able to bring an infringement action against Google when it changes its policy, even if that occurs long after the original scanning of the book. Accordingly, there is no reason to prevent Google from proceeding now, when its practices do not harm owners. It is unlikely that these fees would increase authors' incentive to write", Id at.10,available at http://www.aaupnet.org/aboutup/issues/0865_001.pdf

a. Key players- litigation- current status

On September 2005, the Authors Guild and some individual authors sued Google in the United States District Court for the Southern District of New York[5], alleging that the Library Project infringed their copyrights. The lawsuit was styled as a class action[6] on behalf of all authors whose works were in the University of Michigan's collection and the request was for damages and injunctive relief. On October 19, 2005, five publishers—McGraw-Hill, Pearson, Penguin, Simon & Schuster, and John Wiley & Sons—sued Google in the same court with the difference that they only requested injunctive relief. The two cases ultimately were consolidated into one action[7].On October 2008 and in view of the precariousness of the outcome of the litigation the parties reached a settlement[8]. The settlement (although it had reached a preliminary approval on November the 17th 2008), caused a great deal of debate and faced negation from both the right holders and the Department of Justice[9].In response to these reactions an amended settlement[10] was proposed on November the 13th 2009 which was also granted preliminary

[5] On the 31st of March 2010 an unexpected turn was affixed on the Google books opposition. The American Society of Media Photographers and other groups representing visual artists announced their plan to file a class-action lawsuit against Google, asserting that the company's efforts to digitize millions of books from libraries amount to large-scale infringement of their copyrights as well. After the rejection of the Society's efforts to intervene in the settlement last year, it moved on to seek compensation for visual artists whose work appeared in the books and other publications which Google has illegally scanned (see Miguel Helft, Visual Artists to Sue Google Over Vast Library Project, The New York Times,Ap.6,2010 available at http://www.nytimes.com/2010/04/07/technology/07google.html)

[6] Class action definition: a lawsuit brought by one or more plaintiffs on behalf of a large group of others who have a common legal claim (see http://www.answers.com/topic/class-action)

[7] The Authors Guild, Inc., et al. v. Google Inc., Case No. 05 CV 8136 (S.D.N.Y.)

[8] Original settlement agreement available at http://www.googlebooksettlement.com/r/view_settlement_agreement,

[9] The main oppositions of the DOJ regarded the application of rule 23 referring to which they said "As a theoretical matter, a properly defined and adequately represented class of copyright holders may be able to settle a lawsuit over past conduct by licensing a broader range of conduct to obtain global copyright peace and in conformity with antitrust law", see STATEMENT of INT. of the U.S, 05 Civ. 8136 (DC), available at http://www.justice.gov/atr/cases/f250100/250180.pdf

[10] Amended settlement available at http://www.googlebooksettlement.com/r/view_settlement_agreement

approval on November the 19th 2009.Final approval can be granted by the judge upon realization that the settlement is "fair, reasonable and adequate" for the class members, because the suit is a class action[11]. The final fairness hearing on the case took place on February the 18th, 2010 and judge Denny Chin after something more than a year, on March the 22nd 2011, gave his final ruling on the settlement which was rejected[12].Judge Chin pointed to the Congress for answers on several of the issues under debate. He further stated that the Court would have a status conference on April the 25th 2011 which was later postponed for June 1st.

The Department of Justice (DOJ) in the final fairness hearing had appeared to remain in opposition to the settlement in its amended form. William Cavanaugh Jr., Deputy Assistant Attorney General for Civil Matters, representing the Department of Justice (DOJ) characteristically had said "the "forward-looking business plans" contemplated by the settlement may be a good idea, but they were outside the scope of the settlement. This turns copyright law on its head[13]". According to the statement of interest by the DOJ, in addition to several unfair-competition issues and the remaining copyright infringement theories, the main problem of the settlement had to do with the implementation of rule 23, in particular with regard to right holders of out-of-print works and foreign right holders. The settlement "essentially authorizing, upon agreement of the Registry, open-ended exploitation of the works of all those who do not opt

[11] Fed.R.Civ.P.23(e).A settlement of a class action requires approval of the court. Because Rule 23 (e) does not set forth the factor to be taken under consideration when determining when a settlement is fair, reasonable and adequate, the factors used by Judge Chin's Circuit are the so called "Grinnelli factors": 1) the complexity, expense and likely duration of the litigation, 2) the reaction of the class to the settlement, 3) the stage of the proceedings and the amount of the discovery completed, 4) the risks of establishing liability, 5) the risks of establishing damages, 6) the risks of maintaining a class action through trial, 7) the ability of defendants to withstand greater judgment,) the range of reasonableness of the settlement fund in light of the best possible discovery and 9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation (City of Detroit v. Grinnell Corp. 495 F.2d 448, 463 (2nd Circ. 1974)).

[12] See full decision at http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115

[13] Google Book Search Settlement Fairness Hearing Has Concluded, Here Come the Reports, Resource Shelf,Feb.19,2010 available at http://www.resourceshelf.com/2010/02/18/google-book-search-settlement-fairnesss-hearing-has-concluded-here-come-the-reports/

out[14]" would according to the DOJ need modification in order to comply with Rule 23.Secondly, The Parties had not demonstrated that the class Representatives adequately represented absent class members[15]. The DOJ believes no adequate notice was given which is unacceptable "given the size and geographic scope of the class, and the alteration in copyright protection that the Proposed Settlement would effectuate.[16]" The notice requirement is designed to ensure that absent class members are also provided with the chance to protect their rights. William Cavanaugh Jr. also noted in the hearing that "the settlement has the effect of rewriting contracts" in support of his belief that publishers and the Authors guild do not have a right to enable a third party such as Google to use an author's work without their permission[17].

Judge Chin obviously agreed with several of the points raised by the DOJ.

b) Orphan and out-of-print works

Right holders can be divided into 3 categories for the purposes of the GLP: active right holders[18] (the ones that register with the registry[19]), inactive right holders (those who fail to opt-out of the settlement and also fail to register with the Registry including in copyright but out-of print[20] works owners) and orphan works . "Orphan works" refer to the subset of right holders

[14]STATEMENT of INT. of the U.S, 05 Civ. 8136 (DC)at 7
[15] See *Amchem*, 521 U.S at 620, 628-29 and *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,396 F.3d 96,106-13 (2nd Cir.2005).*
[16] STATEMENT of INT. of the U.S, 05 Civ. 8136 (DC)at 7
[17] Google Book Search Settlement Fairness Hearing Has Concluded, Here Come the Reports, Resource Shelf,Feb.19,2010 available at http://www.resourceshelf.com/2010/02/18/google-book-search-settlement-fairnesss-hearing-has-concluded-here-come-the-reports/
[18] See http://blog.librarylaw.com/librarylaw/2009/03/google-books-settlement-at-columbia-part-1.html
[19] See p.10
[20] "The Amended Settlement Agreement uses the term Commercially Available, which generally means that a Book is in-print. If a Book is not Commercially Available, that means, in general, that it is Out-of-Print. Google is authorized to make Display Uses and Non-Display Uses of each Book that is not Commercially Available for the term of the U.S. copyright for that Book unless the Rights holder directs Google not to do so or directs Google to remove the Book", available at http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704#q29

who are unknown or cannot be located after a diligent search. "The Project, from one hand brings forth unused or inaccessible books which in digital format can even be accessible to people with disabilities but at the same time, "establishes a marketplace in which only one competitor would have authority to use a vast array of works especially orphan works[21]".

According to the amended settlement, Copyright owners of out-of-print works can deny Google permission to use their works in certain ways if they learn of the agreement and their rights under it[22]. But, copyright owners of out-of-print works provide a release to Google for any exploitation of their rights that occurred prior to those owners becoming aware of Google's use[23].And, "because the owners of orphan works are an incredibly diverse group that includes not only living authors or active publishers, but heirs, assignees, creditors, and others who acquire the property interest by contract or operation of law, these rights holders are difficult or impossible to locate, and thus difficult to notify[24]". Moreover, "no amount of notice is likely to protect those orphan rights holders who are unaware of their rights[25]".

However, is response to the DOJ's concerns regarding out-of-print works and especially orphan works, the amended settlement changed Article 6.3 of the original settlement regarding unclaimed funds by a fundamental alternation of the distribution model. Before the amendment, if an out-of-print copyright owner did not come forward within five years, profits from the commercial use of the out-of-print work were to be distributed to pay the operational expenses of the Registry that were related to its performance and then on a proportional basis to the Registry's registered rights holders. "Therefore, at the expense of every rights holder who failed

[21] STATEMENT of INT. of the U.S, 05 Civ. 8136 (DC)at 3
[22] S.A. §§ 3.2(e)(i), 3.5, 4.7[22].
[23] S.A. §§ 10.1(f), 10.1(m)-(n), 10.2(a).
[24]STATEMENT of INT. of the U.S, 05 Civ. 8136 (DC)at 6
[25] Id. at 8

to come forward to claim profits from Google's commercial use of his or her own work the Registry and its registered rights holders would benefit"[26]. The DOJ had stressed out that the fact "that out of- print rights holders might benefit from a fundamental alteration of their rights is insufficient to show that they were adequately represented by named plaintiffs whose rights will not be altered (or who can readily avoid such alteration), and who stand to gain if out-of-print rights holders do not opt out[27].

Google through the amended settlement and in response to accusations about a) negligence regarding the copyright status of orphan works as much as b) the limited breadth of the class-action representation of orphan works right holders, responded with a complete remodeling of article 6.3.The provision now holds that unclaimed funds will primarily be held by the Registry for the benefit of rights-holders of such Books until they register or claim the books. The article also provides for an up to 25% use of the "per year" unclaimed funds deriving from books that have remained unclaimed for at least 5 years, to favor the efforts to allocate right holders of those books. Regardless however of those provisions, Judge Sin in his decision regarding the amended settlement concluded that "the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court".

c) The Book Rights Registry

Under the 2008 original agreement Google took a step up and introduced the creation of a non- profit entity called the Book Right Registry whose duty would be representing rights holders and negotiating their interests in respect of the Google Library Project by identifying and coordinating their payments. Google agreed to pay U.S. $34.5 million to fund the launch and the

[26] Id. at 9
[27] Id. at 10

initial operations of the Registry and to fund other Administrative Costs. In exchange for the benefits conferred in the Settlement Agreement Google, the fully participating and cooperating libraries and host sites were authorized "(a) to make Display Uses and Non-Display Uses[28] of their Books and Inserts in GBS and other Google Products and Services, (b) each Fully Participating Library to use its Library Digital Copy and (c) each Host Site to make the Research Corpus available, all in accordance with the terms and conditions of this Settlement Agreement, a Library- Registry Agreement or a Host Site-Registry Agreement.[29]"

The settlement also provides that any breach of the terms or conditions of the settlement would not result in termination of such authorizations except as provided in Section 3.7(b) (Failure to Provide Contemplated Rights holder Services). It's also interesting to notice that the first Settlement agreement neither authorized nor prohibited, nor released any Claims with respect to, "(1) the use of any work or material that is in the public domain under the Copyright Act in the United States, (2) the use of books in hard copy (including microform) format other than the creation and use of Digital Copies of Books and Inserts, or (3) Library's Digitization of Books if the resulting Digitized Books are neither provided to Google pursuant to the Settlement Agreement nor included in the Library Digital Copy provided to Library by Google, or the use of any such Digitized Books that are neither provided to Google pursuant to the Settlement Agreement nor included in such LDC (Library Digital Copy)[30]".

[28] Non-display Uses are uses that do not involve displaying any content from the book to the public. Examples include: bibliographic information, full text indexing without displaying the text, geographic indexing of books and algorithmic listings of key terms for chapters of books. Definition is available at http://www.googlebooksettlement.com/help/bin/answer.py?hl=en&answer=118704 Question 36.

[29] Amended settlement available at http://www.googlebooksettlement.com/r/view_settlement_agreement

[30] Attachment B1 to SA available at http://static.googleusercontent.com/external_content/untrusted_dlcp/books.google.com/en/us/booksrightsholders/Attachment-B-1-Library-Registry-Agreement-Fully-Participating.pdf

Although the Registry will unavoidably be a Google sponsored project, the organizational structure of the Registry has been canvassed as one to reassure the unbiased distribution of profits. The board of directors responsible for each action of the Registry (through majority decisions) will be composed by the Author sub-class and the Publisher sub-class with several guarantees of equal participation of both in the decision making process. The amended settlement also provides for an independent "Unclaimed Works Fiduciary" empowered to act with respect to the exploitation of unclaimed books or inserts. It's interesting to notice that Google in response to the DOJ's criticism toward Article 4.7 of the first agreement which authorized, upon agreement with the Registry open-ended exploitation of the works of those who do not-opt-out amended the Article by stating that Google would give registered right holders or the unclaimed works fiduciary a 60 day notice prior to the adoption of any additional revenue model. It is apparent that Google is attempting to reinforce the impartiality and integrity of the Registry as an act of good will towards the final settlement of the project.

d) The opt-out copyright strategy and competition

In August 2005 the so called "opting out policy" was announced as a response to the reaction by the American Association of publishers and the Authors Guild. The opting out policy as opposed to the opting in policy adopted by all copyright systems so far remains the corner stone of the problem posed by the GLP and the basis for those who accuse Google for audaciously stretching too far. The opting out policy refers to the opportunity given to copyright owners to expressly decide not to participate in the project by providing a list with the titles they do not want to be included, regardless of whether or not they are within the libraries whose

books are to be digitized. In-copyright books would not be digitized within the period from August 2005 to the 1st of November 2005. With the first settlement, which did not apply to books first published after January the 5th 2009, the deadline to opt out was extended to September the 4th 2009[31] and with the amended settlement the deadline to opt-out, object or opt back into was set for January 28, 2010[32]. If one had opted out of the Original Settlement and wished to remain opted out, there was no need to opt out again and unless they are withdrawn, objections filed to the Original Settlement should not be refilled[33].

Opting out according to Google means as explicitly stated in its site[34] "that the author or publisher is retaining all rights to bring a legal action against Google, for digitizing and displaying the author's or publisher's books and Inserts, and against the Participating Libraries, if desired. It also means that the settlement neither authorizes Google to make certain uses of these books and Inserts nor does it prohibit Google from doing so". The author or publisher by opting-out can request that the Settlement Administrator ask Google not to digitize or display any contents from the books or Inserts[35] identified in the opt out form."Although **Google has no**

[31]Updated notice available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/Final-Notice-of-Class-Action-Settlement.pdf

[32]Supplemental notice available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/Supplemental-Notice.pdf

[33] The opting-out deadline differs from the removal deadline. Removal refers to the demand made by a right holder that his book which has already been digitized be extracted from the Google Library Project. The Removal deadline according to the supplemental notice published by Google was extended from April 5, 2011 to March 9, 2012. (The Removal deadline as to the libraries' digital copies remains April 5, 2011). Supplemental notice available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/Supplemental-Notice.pdf

[34] http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q17

[35] **Insert definition** as given by Google:
"Content from one source is an "Insert" if it meets all of the following conditions: 1)It must be text; or tables, charts, graphs that are not pictorial works; and ,2)It must be contained in a Book, government work or public domain book that was published on or before January 5, 2009; and ,3) It must be protected by a U.S. copyright where the U.S. copyright interest in the Insert is held by someone *other than* a Rights holder of the Book's

obligation under the Amended Settlement to comply with such request, Google has **advised** the Settlement Administrator that it is Google's current policy **to voluntarily** honor such requests, if the Books or Inserts are individually specified, are in copyright, and the author or publisher has a valid and unchallenged copyright interest in their Books and Inserts". Obviously Google here goes beyond implying that such requests are not to be conceived as binding and it cannot be guaranteed that in the future such requests shall remain under consideration. As Judge Chin put it in the conclusion of his decision to deny the settlement "many of the concerns raised in the objections would be ameliorated if the ASA were converted from an opt-out settlement to an opt-in settlement".

3) The first settlement agreement v. the amended settlement agreement and the intervention of the US Department of Justice

Several of the crucial changes made by the amended settlement were:

• 1) The removal of many foreign rights holders from the settlement class by redefining "book" to include only non-U.S. works registered with the U.S. Copyright Office or published in Canada, Australia, or the United Kingdom on or before January 5 2009 (ASA §1.19) rather than "any book subject to a U.S copyright interest as of the Notice of Commencement date" as was proposed in the original settlement. Google in response to foreign copyright holder's disapproval and non-recognition of the opting-out policy as an equivalent to copyright protection decided,

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"Principal Work." (For example, if you own rights in a poem that is contained in a Book for which you also hold a U.S. copyright interest, then your poem, as it appears in your Book, is not an Insert; however, it would be an Insert if the poem is contained in a Book for which someone else holds the U.S. copyright interest); and ,4) It must have been registered – either alone or as part of another work – with the U.S. Copyright Office on or before January 5, 2009, UNLESS the Insert or that other work is not a "United States work," in which case such registration is not required" .Available at http://www.googlebooksettlement.com/help/bin/answer.py?answer=118722&hl=en#insert

instead of considering an opting-in policy together with foreign participation in the class action representation (as contemplated by the DOJ), to limit the scope of the settlement by redefining it's amplitude. The alternatives as presented by the DOJ would probably require an enormous amount of money in the licensing agreements and would be faced with extra difficulties as the willingness of participation in the class action would imply some form of fostering of the Project in a non-US basis which should not be taken for granted.

For the time being, only foreign authors whose books were published outside the U.S. but are in the collection of a U.S. library from which they were digitized can register with the Book Rights Registry, and receive compensation otherwise only holders of U.S. copyrights worldwide can register their works with the Book Rights Registry[36]. Naturally, regardless of the approval or not of the settlement agreement, litigation in foreign jurisdictions is possible and more than highly likely.

•2) The removal of the provision granting Google the right to any more favorable terms that the Registry negotiates with third-parties over the next 10 years. The specific provision could clearly be deemed anti-competitive in nature.

• 3) "To explicitly recognize rights holders' right to authorize, through the Registry or otherwise, any third party to use their copyrighted content in any way, including ways provided for under this Amended Settlement Agreement[37]".In Article 2.4 of the amended settlement the authorization granted to Google under the settlement is characterized as **non-exclusive**. In order to deal with anti- Google allegations speaking of anti-competitive and anti-trust techniques that solely aim at a monopoly over innumerable works, Google expressly notes that "nothing in this amended settlement agreement shall be construed as limiting any Rights holder's right to

[36] Question 17 available at http://books.google.com/googlebooks/agreement/faq.html#q16
[37] Id.

authorize, through the Registry or otherwise, any Person, **including direct competitors of Google**, to use his or her or its Books or Inserts in any way, **including ways identical to those provided for under this Amended Settlement Agreement** [38]"

• 4) "To appoint an independent fiduciary to represent rights holders who have not claimed their works and authorize the fiduciary to spend part of the revenue derived from unclaimed works in searching for their rights holders[39]"

• 5) "To extend the date for rights holders to request "removal" of their works from the books database to April 5, 2011[40]", which was subsequently extended to March 9th 2012.

• 6) "To allow rights holders to direct the Registry to make their books available at no charge pursuant to one of several standard licenses (e.g., Creative Commons licenses) or similar contractual permissions for use authorized by the Registry[41]".Users in general will be able (as understood after the clarifications made by the amended settlement) to access the digital content in several different ways either through purchase of access or under some circumstances for free. Such ways include: preview (free preview of a limited number of pages automatic upon out-of-print works, upon approval of the right holder for in-print books), consumer purchase (for entire books), institutional subscription (for academic, corporate, and government organizations), free public library access (free, full-text, online viewing of in-copyright, out-of-print books at designated computers in U.S) and future services including Print-On –Demand and Consumer Subscription[42].

[38] Article 2.4 of the ASA
[39] KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, at 14,CONG.RES.SERVICE(Nov. 27,2009)
[40] Id
[41] Id
[42] http://books.google.com/googlebooks/agreement/faq.html

• 7) "To allow the Registry, in its discretion, to authorize more than one free terminal per public library;

• 8) To specify that Google will not provide personally identifiable information about users to the Registry "other than as required by law or valid legal process.[43]"

The amended settlement, amongst the Project's opponents or those who remain in doubt, could be seen as ineffective in that it still "gives Google and/or the Registry effective control over orphan works; could have anticompetitive effects; fails to protect users' privacy; and does not adequately promote fundamental library values[44]". However, Google's efforts to find a solution that will meet with the demands of right holders and overrule the skepticism generated by its initial, or in other words financial, objectives cannot be left without recognition.

4) Legal repercussions

A) Copyright Liability-three target points

i) The creation of intermediate copies/Digitization of full text into the Google search Database

ii) Partial availability of scanned and stored works by user request-the so called "snippets"

iii) The distribution provision regarding the partner libraries-the digital library copy

B) The fair use defense and the four factor test

Google based her defense against the rights holders' allegations of copyright infringement on the fact that even if found to be infringing, the Library Project constituted a fair use. According to 17 U.S.C §107 "the fair use of a copyrighted work, including such use by

[43] KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, at 14,CONG.RES.SERVICE(Nov. 27,2009)
[44] Id at15

reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" even if these actions are therefore made without the rights holders' consent. The criteria for the determination of fair use include (thus are not limited to):i) The purpose/character of the use, ii) The nature of the copyrighted work, iii) The amount and substantiality of the portion used, iv) The effect of the use on the market.

These four factors are not exhaustive and should not be treated in isolation, one from another[45].Rather, "all are to be explored, and the results weighed together, in light of the purpose of copyright[46]," which is to promote the progress of science and the useful arts[47] and serve the public welfare[48]. Although a case by case analysis [49] is needed to determine whether the fair use defense applies to every specific case, previous case law might prove to be helpful together with the corresponding findings of fact[50]. Because, fair use is an "equitable rule of reason" to be applied in light of copyright law's overall purposes, other relevant factors may be considered[51].

I) The purpose/character of the use

a) Kelly v. Arriba

[45] Campell v. Acuff-Rose Music Inc., 510 U.S.569, 578 (1994).
[46] Id. KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, at 14,CONG.RES.SERVICE(Nov. 27,2009)
[47] U.S. CONST, art.I,§8,CL.
[48] Perfect 10,Inc. v.Amazon.com, Inc., 487 F.3d 701,720 (9th Circ.2007)
[49] Campell,510 U.S. at 577-78
[50] KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, at 14,CONG.RES.SERVICE(Nov. 27,2009)
[51] Steward v. Abend, 495 U.S.207,237(1990)

Regarding the purpose and character of the use, there are two parameters to be considered: whether or not the use is commercial and whether or not the use is transformative. The main case used by Google to support its position would be Kelly v. Arriba Soft. In this case, Kelly who was a professional photographer brought a claim against Arriba Soft which was an internet search engine that displayed low-quality thumbnails of pictures it had copied from other locations in the web. Arriba created a computer program that would search the web for images to index, then download them into its server, generate lower resolution thumbnails and then delete the original photocopy. By clicking on the thumbnail the user was redirect to the original internet site where the content was found.

The court decided in this case that even when a use is deemed to be commercial the "transformative use" factor might still prevail in favor of fair use and found Arribas use of the thumbnails to be transformative. "The Supreme Court has rejected the proposition that a commercial use of the copyrighted material ends the inquiry under this factor. Instead, the central purpose of this investigation is to see whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative[52]".Although Kelly supported that mere transformation in another medium has been deemed insufficient to comply with the transformative criteria, the court suggested that since the resulting use of the copyrighted work was not the same with the original use and Arriba's use did not supersede Kelly use, this was irrelevant.

[52] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994)

Google based on the Kelly v Arriba case, underlines that although it is making a commercial use[53] and it is altering books into a different, digital medium, its use is transformative and thus fair use. Firstly, although the project is operated for commercial reasons, it will not profit from the sale of copies of the book and in that sense its use of the books is not highly exploitative. Google suggests that the Library Project will not eliminate the need for the original books but rather augment access to them by creating the index and displaying only a few snippets of the original work. [54].Indexing can be considered a transformative use in analogy to the Arriba case very easily. As the original photographs were intended "to inform and to engage the viewer in an aesthetic experience," Arribas indexing served a completely different function: "improving access to information on the internet[55]."In the same way the snippets of books do not serve the same purpose as reading the book and the digital index merely facilitates access to them.

b) Perfect 10 v. Amazon

Another interesting case issued by the 9th Circuit in 2007, which could be used in favor of Google, would be *Perfect 10, Inc. v. Amazon.com*[56]. "Perfect 10 published erotic photographs in a magazine and a website and claimed that Google. Inc infringed its copyright firstly by displaying thumbnails of its images in its search results and secondly by directing to third-party

[53] About advertising shown with the books in the project, Google in its website states that: "As with advertising currently offered through Google's Partner Program, advertising may be displayed on books.google.com web-pages. Advertising will not be overlaid on pages from a book. Rights holders will receive the majority of the revenue from the advertising on web pages for specific books. As with all revenues paid by Google to rights holders, if the rights holder cannot be found immediately, the Book Rights Registry will hold the advertising revenue for a reasonable period of time for the rights holder to claim."

[54] Jonathan Band, The Google library Project: both sides of the story, at 4(2006), *Plagiary: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification, 1* (2): 1-17

[55] 336 F.3d 811 (9th Cir.2003) at 818-819

[56] Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828, 831–32 (C.D. Cal. 2006), aff'd in part, rev'd in part, 487 F.3d 701 (9th Cir. 2007).

infringing websites that actually did contain full size images of Perfect 10. In fact, Google scanned and stored photos from the infringing websites in its database, displayed thumbnails of them in response to search queries, and provided links to the third-party sites. The plaintiffs sought to differentiate their case to the Kelly v. Arriba one in two ways. The first one was by stating that some of the sites containing infringing images participated in Google's Adsense program despite the fact that Google didn't normally have advertisements on image search result pages, and the second one was by asserting that Google by presenting the thumbnails undermined Perfect 10's market for cell-phone thumbnails, as the company had an agreement to license the specific thumbnails to a cell-phone company called Fonestarz.

The United States Court of Appeals for the Ninth Circuit reversed the district court's rejection of Google's fair use defense and reaffirmed its holding in Arriba Soft. The Ninth Circuit found that there was no evidence that the Google thumbnails superseded the Fonestarz cell-phone downloads and ruled that "the transformative nature of Google's use is more significant than any incidental superseding use or minor commercial aspects of Google's search engine and web site". To be exact, Google's thumbnail use was judged as "highly transformative." In fact, the court went so far as to say that "a search engine may be more transformative than a parody," it represents the quintessential fair use, "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."

"The importance of analyzing fair use flexibly in light of new circumstances [,] especially during a period of rapid technological change" as well as the relation the court made between "transformative use" and social benefit are factors that if taken into account in the Google Library Project case could prove to be determinative. Google could build a strong defense based

on its contribution to preserve the global books reserve through digital access. In Perfect 10 the court noted that "a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool[57]".Taking into account the amount of original works incorporated into the digital library as well as the intellectual and educational advantages provided by the accessibility of this content, Google should probably win the public benefit argument. The project would undeniably benefit both authors and publishers in terms of income streams by creating new audiences as well as people with disabilities who would be able to access books converted into Braille and audio formats and all sorts of individuals, research institutions, libraries etc who will be helped to gain access to rare materials otherwise unapproachable. However as Judge Chin mentioned in his decision on the GLP "while the digitization of books and the creation of a universal digital library would benefit many, the ASA would simply go too far".

c) Sony Corporation of America v. Universal City Studios case

In *Sony*, the Court held that the sale of the video recording machine, which was used to "time shift" broadcast television for personal home viewing, was not contributory copyright infringement. Stating the Sega case[58], the Court found that intermediate copying when necessary to gain access to the functional element of the software itself, constituted fair use. Fair use was also based on the fact that the intermediate copies themselves permitted a non-infringing function such as time-shifting. In analogy to the Sony case, Google could state that its digitization, as a process of intermediate copying, is incidental and necessary in order to

[57] Perfect 10 Inc.,487 F.3d at 721

[58] Sega Enterprises Ltd. v. Accoladde, Inc.,977,1524-26, F.2d 1510 (9th Cir. 1993)

guarantee access to the books. Then Google would be left to prove that the presentation of the snippets doesn't constitute copyright infringement either. "The analogy to *Sony* might not be enough to persuade a court that digitizing for purposes of non infringing indexing constitutes a fair use, however. Digitizing and indexing print books are arguably far removed from making and selling devices that consumers use to record broadcast television programming and replay it later. Additionally, courts have shown little inclination to recognize categories of judicially created fair uses other than time shifting[59]".

d) UMG v. MR3.com

On the other side of the spectrum, in *UMG* Recordings *v. MP3.com, Inc.*[60], the fair use defense was rejected on the basis that simple "repackaging" to "facilitate transmission through another medium" cannot constitute fair use. In this case, the plaintiff recording companies sued MR.com for permitting through the MP3 technology, conversion of compact disk recordings into internet accessible computer files which would permit subscribers to access the songs from any place simply using an internet connection. The unauthorized copying of the plaintiffs audio CDs, despite the fact that it enabled CD owners to "space shift", was found different from the Sony case in terms of adding "no new aesthetics, new insight and understandings to the original recordings[61]" but merely retransmitting the same expression into a different medium. The court also noted that "while such services (MP3 technology) may be innovative, they are not

[59] KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, at 7,CONG.RES.SERVICE(Nov. 27,2009)
[60] UMG v. Mp3 Inc., 92 F. Supp.2d 349 (S.D.N.Y.2000)
[61] Id at 351

transformative[62]" therefore undermining the public benefit theory as supported in the Perfect 10 case.

II) The nature of the copyrighted work

Under this criterion, the Court examines whether a copyrighted work is factual or creative, granting a greater deal of protection to creative works. However, because within the realms of the project billions of books of both categories will be digitized it is hard to say whether the factor will count against Google or if the court will graciously disregard it focusing its attention on the other three factors as being more critical to establish a conclusion. It's also possible that some "materials may be nonfiction and mix unprotected ideas with protected expressions of these ideas[63]" making calculations even more complicated. "This diversity of materials makes possible the arguments of both proponents and opponents of the view that projects like Google Book Search constitute fair uses. The nature of the work can, however, be less important than the purpose and character of the use, at least in situations where the use can be clearly recognized as transformative."[64]

III) The amount and substantiality of the portion used

This is one more factor that could weight either for or against Google depending on the case law the court decides to endorse. In general, "while wholesale copying does not preclude fair use *per se*, copying an entire work militates against a finding of fair use[65]" and Google undeniably will have to proceed in full-text copying in order to realize the project. If the court

[62] Id.
[63] Id.
[64] Congressional Research service/The Google library project: Is digitization for purposes of online indexing fair use under Copyright law? By Kate M.Manuel, November 27,2009
[65] Worldwide Church of God v. Philadelphia Church of God,Inc.,227 F.3d 110,1118 (9th Cir.2000)

follows the decision in UMG v. MR3 it will have to deny the fair use claim. If it follows the Kelly v. Arriba case however it will be called to take into account whether copying the entire works is reasonable given the purpose and character of the use. "The question would thus become whether such wholesale copying was reasonable for an indexing project[66]" and the Court would either favor Google as it is impossible to index and present snippets without having digitized the entire book, or decide "that this factor is neutral weighing neither for nor against a finding of fair use because the secondary use necessitates use of the entire copyrighted work[67]". Opponents, in contrast, could argue that, "in all cases where courts protected wholesale copying for purposes of indexing, the authors had placed their works online, thereby creating implied licenses for others to copy and index them. Moreover, in at least some of these cases, the copies were deleted after the indexing was completed. In no case did the copier propose to give copies to third parties, as Google did when contracting to provide digital copies of the books in their collections to libraries."[68]

IV) The effect of the use on the market

"The outcome of any findings by the court on this factor may hinge upon the degree of harm to their markets that plaintiffs must show[69]." The courts have been known to make a distinction between the markets "likely to be developed (potential markets)" and established markets (immediate markets), in terms of proof of actual losses. "The fact that a use is

[66] KATE M.MANUEL, THE GOOGLE LIBRARY PROJECT:IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW?, CONG.RES.SERVICE(Nov. 27,2009)
[67] EMILY ANNE PROSKINE,GOOGLES TECHNICOLOR DREAMCOAT: A COPYRIGHT ANALYSIS OF THE GOOGLE BOOK SEARCH LIBRARY PROJECT, at 8,21 Berkeley Tech.L.J.213
[68] Id.
[69] Id.

transformative can, however, outweigh even inhibition of or harm to plaintiffs' markets[70]". "Whereas a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original, a transformative work is less likely to do so[71]". On the other hand, according to the decision in UMG v.MR3.com "any alleged positive impact of defendant's activities on plaintiffs prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiff's copyrighted works[72]".Another factor considered by the courts in their decision in Field v. Google Inc[73] was "whether the alleged infringer has acted in good faith[74]" which could be in favor of Google taking into consideration its presentation of only snippets, its general efforts to find a solution to which both sides agree and its willingness to upgrade any book into the revenue sharing Partner Program[75].

From a realistic point of view and regardless of whether the plaintiffs will be able to show that the Project could be harmful to the market of books (which is unlikely considering the disappointing percentages[76] of book usage for purposes other than research), a digital library serving as a liaison to bookstores and libraries around the world can only be seen as a promising evolution to the book market. Let's not forget that the expedited rhythms of internet-orientation are quickly serving as a substitute for many recreational activities, especially among the new generations making the percentages of young people reading books smaller every year. This

[70] Id.
[71] Acuff-Rose, 510 U.S.,590,591
[72] UMG v. Mp3 Inc., 92 F. Supp.2d 349,352 (S.D.N.Y.2000)
[73] 412 F.Supp.2d 1106 (D.Nev.2006)
[74] Id at 1122
[75] JONATHAN BAND, THE LONG WINDING ROAD TO TH GOOGLE BOOKS SETTLEMENT,FN.160,9 J.Marshall Rev.Intell.Prop.L.227.
[76] Statistics available at http://www.publishers.org/main/IndustryStats/indStats_02.htm , "Book sales fell 1.8% in 2009. This followed a larger drop of 2.6% in 2008. From these numbers, we can see the overall effect of the Great Recession on book sales"," "Books are no longer counter-cyclical and no longer recession-proof" available at http://www.examiner.com/x-25786-SF-Publishing-Examiner~y2010m4d11-New-book-sales-statistics-released-for-last-year

specific target group will turn to the internet to acquire the information it seeks to absorb and a digital market for books might be the only effective way to approach it.

5) International dimensions

Roughly 50% of the books digitized by the Google Library Project will be in languages other than English, with more than 100 languages represented[77].U.S consumers will be enabled to buy online access to millions of books by European authors whose works are scanned in US Libraries. However concerns regarding the digitization are reaching the level of strong opposition both in Europe and elsewhere. As the president of France, Nicolas Sarcozy characteristically said on December the 8th 2009 speaking about the Project, "France is not going to be stripped of what generations and generations have produced in the French language, just because it isn't capable of funding its own digitization project[78]" [79].Many more European countries (such as Germany[80], Austria, Switzerland, Spain etc) as well as non-European countries such as China are in the same spirit as France[81] regarding the Google Library Project.

Google faced a lawsuit in France by a publishing company called "La Martiniere Groupe" joined by the French Publishers Association (FPA), which accused Google of infringing its copyright by scanning books whose copyright it owned. In December the 18th 2009 Google's

[77] http://www.eff.org/deeplinks/2009/08/google-book-search-settlement-access
[78] The European Union has launched a "parallel" project in view of the need to create digitized resources for consumers and the need to become more competitive such as a the Europeana Project. However concerns about orphan works do not seize to create questions in Europe as well, especially taking into consideration the moral right regime which generates advanced protection for the author of creative material. See http://europeana.eu/portal/
[79] Bruce Crumley, Europe v. Google :the next chapter, available at http://www.time.com/time/world/article/0,8599,1946920,00.html
[80] In Germany 2700 people have signed a petition asking the Government to try to stop Google. See Kevin J.O'brien and ERIC Pfanner, European opposition grows to Google's digital books plan. Publishers and authors are divided on whether online sales are a threat, International Herald Tribune available at http://www.highbeam.com/doc/1P1-169772768.html
[81] Id.

book search project suffered a legal setback in Paris, as the court ordered it to pay €300,000 (US$432,000) in damages for breach of copyright, and to stop distributing digital copies of French books to French Internet users without the permission of their publishers[82].Despite the fact that the amount is not that significant considering Google's gigantic amount of revenues, the case is symbolic of the intentions of Europe.

Britain, being known for its close relationship to the U.S has not forcefully reacted to the Project or settlement and instead is expressing concerns regarding practical issues such as the determination of whether a book is out-of –print if it is not available in the states but is widely available in Europe[83]. Britain is also the only European Country participating in the Books Registry together with Australia and Canada (books published in Great Britain fit the definition of "book" as given by the amended settlement), which although could be explained based on the principal linguistic similarities of these countries, is not enough to justify the lack of adequate European representation in a Project that would influence Europe as intensely as this.

Even the European Commission looked into the project by summoning a hearing on the 3rd of August 2009, regarding possible effects of the project on European intellectual property rights. In the hearing, Google's representative was present to reassure the European critics that: a) foreign authors and publishers would be allowed to appoint two representatives to the board of the Books Rights Registry, b)that it would only display out-of-print translations of works that were still commercially available in Europe with the approval of their copyright holders, c) that greater efforts would be made to ensure that books are truly out-of-print before making them

[82]Peter Sayer, Paris Court Rules Against Google in Book Copyright Case(Dec.18,2009), available at http://www.pcworld.com/businesscenter/article/185092/paris_court_rules_against_google_in_book_copyright_case.html

[83] Kevin J. O' Brien and ERIC Pfanner, European opposition grows to Google's digital books plan. Publishers and authors are divided on whether online sales are a threat, International Herald Tribune (Aug.24,2009),available at http://www.highbeam.com/doc/1P1-169772768.html

available in digital form[84].The Commission was concerned with accusations against Google again on the 24th of February 2010 when it confirmed it had received 3 complaints from three internet companies accusing Google of anti-competitive behavior by lowering their search rankings.

The basic objections coming from foreign rights holders have to do a) with the inadequacy of the class notice and class representation b) with the orphan works issue[85] and c) with international law concerns that refer to the opting out policy which would require them to determine whether they are covered by the settlement and to decide to opt-out instead of opting in. The Berne Convention and the agreement on the trade related aspects of IP rights could in no way be read as allowing such a project without a simultaneous violation of international law at its core. Other concerns include fears of prejudicial treatment of certain rights holders (UK, Canada, and Australia) by favoring their counterparts of certain nations in terms of copyright protection. Google has responded to international law concerns by saying that "this case is about United States copyright interests. It's about uses of works in the United States[86]". Google's answer shows an utter disregard of foreign rights making us wonder whether Google itself has no realization of the dimensions of its own project or if it simply pretends not to.

[84] See Google gives ground at EU hearing available at http://www.spiegel.de/international/europe/0,1518,647700,00.html

[85] Germany with her written intervention before the court stated that: "Competing digital libraries in Germany (Deutsche Digitale Bibliothek) and throughout the world do not enjoy rights to such authors or "orphan works" because Germany requires licensing of rights prior to the usage of orphan works. Such a sweeping de facto compulsory license system would require legislative action (equivalent to Congressional action) in Germany".

[86] Hr'g Tr. 157-58 (Daralyn J.Durie)

6) Conclusion

Global harmonization has to be achieved through the conception of a golden rule between respect of international intellectual property regimes and the US system, as to allow everyone to draw the innumerous benefits arising from Google's initiative to create an online library. Since the project is ambitious enough to incorporate books arriving from the four corners of the planet, a greater deal of respect should be afforded to right holders whose works are suddenly and without their permission in the center of digital renovation.

The fair use doctrine however, might need to be reformed in order to affectively apply to potential infringement cases coming from the benign of internet use proliferation. As underlined in the ASA rejection, there are many questions deriving from the GLP which are "better left for Congress" and maybe Google's project can be seen as a scapegoat opening the road for updated legislation dealing with all those copyright issues that Congress has been avoiding to legislate for some time now. Between the theories that could potentially be adopted is: 1) the replacement of the right of reproduction, in other words the right of making copies, with a boldly canvassed (and restrained in its scope) right to control public distribution of a copyrighted work[87] or 2) the adoption of a different set of criteria with regard to the application of the fair use doctrine online. At any case, paranoid, bellicose obsessions against the so called "googlization" phenomenon have no chances of leading to innovation.

[87] ERNEST MILLER AND JOAN FEIGENBAUM,TAKING THE COPY OUT OF COPYRIGHT, available at http://cs-www.cs.yale.edu/homes/jf/MF.pdf