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Copyright Protection in the Digital Age: Google Book Settlement and Beyond

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I.
INTRODUCTION

Google has tentatively settled the three-year-old class action lawsuit brought by the Association of American Publishers (AAP) and the Authors Guild alleging Google's Book Search Project constituted copyright infringement. If approved, the settlement constitutes a significant development in the ongoing evolution of intellectual property law in the internet age.

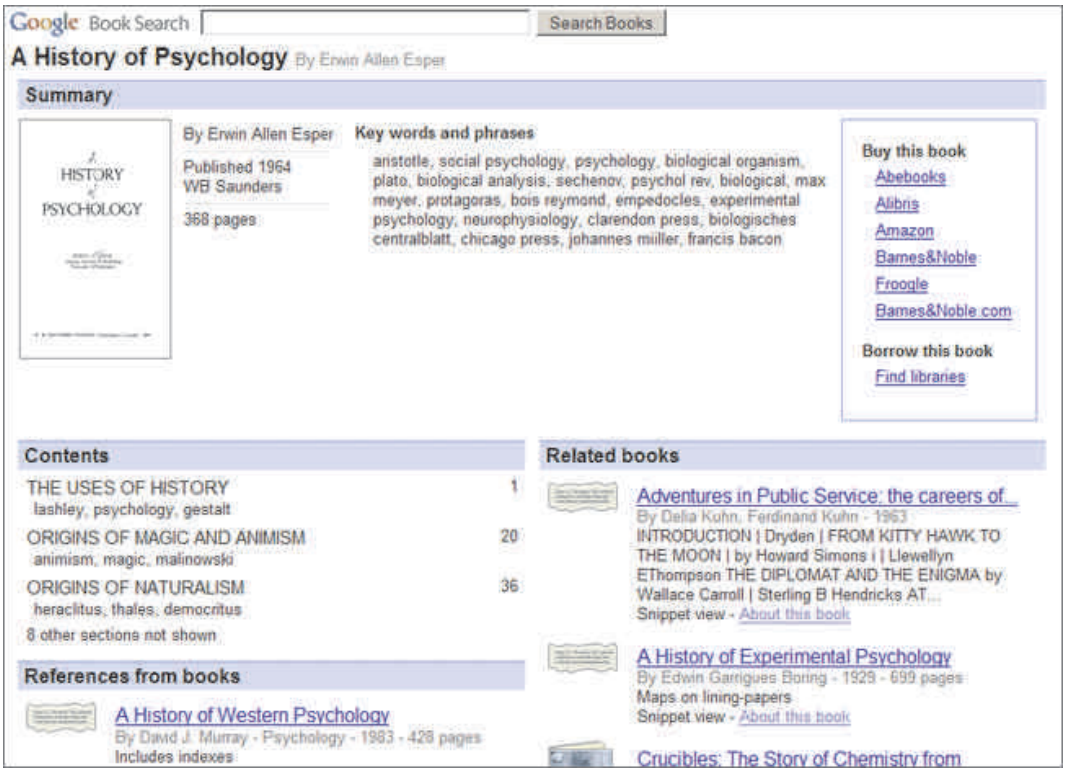
The proposed settlement immediately drew both praise and criticism from commentators. Some view it as a breakthrough toward making the world's vast treasure of literary works readily available to anyone with internet access. Others view it as creating an unfair and anti-competitive advantage for Google in the ongoing race to control the world's information.

Others predict the settlement will have a significant impact on internet copyright litigation and the "fair use" defense, including the pending *Viacom v. Google* YouTube litigation. This outline will attempt to provide basic background information regarding the lawsuit and associated fair use issues; 2) identify the basic parameters of the proposed settlement; and 3) note potential benefits and concerns with the settlement identified by commentators.

II.
BACKGROUND

Google launched its Book Search Project in 2002. The scope of the project was nothing short of remarkable – scanning every book in the English language and making its text searchable and available online. The potential impact and benefits of the project were even more remarkable – putting the worlds' libraries at our fingertips.

In 2004, Google partnered with major University libraries to scan their collections (California, Michigan, Wisconsin and Stanford). The project called for all the books to be scanned – or "copied" – in their entireties. However, Google utilized the digitized works differently depending on whether the applicable copyrights were valid or expired. Complete results were available via the internet for public domain works. Only a "Snippet View" was made available for works still covered by a valid copyright. The "Snippet View" contains limited "indexing"-type information about the subject book. The "Snippet View" also displays complete sentences containing the user's search terms.



Copyright owners objected, claiming the scanning or "copying" and resulting use of their works constituted infringement. In response, Google developed an "opt out" plan. Specifically, copyright owners would be afforded the opportunity to opt out or withhold permission for their works to be utilized.

Copyright owners complained Google's opt out plan turned copyright law on its head by requiring authors or copyright owners to object to the use of their works, rather than requiring the user to affirmatively obtain permission. Not surprisingly, the AAP and the Authors Guild commenced a class action lawsuit alleging Google's scanning of copyrighted works and resulting use without permission constituted infringement.

Google took the position its use was authorized pursuant to the opt out program, and/or that its Book Search Project constituted a limited non-infringing fair use.

III.
FAIR USE ANALYSIS

Many commentators considered the Book Search Project litigation to be a perfect vehicle for establishing clarity and guidance concerning the scope/boundaries of the fair use doctrine in the digital arena. Because the fair use doctrine is so amorphous and unpredictable, and litigation costs and potential copyright damages so steep, well-established fair use principals in the internet age have yet to emerge.

Google was viewed as a perfect high-profile candidate for litigating the internet fair use issues to conclusion. Google has generally been viewed as a risk taker and as willing to litigate,

it has deep pockets, and it has a huge stake in how the issue is resolved. Unfortunately, if the settlement is approved, the case will not provide the legal answers/guidance many in the industry were hoping for. However, it remains useful to analyze and evaluate the fair use issues at play in the case.

The fair use defense, codified at 17 U.S.C. § 107, provides that:

> [U]se of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Fair use is an "equitable rule of reason" to be applied in light of the overall purposes of the Copyright Act, and other relevant factors may also be considered. *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 448, 454 (1984). The fair use exception "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Kelly v. Arriba Soft Corp.*, 335 F.3d 811 (9th Cir. 2003) (*quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.,* 109 F.3d 1394, 1399 (9th Cir.1997)).

A. Purpose and Character of Use

Those arguing in favor of "fair use" rely in large measure on public policy considerations, emphasizing that Google's Book Search Project will greatly benefit the public by making the worlds' books available to anyone with internet access. According to such proponents, the use serves an educational purpose. Further, being required to locate and pay all copyright owners would render the project unfeasible.

Proponents further contend the resulting "Snippet Views" are a significant transformative use. Such "Snippet Views" are compared to the long-accepted practice of library card catalogues.

Those opposing application of the fair use doctrine contend Google's use is commercial. First, they note that Google compensates the libraries involved by furnishing them with their own digital copies of the subject works. Second, they point out Google is not pursuing the

project for solely humanitarian reasons, but rather because it will realize significant advertising revenues as a consequence of its enhanced search capabilities.

B. Amount and Substantiality of the Portion Used

Those seeking a broad application of the fair use doctrine again note what they see as very limited use of the subject works in the "Snippet View." Those opposing application of the fair use doctrine emphasize that in order for the project to work, Google must scan the *entire* copyrighted work.

C. Effect on Potential Market or Value

Those favoring application of the fair use doctrine stress that Google's Book Search Project is likely to rejuvenate the market for books, including long forgotten works. According to such proponents, the "sampling" feature will allow users to make an informed decision on whether to purchase the work.

Those opposing application of the fair use doctrine respond by arguing that such "sampling" has long been recognized as the type of use for which license fees are required, and application of the fair use doctrine would represent a setback for copyright owners. Copyright owners have also expressed concern that Google's creation of a digital copy of the works may result in or lead to increased piracy/infringement.

D. *Kelly v. Arriba Soft Corp.*

The Google Book Search case is frequently compared to *Kelly v. Arriba Soft Corp.*, 335 F.3d 811 (9th Cir. 2003). *Arriba* involved a search engine's compilation and display of thumbnail images. The Ninth Circuit determined this was a transformative fair use based in large part on the fact the search engine used the photographs in question to "improv[e] access to information on the internet" while the original function of the work in question was artistic. *Arriba*, 335 F.3d at 819.

Advocates seeking a broad application of the fair use doctrine argue the single quote or sentence "sampling" utilized in the Book Search Project is an even more limited use than the reproduction and display of a complete image in *Arriba*. Moreover, they contend that, as in *Arriba*, the Book Search Project greatly improves or advances access to information on the internet, which in turn promotes the creative process – the very purpose of the Copyright Act.

Those seeking a narrow application of the fair use doctrine distinguish *Arriba* on at least one significant ground. Specifically, they note that the copyright owner in *Arriba* voluntarily uploaded his images to the internet. The court's reasoning in *Arriba* was at least in part based on an unspoken "implied license' theory – to the extent you voluntarily place your copyright materials on the web, it is understood such materials will be utilized in limited fashion by search engines like Arriba or Google. Unlike the copyright owner in *Arriba*, the plaintiffs in the Book Search case did not voluntarily digitize and upload their works to the internet. Rather, Google was required to independently create a digital database for use with the project.

IV.
THE PROPOSED SETTLEMENT

A copy of the full proposed written settlement agreement can be found at http://books.google.com/booksrightsholders/agreement-contents.html. The proposed settlement applies only to books created *before* January 5, 2009. The memorandum filed with the court in support of the Motion to Approve the Settlement identifies the following features of the settlement:

- At least $45 million to compensate Settlement Class members whose works have already been scanned without permission;

- Another $34.5 million to establish and maintain a registry of rights to books (the "Book Rights Registry" or "Registry"), which will locate Settlement Class members, maintain a database of their contact information, collect and pay revenues on behalf of the Settlement Class for the use of copyrighted works through this Settlement, and otherwise protect and represent the interests of the Settlement Class;

- Prospectively, 63% of the revenues earned from Google's future commercial uses of the Settlement Class members' works;

- In addition to these and other significant benefits, the proposed Settlement creates a rights clearance mechanism that lets members of the Settlement Class, at all times, retain control over their copyrighted works by giving them the ability to determine the extent to which those works are included or excluded from the Google Library Project;

- Creates an innovative marketing program for authors and publishers of in-print books that catapults the publishing industry into the digital age, a result that greatly benefits individual authors and publishing houses, which simply could not launch such a program on their own;

- Addresses what has been a persistent problem, particularly for individual authors – how to breathe new life into older, out-of-print books that are generally inaccessible to the public and have stopped generating revenue;

- Is designed to maximize Settlement Class member rights by allowing any of them, at any time, to commercially exploit their works in other ways outside of the Google Library Project; and

- Benefits the Settlement Class, as well as the general public, through the ability to access books on Google's website and, as a result of provisions addressing the extent to which libraries may also use digitized copies of these works, enjoy a new and unprecedented ability to use books and conduct research.

(A complete copy of the Memorandum in Support of the Motion to Approve the Settlement can be found at http://www.publishers.org/main/Copyright/Google/documents/05cv8136-MemoSupportingPrelimSettlementApproval.pdf.)

Several commentators have lauded the proposed settlement as a significant advancement in making information readily available. Examples include: Universities being able to provide faculty with instant/online access to vast collections of books, and students being able to access the worlds' libraries from their own dorm rooms. In addition, the proposed agreement calls for the nation's 16,500 public libraries to be provided with a free, online portal to this vast digital database of books (patrons would be allowed to print an unlimited number of pages for a reasonable per page fee).

The proposed settlement agreement has also received significant criticism. Critics note it is not the settlement which makes the world's information readily available at our fingertips, but rather the underlying technology. They contend the lawsuit was about resolving the manner in which such technology can be employed without committing copyright infringement. Rather than resolving the fair use questions in a manner allowing all stakeholders to participate on an even playing field, critics are concerned the settlement will afford Google an unfair and anti-competitive advantage.

At a minimum, the settlement will undoubtedly make it more difficult for others in the industry to succeed on a fair use defense now that a precedent of paying royalties for such use has been established. James Gibson, associate professor and director of the Intellectual Property Institute at the University of Richmond School of Law, remarks, ″If Microsoft starts its own book search service and claims fair use, the courts will say, "Hey, Google manages to pay for this sort of thing. What makes you so special?"

Brewster Kahle, founder of the Internet Archive, which has partnered with Yahoo, Microsoft and 135 libraries to create the Open Content Alliance, contends, "One company is trying to *be* the library system." Kahle opines, "This is not good for a society that is built on free speech. Let's have the World Wide Web rather than the iTunes of books."

Below is a sampling of some of the additional commentary:

> [T]his outcome is plainly second-best from the point of view of those who believe Google would have won the fair use question at the heart of the case. A legal ruling that scanning books to provide indexing and search is a fair use would have benefited the public by setting a precedent on which everyone could rely, thus limiting publishers' control over the activities of future book scanners. In contrast, only Google gets to rely on this settlement agreement, and the agreement embodies many concessions that a fair user shouldn't have to make.
>
> The agreement apparently envisions a world where Google keeps all of the electronic books that you "purchase" on an "electronic shelf" for you....Google is also likely to keep track of which books you browse (at least if you're logged in). This is a huge change in

> the privacy we traditionally enjoy in libraries and bookstores....Does the agreement contain ironclad protections for user privacy?

(Fred von Lohmann at http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide.)

> *The First-Sued Advantage* ...[T]his settlement only applies to Google. Even in the ideal case where the BRR [books right registry] offers similar rights to non-Google organizations on nondiscriminatory terms – a situation which I sincerely hope will come to pass – the BRR can only offer third parties licenses for those authors in the registry. It is only the opt-out nature of a class action law suit that allows the AAP and Authors Guild to license the rights of millions of rights holders who are not actively involved in the case and often don't even know they have rights to defend. Short of getting sued and settling (in a non-collusive fashion), no one else can pull this off. And since the case didn't go to judgment, anyone else who wants to make fair use of these works will face uncertain legal ground and the possibility of a massive copyright suit....
>
> This structure effectively limits the BRR to authors represented by the AAP or the Authors Guild or those who individually register themselves. If I want to use an orphaned book, and the rights holder does not identify himself or herself in the BRR, then I'll be *no better position* after the settlement than I am right now. I still will run the risk of an expensive lawsuit if the rights holder shows up, and will have no way to mitigate that risk.

(Jef Pearlman at http://www.publicknowledge.org/node/1843.)

> ...Has Google backed away from an interesting and socially constructive fair use fight in order to secure market power for itself? I wrote early on that I would be disappointed if Google didn't see the case through to judgment, and at one level, yes, I am disappointed.
>
> But there is a big silver lining for me. The proposal offers a new and larger set of questions, questions that have surrounded Google generally for some time but that the proposal puts into more concrete focus: Are we seeing the early stages of the beginning of the end of copyright law as we know it? The "standard" account of copyright, if such a thing still exists, posits a statutory allocation of interests between authors and readers, followed by institutional arrangements in specific contexts (fair use, voluntary licensing, collective rights management, compulsory licenses) to tweak that allocation at the margin, where problems arise. It has been my sense for some time that in many information policy debates, the default statutory arrangement no longer commands automatic attention as the presumptive center of the copyright universe. Institutional and disciplinary interests and arrangements of various sorts (technical architectures, commercial enterprises, new institutions such as open source licensing and Creative Commons) have not displaced the statute entirely, but instead have begun to push the statute to a place where it negotiates for attention as a normative landmark. Fighting over the scope of section 106 (the copyright owner's exclusive rights) and section 107 (fair

use) sometimes seems very 20th century. I suspect that the Google Book Search settlement will reinforce and perhaps accelerate that trend....

(Mike Madison at http://madisonian.net/2008/10/29/on-google-book-search/.)

V.
VIACOM V. GOOGLE YOUTUBE LITIGATION

Following the announcement Google had paid $125 million to resolve the Book Search litigation, media giant Viacom – who has a copyright infringement lawsuit pending against Google involving YouTube seeking damages in excess of $1 billion – wasted no time issuing a statement suggesting the settlement represented an acknowledgement of infringement by Google. "Copyright laws provide creators with the incentive to create the works consumers crave. It is unfortunate that the publishers had to spend years, and millions of dollars, for Google to honor that principle. We hope that Google avoids the wasted effort and comes more quickly to respect movies and television programming."

Admittedly, the copyright issues involved in the two cases are vastly different. One of the key issues in the *Viacom* litigation is the applicability of the Digital Millennium Copyright Act's Safe Harbor Provisions. The DMCA's Safe Harbor Provisions protect qualifying service providers from monetary liability for all claims for monetary relief if certain threshold conditions are met.

To be entitled to immunity, a service provider must: (1) designate an agent to receive notification of alleged copyright violations; (2) not have actual knowledge its systems contain infringing material; (3) not be aware of facts or circumstances from which infringing activity is apparent; (4) act expeditiously to remove or disable access to the material when it obtains actual knowledge or awareness of facts or circumstances from which infringing activity is apparent or receives a DMCA-compliant notice; and (5) not receive a financial benefit directly attributable to the infringing activity when the service provider has the right and ability to control said activity; and. *See* 17 U.S.C. § 512(c)–(d).

Viacom has alleged Google/YouTube "harnessed technology to willfully infringe copyrights on a huge scale" and that "YouTube's Web site purports to be a forum for users to share their own original 'user-generated' video content ... however, a vast amount of that content consists of infringing copies of Plaintiffs' copyrighted works ... ."

Google/YouTube argues it has complied in all respects with the DMCA Safe Harbor provisions and it is therefore immune from liability.

While the *Viacom* issues are different, the cases are similar in that they both represent the ongoing struggle to balance -- in a rapidly changing environment -- the copyright owners' rights against the public's interest in a free exchange of information. It will be interesting to follow whether the resolution of the Google Book Search litigation has a significant impact on the *Viacom* case. Some key issues to be addressed in the *Viacom* litigation include:

- Will the voluminous number of allegedly infringing videos posted on YouTube affect/alter the court's analysis of the Safe Harbor provisions?

- Does YouTube have an affirmative obligation to employ cutting edge technology which could minimize the number of infringing videos posted to their site?

- Does YouTube have an affirmative obligation to strengthen its repeat-infringer policy?

- Does the voluminous number of take-down notices purportedly received by YouTube create a heightened level of knowledge of infringing activity on YouTube's part?

VI.
CONCLUSION

If the proposed settlement agreement in the three-year-old class action lawsuit brought by the Association of American Publishers and the Authors Guild against Google for copyright infringement is approved, it will constitute a significant development in the ongoing evolution of intellectual property law in the internet age. On the one hand, approval of the settlement may lead to significant advancements in making information readily available. On the other hand, approval may also make it more difficult for others in the industry to succeed on a fair use defense because a precedent of paying royalties for such use will have been established. Either way, the settlement will have a significant impact on internet copyright litigation and the "fair use" defense.