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Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe

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Cover Page Footnote

Assistant Professor of Law, Humboldt-University School of Law; Adjunct Assistant Professor, Columbia Law School. I would like to thank Jane Ginsburg, James Grimmelman, C. Scott Hemphill, Jeremy Sheff, and the participants of the 10th Annual Intellectual Property Scholars Conference at UC Berkeley School of Law for their comments and suggestions.

Finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe

Katharina de la Durantaye*

ABSTRACT

The Google Books case and its proposed settlement have provoked heated debate. Objections to the settlement proposals have come from virtually all sides—from Google’s competitors to public interest organizations, state attorneys general, the U.S. Department of Justice, and even foreign countries such as France and Germany. While it is impossible to know what the terms of the final settlement will be, it is already clear that one of the settlement’s most important consequences will be how it changes the orphan works debate, both in the United States and in Europe.

This Article argues that the Google Books case offers an unprecedented occasion to address the orphan works problem and to adopt a legislative solution that will promote desperately needed international harmonization of the law on this issue. The Article analyzes the framework that the Google Books settlement proposes as well as proposed legislative solutions in the United States and the European Union. It suggests a legislative solution which would be as effective as the one envisioned by the settlement but which would avoid the monopoly the settlement would create if

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approved. The most important element of that solution foresees the introduction of extended collective licenses.

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INTRODUCTION

“The famous Library at Alexandria burned three times, in 48 B.C., A.D. 273 and A.D. 640, as did the Library of Congress, where a fire in 1851 destroyed two-thirds of the collection. I hope

such destruction never happens again, but history would suggest otherwise.”¹ Promising “A Library to Last Forever,” Sergey Brin, co-founder and Technology President of Google, resorted to drastic images in order to defend Google Books, Google’s ambitious project to digitize the world’s books and make them available and searchable online.² In doing so, Brin was reacting to a heated debate in both the popular press and academic forums about the proposed “Google Book Search Settlement,” both in its original and in its revised form.³ The settlement proposals are the result of a class action lawsuit which the Author’s Guild and a group of publishers brought against Google in 2005, claiming that Google had violated their copyrights when it scanned the plaintiffs’ books, created a database of these books and displayed short excerpts of the books without the permission of copyright holders.⁴ As of now, Google has scanned more than 12 million books.⁵

The settlement proposals gave rise to a variety of concerns. One major concern regards the treatment of orphan books, “a term used to describe the situation where the owner of a copyrighted work [here: a book] cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner.”⁶ The proposed settlements

¹ Sergey Brin, Op-Ed., *A Library to Last Forever*, N.Y. TIMES, Oct. 9, 2009, at A31, available at <http://www.nytimes.com/2009/10/09/opinion/09brin.html>.

² See *id.*

³ Original Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136 (S.D.N.Y. Oct. 28, 2008) [hereinafter Original Settlement Agreement], available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/settlement/Settlement%20Agreement.pdf>.

⁴ Authors Guild, Inc. v. Google, Inc., No. 05-Civ-8136, 2009 WL 4434586 (S.D.N.Y. Dec. 1, 2009).

⁵ See Declaration of Daniel Clancy in Support of Motion For Final Approval of Amended Settlement Agreement ¶ 5, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136 (S.D.N.Y. Feb. 11, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/946>.

⁶ U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 15 (2006) [hereinafter REPORT ON ORPHAN WORKS], available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. The definitions of what constitutes orphan works range widely and have wide ranging consequences. For an interesting distinction between different groups of orphan works as well as different solutions for each group, see Dennis W. K. Khong, *Orphan Works, Abandonware and the Missing*

would grant Google a monopoly for the use of such books (as well as for out-of-print books—the settlement conflates the two terms).

This Article focuses on this crucial element of the settlement and argues that the debate surrounding the Google Book Search Settlement poses a singular opportunity to harmonize orphan works legislation. Over the past few years, both the United States and its closest ally in matters of copyright law and policy, the European Union, have struggled to find legislative solutions for the orphan works problem, one of the major challenges in copyright law today. Their solutions have differed significantly. This is somewhat surprising given that both proposals were drafted with digitization and online availability in mind. Digitization and online display of copyrighted works cut across national boundaries. If the aim is to digitize as many copyrighted works as possible, and make the works available to as many users as possible while respecting the rights of the works' owners, a common and transnational solution to the legal problems presented by such digitization should be a high priority.

The Google Book Search Settlement proposes a third solution to the orphan works problem, one that shares characteristics of both the American and the European proposals but would only apply to Google. The settlement proposal and the subsequent outcry to which it gave rise have had several consequences. They have highlighted the need both for the United States and for Member States of the European Union to take greater action to resolve the orphan works problem by way of legislation. The European Commission is even questioning long-cherished features

Market for Copyrighted Goods, 15 INT'L J.L. & INFO. TECH. 54 (2007). According to the most common French definition, a work is only orphaned if it cannot be found, despite a documented and serious search. See *RAPPORT DE LA COMMISSION SUR LES OEUVRES ORPHELINES* [Report of the Committee on Orphan Works], CONSEIL SUPÉRIEUR DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ("CSPLA") (March 19, 2008), <http://www.cspla.culture.gouv.fr/travauxcommissions.html> [hereinafter CSPLA]. For the definition most commonly used in the U.K., see JISC, *IN FROM THE COLD: AN ASSESSMENT OF THE SCOPE OF "ORPHAN WORKS" AND ITS IMPACT ON THE DELIVERY OF SERVICES TO THE PUBLIC* 5 (2009), available at <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf> [hereinafter JISC]; also see Andrew Gowers, *Gowers Review of Intellectual Property*, HER MAJESTY'S TREASURY 4, 69 (2006), available at http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf.

of Continental European copyright law. Moreover, Google Books has illustrated that the resolution of the orphan works problem is essential to any and all mass-digitization efforts. Any piece of legislation attempting to adequately address the orphan works problem has to be drafted with an eye towards its effects on mass-digitization. This Article argues that the Google Book Search settlement proposes an effective framework for dealing with orphan works. With some crucial changes, it could serve as a model for legislatures on both sides of the Atlantic. One of the chief reasons for this is that the settlement combines European and American legal reasoning. It thereby obviates what has been one of the most significant hurdles to international harmonization in the past: pressure, or perceived pressure, for either side to adopt a foreign model.

Part I explains the orphan works problem, the reasons for its existence, its prevalence and its relevance. Google Books and its (modest) European counterpart, Europeana, serve to show that the orphan works problem is significantly aggravated in cases of mass-scale digitization of copyrighted works. Part II illustrates the attempts made by legislatures in the United States and the European Union to deal with that problem. This section will show that the envisioned solutions reflect their legal systems more generally: belief in market forces on one side, preference for public ordering on the other side.

Part III describes the relevant parts of the proposed Google Book Search Settlement and compares the framework it establishes to the legislative ones proposed in the United States and the European Union. It traces the impact which the proposed settlements have had in the European Union and its Member States, both on the debate surrounding orphan works legislation as well as on the debate surrounding publicly funded attempts to mass-scale digitize books and other works. As the following will make clear, European reactions have not been unified. While highly outspoken skepticism concerning the first settlement proposal was heard in some Member States, the European Commission has quickly recognized the settlement's potential. At present, opposition to the settlement seems to be fading. Member

States are making individual deals for public domain works with Google without confronting the orphan works problem.

Part IV proposes a legislative solution for the future. That solution shares parts of all three proposals—the American one, the European one and the one proposed by the parties to the Google Books case. The solution would be as effective as the one envisioned by the proposed settlement but would avoid the monopoly the settlement would create if approved. The most important element of that solution foresees the introduction of extended collective licenses.

I. THE ORPHAN WORKS PROBLEM

As the Google Book Search Settlement has shown, the existence of books owned by unknown rights holders or by rights holders which cannot be located, presents an obstacle to the creation of a comprehensive digital library. That said, the issue of orphan works existed before Google started its scanning efforts and thus long before the proposed settlement was negotiated.

A. *The Problem in General*

Books are not the only group of copyrighted works that can fall into orphanage, and they are not the group of works most sensitive to orphanage.⁷ In nearly all cases books contain at least some information about their authors and publishers. Photographs, for instance, are more vulnerable to orphanage both because their authors often produce many works (too many to register them all) and because, as a rule, the actual copies of the work (the photographs) lack identifying information regarding their author or other rights holder.⁸ Similarly, unpublished documents rarely contain ownership information.⁹ Generally, works with little

⁷ REPORT ON ORPHAN WORKS, *supra* note 6, at 24.

⁸ *Id.* at 24–25.

⁹ The conseil supérieur de la propriété littéraire et artistique, the French High Council for Literary and Artistic Property, determined that in France, the orphan works problem mainly exists for literary and photographic works. Ownership information for musical works and movies usually can be found during a reasonably diligent search. Since 1944, cinematographic works have been subject to registration, with the producer being presumed to own all the rights. *See* CSPLA, *supra* note 6.

commercial but high academic and cultural value, such as documentary photographs, letters and sound recordings, are most likely to become orphaned.¹⁰

In a situation where the copyright owner cannot be identified and located, the user has to decide whether to use the work and risk the remote chance of being sued for copyright infringement, including, in the United States, statutory damages¹¹ (a fact that aggravates the problem in the United States when compared to Europe), or whether to forego the use of the work in question. Presented with this choice, especially users with limited resources such as public libraries shy away from the use of the work.¹² This is true even though evidence indicates that the artists who have created such works and who often hold the rights to these works themselves might not mind their reproduction and/or public display or performance.¹³

Marybeth Peters, the Register of Copyrights, summarized the general sentiment of users accurately when she noted:

The most striking aspect of orphan works is that the frustrations are pervasive in a way that many copyright problems are not. When a copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage. . . . The Copyright Office finds such loss difficult to justify when the primary rationale behind the prohibition is to protect a

¹⁰ See JISC, *supra* note 6, at 6, 8.

¹¹ See 17 U.S.C. § 504(c) (2006).

¹² In the over 850 submissions made to the U.S. Copyright Office following its Notice of Inquiry regarding the orphan works problem, especially not-for-profit organizations recount instances in which they shied away from digitizing and preserving copyrighted works of which the owners cannot be identified and located. See Letter from Denise Troll Covey, Principal Librarian for Special Projects, to Jule L. Sigall, Assoc. Register for Pol'y & Int'l Affairs, U.S. Copyright Office (Mar. 22, 2005) [hereinafter Covey Letter], available at <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>.

¹³ Andy Ellis, Director of The Public Catalogue Foundation, stated that, "[m]ost of the artists we cannot find are not well-known. In those cases where we have tracked them down at a later stage post publication, they have always been grateful for the publicity." See JISC, *supra* note 6, at 23.

copyright owner who is missing. If there is no copyright owner, there is no beneficiary of the copyright term and it is an enormous waste. The outcome does not further the objectives of the copyright system.¹⁴

For a while, evidence regarding the extent of the problem was mostly anecdotal.¹⁵ Recently, however, empirical studies conducted in the United States and elsewhere have produced more reliable proof regarding both the amount of orphan works and the impact these works have on services provided by cultural institutions. A study by the Carnegie Mellon University Libraries showed that 22% of the publishers for the works in its collection could not be found.¹⁶ Thirty-six percent of the publishers that were found and contacted did not respond to multiple letters of inquiry, most of which regarded out-of-print books.¹⁷ According to the British Library, orphan works constitute 40% of the copyrighted works in its collection.¹⁸

¹⁴ *The "Orphan Works" Problem and Proposed Legislation: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop., Comm. on the Judiciary*, 110th Cong. (2008) [hereinafter Statement of Marybeth Peters] (statement of Marybeth Peters, The Register of Copyrights), available at <http://www.copyright.gov/docs/regstat031308.html>.

¹⁵ Both the Register of Copyrights' *Report on Orphan Works* (January 2006) and IViR's *Report on The Recasting of Copyright & Related Rights for the Knowledge Economy* (November 2006) recount anecdotal evidence (and stress the difficulty of accurately assessing the problem), with the IViR study repeatedly referring to the report by the U.S. Copyright Office. See REPORT ON ORPHAN WORKS, *supra* note 6; see also IViR, UNIV. OF AMSTERDAM, THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY: FINAL REPORT (2006), available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

¹⁶ See Covey Letter, *supra* note 12; see also Denise Troll Covey, *Copyright and the Universal Digital Library*, in UNIVERSAL DIGITAL LIBRARIES: UNIVERSAL ACCESS TO INFORMATION, PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE UNIVERSAL DIGITAL LIBRARY 9 (2005), available at http://works.bepress.com/denise_troll_covey/44 (detailed analysis of several studies performed by the Carnegie Mellon University Libraries).

¹⁷ See Covey, *Copyright and the Universal Digital Library*, *supra* note 16, at 3. A large percentage of the cases in which publishers did not answer letters of inquiry concerned out-of-print works. See *id.*

¹⁸ See *Intellectual Property: A Balance—The British Library Manifesto* § 5, BRITISH LIBRARY, available at <http://www.bl.uk/news/pdf/ipmanifesto.pdf> (last visited Oct. 19, 2010); see also Press Release, British Library, British Library Welcomes Orphan Works

Another U.K. study, conducted by the Collections Trust and the Strategic Content Alliance and mainly based on museums, galleries and archives¹⁹ concluded that on average, 5–10% of a museum's or gallery's collection and 11–20% of an archive's collection consisted of orphan works.²⁰ In total, the study found, the responding organizations might well own more than 50 million orphan works.²¹ Twenty-six percent of the participants reported that legal difficulties surrounding orphan works were frequent, with 5% reporting that “virtually every significant activity they undertake was affected by these difficulties.”²²

B. Causes

As Marybeth Peters stressed in her statement before the House's Judiciary Committee, the orphan works problem has been aggravated over the past few decades for multiple reasons:

More than one phenomenon has contributed to the orphan works problem. Digital technology has made it easier for a work or part of a work (such as a sound recording or a “sample”) to become separated from ownership or permissions information, whether by accident or through deeds of bad faith actors. Business practices have furthered the publication of works without any credit of authorship or copyright ownership, as in the publication of photographs in some advertising contexts. Sweeping changes to copyright law in the

Commitments (Nov. 23, 2009), available at <http://pressandpolicy.bl.uk/Press-Releases/British-Library-welcomes-orphan-works-commitments-302.aspx>.

¹⁹ The respondents were mainly museums, libraries, archives, educational and health organizations. Eighty-one of the participants were later interviewed in an in-depth phone survey. Ninety percent of the 503 respondents were based in the U.K. *See* JISC, *supra* note 6, at 17–18.

²⁰ *See id.* at app. B, fig. 2.2. The numbers for libraries were even higher. *See id.* at 18.

²¹ *See id.* at 18. According to the study, museums and galleries in the United Kingdom alone owned at least 25 million orphan works. *See id.*

²² *Id.* at app. C, fig. 3.1. Eighty-nine percent of the 503 participants reported that their services are at least occasionally affected by issues regarding orphan works. *See id.*

past 30 years have also contributed heavily to the problem.²³

The “sweeping changes in copyright law in the past 30 years” that she referred to are twofold. The first change regards formalities for copyright protection. Its first step occurred on January 1, 1978 when the Copyright Act of 1976 entered into force. The Copyright Act of 1976 abolished the registration requirement that had been a hallmark of United States copyright law since the first Copyright Act in 1790.²⁴ While federal copyright protection in the United States formerly applied only to registered published works that had a copyright notice affixed to them, protection today extends to any worked fixed in a tangible medium.²⁵ Registration is only required for copyright owners of American works who want to sue for copyright infringement.²⁶ For that reason, the copyright registry, which once provided an exhaustive list of works protected under copyright law, including information on copyright ownership, is no longer comprehensive. In addition, in 1989, just before the United States signed the Berne Convention, and as a pre-condition for entering into this international treaty, the United States abolished the notice requirement.²⁷ Up to that point, the copyright notice had provided potential licensees of copyrighted works with valuable information about the name of the copyright owner and the year of publication.

While the first change was much more dramatic in the United States than in the European Union, the second change was one that to a certain extent occurred on both sides of the Atlantic.²⁸ This change regards the term of copyright protection. Before 1978, copyright protection in the United States had lasted for twenty-eight years, after which time the copyright owner could apply for a

²³ Statement of Marybeth Peters, *supra* note 14.

²⁴ See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[A] (Matthew Bender rev. ed. 2010).

²⁵ See 17 U.S.C. § 102 (2006).

²⁶ See *Id.* § 411.

²⁷ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853, 2857 (1988).

²⁸ All Member States of the European Union are contracting parties to the Berne Convention; some have been founding members, and thus have long abolished their formalities, if they ever had any.

renewal term of twenty-eight years with the Copyright Office.²⁹ Only about 15% of all registered works were renewed before 1978.³⁰ The rate for books was even lower: 7% of copyrights for books were renewed.³¹ Most works thus fell into the public domain after the initial copyright term, and ownership information at the Copyright Office was never older than twenty-eight years. The Copyright Act of 1976 abolished this bifurcated system and replaced it with one where copyright protection lasted for the life of the author plus fifty years.³² The purpose of this change was, again, to align United States copyright law with international copyright conventions.³³

In the 1990s, both the United States and countries in Europe extended copyright protection to a term of the life of the author plus seventy years.³⁴ That led to an increase in the number of protected older works. A significant number of these older works have lost their commercial value and have owners who are unlikely to be found. In fact, according to a CRS Report for Congress that was prepared before the last term extension in 1998, only roughly 1% of copyrighted works retain commercial value (in the sense that they still generate royalties) fifty-five to seventy-five years after their creation.³⁵ Few owners of such works spend time and

²⁹ See 3-9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.08 (Matthew Bender rev. ed. 2010).

³⁰ Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 519 (2004).

³¹ BARBARA RINGER, 86TH CONG. STUDY NO. 31: RENEWAL OF COPYRIGHT app. C (1960).

³² See 3-9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02 (Matthew Bender rev. ed. 2010).

³³ See 2-7 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.01[A] (Matthew Bender rev. ed. 2010).

³⁴ See Council Directive 93/98, 1993 O.J. (L 290) 9 (EC), available at http://www.ebu.ch/departments/legal/pdf/leg_ref_ec_directive_copyright_duree_protection_291093.pdf; see also Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 § 102(b)(A)–(B), 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302 (2006)). An anonymous work, a pseudonymous work, or a work made for hire is protected for a term of ninety-five years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. *Id.*

³⁵ EDWARD RAPPAPORT, CRS REPORT FOR CONGRESS—COPYRIGHT TERM EXTENSION: ESTIMATING THE ECONOMIC VALUES 6 (1998), available at http://digital.library.unt.edu/ark:/67531/metacrs727/m1/1/high_res_d/98-144e_1998May11.pdf.

money in the hopes of enabling potential (noncommercial) users to find them.

C. Mass-Scale Digitization and Orphan Works

Because of legal uncertainties, libraries and archives hesitate to restore and preserve old movies and photographs, museums hesitate to publicly display images or illustrations, publishers hesitate to publish and researchers hesitate to write books that require the reproduction of manuscripts and other documents with unknown rights owners.³⁶ All these and many more are, as Marybeth Peters says, “important, productive projects, many of which would be beneficial to our national heritage.”³⁷

Arguably the most important of these projects would be the creation of a universal digital library, accessible by anyone from anywhere. Orphan works create a major obstacle to mass-scale digitization of copyrighted works. Some governments and nonprofit organizations as well as some companies have started scanning books and other works with the aim of creating a comprehensive digital library of their holdings, their “cultural heritage,”³⁸ or, even more ambitiously, “all of human knowledge.”³⁹ Among private initiatives, Google Book Search,⁴⁰ now known as Google Books, is probably the best known and most comprehensive. As concerns public initiatives, Europeana,⁴¹ the library created by the European Commission, is among the most

³⁶ For initial comments to the Copyright Office’s Notice of Inquiry, see *Orphan Works Initial Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/index.html> (last visited Oct. 5, 2010). For reply comments, see *Orphan Works Reply Comments*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/orphan/comments/reply> (last visited Oct. 5, 2010). Many of the reply comments give detailed accounts of instances in which valuable uses were frustrated because of issues with orphan works. *See id.*

³⁷ Statement of Marybeth Peters, *supra* note 14.

³⁸ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Europeana: Next Steps*, at 2, COM (2009) 440 final (Aug. 28, 2009), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0440:FIN:EN:HTML> [hereinafter *Europeana Next Steps*].

³⁹ VIRGINIA A. SCOTT, GOOGLE 33 (2008) (quoting Larry Page and Sergey Brin, Creators of Google).

⁴⁰ GOOGLE BOOKS, <http://books.google.com> (last visited Nov. 15, 2010).

⁴¹ EUROPEANA, <http://www.europeana.eu/portal> (last visited Nov. 15, 2010).

ambitious projects.⁴² Since the European Commission's experiences with Europeana have informed its attitudes towards the orphan works problem in general and the Google Book Search Settlement in particular, this Article will in the following not only give an overview of Google Books and the lawsuit it led to but also of Europeana, its aims and the struggles it has faced.

1. Google Book Search

A great many people in the United States and elsewhere have heard about Google Book Search, the lawsuit it caused, and the settlement proposals it produced. They have heard about the opportunities a possible settlement would present and the dangers it would pose. This began in 2004 when Google announced its "Google Print" Library Project.⁴³ Initially, Google worked with publishers who supplied digital copies of their books which Google then turned into searchable files.⁴⁴

At the end of 2004, Google declared that it would also collaborate with a number of major research libraries—among them those of Harvard University, the University of Michigan, Stanford University, Oxford University, and the New York Public Library.⁴⁵ Google took high-resolution photographs of its partner libraries' holdings and turned them into searchable text and indexes, at a rate of 1000 pages per hour and using its own (secret) scanning technology.⁴⁶ As of early September 2009, Google had scanned approximately 10 million books.⁴⁷ Google claims that of these books, 8.5 million are protected under copyright and 1.5

⁴² See Kathlyn Clore, *E.U. Presents Ambitious Open-Source Library Digitization Project, Site Promptly Crashes*, TECHCRUNCH (Nov. 22, 2008), <http://techcrunch.com/2008/11/22/eu-presents-ambitious-open-source-library-digitization-project-site-promptly-crashes>.

⁴³ See *About Google Books*, GOOGLE, <http://books.google.com/googlebooks/history.html>. (last visited October 5, 2010).

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See Kevin Kelly, *Scan this Book!*, N.Y. TIMES, May 14, 2006, http://www.nytimes.com/2006/05/14/magazine/14publishing.html?_r=2&oref=slogin&pagewanted=all.

⁴⁷ Thomas Claburn, *Google Readies its Book Business*, INFO.WEEK (July 30, 2009, 5:23 PM), <http://www.informationweek.com/news/internet/google/showArticle.jhtml?articleID=218900194&queryText=%22google%20readies%22>.

million books are in the public domain.⁴⁸ According to Daniel Clancy, Engineering Director of Google Book Search, the total number of scanned books had risen to more than 12 million books as of February 11, 2010.⁴⁹

Google allows its users to view and download the full texts of public domain works. It also allows users to see “snippets” (small sections, usually only a few lines long) of works still under copyright protection except in cases where a book’s rights holder formally objects. For books owned by members of its Partner Program, Google only makes as much of the book available as its partners wish. Nevertheless, Google’s practice of scanning whole books still protected under copyright law and of displaying “snippets” of them without compensating the respective copyright owners was a thorn in the side of some authors and publishers. In 2005, the same year that Google changed the name of its project to “Google Books,” the Authors’ Guild filed a class action lawsuit against Google alleging copyright infringement.⁵⁰ Shortly thereafter, five publishers filed suit against Google.⁵¹ The court consolidated the two lawsuits.⁵²

The authors and publishers alleged that Google’s actions had infringed upon their rights to reproduce, distribute and publicly display their works.⁵³ In its defense, Google argued that its actions were covered under the fair use doctrine, despite the fact that it was scanning expressive works in whole and was using these scans

⁴⁸ *Id.*

⁴⁹ See Declaration of Daniel Clancy in Support of Motion for Final Approval of Amended Settlement Agreement at 1, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Feb. 11, 2010), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/946>.

⁵⁰ See Complaint, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/1> [hereinafter Complaint, Authors Guild].

⁵¹ See Complaint, *McGraw-Hill Cos. v. Google, Inc.*, No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08881/275068/1>.

⁵² [Proposed] Case Management Order Regarding Coordination and Scheduling at 2–3, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. May 22, 2006), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/29>.

⁵³ Complaint, *Authors Guild*, *supra* note 50; see also 17 U.S.C. § 106(1), (3), (5) (2006).

for commercial purposes and without transforming the texts themselves.⁵⁴ Google claimed a case of market failure, a situation in which it would have been impossible to create licensing agreements with all rights holders in question. Google also argued that scanning the books was only a necessary step in the process of turning books into “pointers,” of creating search indexes of these books and the terms they contained.⁵⁵ Only the indexes would be made available to users whereas the complete copy of the work that was created when compiling the index would only be stored on Google’s servers.⁵⁶ Last but not least, Google pointed to the enormous social benefit that its service would provide to readers across the world, especially with respect to orphan works which, through Google’s services, anybody with an Internet connection could (for the first time) read and use.⁵⁷

Many scholars were sympathetic to this claim and were excited that the case would go to trial, even though some were anxious about the high stakes involved.⁵⁸ In the words of Stanford law professor Mark Lemley: “If the publishers were to actually prevail in this lawsuit, I think it would be essentially impossible to maintain a search engine.”⁵⁹ Michael Madison, professor at the

⁵⁴ Answer, Jury Demand, and Affirmative Defenses of Defendant Google Inc. at 7, *Authors Guild, Inc. v. Google, Inc.*, No 05-CV-8136 (S.D.N.Y. Nov. 30, 2005), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/14>.

⁵⁵ See Jonathan Band, *The Google Library Project: Both Sides of the Story*, 1 PERSPECTIVES 2, 7 (2006).

⁵⁶ *Id.* at 1.

⁵⁷ See GOOGLE, THE FACTS ABOUT GOOGLE BOOK SEARCH 1–2, available at <http://books.google.com/intl/en/googlebooks/pdf/gbsoverview.pdf>.

⁵⁸ For an analysis of Google’s fair use claim, see Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 236–60 (2009). See also Douglas Lichtman, *Copyright as Information Policy: Google Book Search from a Law and Economics Perspective*, in 9 INNOVATION POL’Y AND THE ECON. (Josh Lerner, Scott Stern, eds. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1472167; Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19 (2010), available at http://www.nyls.edu/user_files/1/3/4/17/49/1080/55-1%20Final%20Sag%2011.17.10.pdf; Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 126 (2006).

⁵⁹ Kevin J. Delaney & Jeffrey A. Trachtenberg, *Publishers Challenge Google’s Book-Scanning Efforts*, WALL ST. J., Oct. 20, 2005, at A1, available at <http://www.cerebral-palsy.net/headlines/google2article.html>.

University of Pittsburgh and founder of *madisonian.net* commented that, “[t]his is not only bet-the-company litigation, it’s bet-the-Internet litigation.”⁶⁰ One of the reasons for the scholars’ enthusiasm was the fact that if Google had won that case, it would have opened the door for its competitors to develop their own ways of making unused or underused books available to the greater public via the Internet.

Ultimately, however, the case has not yet gone to trial. Instead, on October 28, 2008, the parties to the Google Book Search Case proposed the Google Book Search Settlement, the terms of which will be discussed in detail below.⁶¹

2. Europeana

A few days after the Google Book Search Settlement was filed with the court, the European Commission launched the beta-version of Europeana, a centralized library the Commission had created as part of its i2010 Digital Libraries Initiative.⁶² Europeana is designed to serve as a “showcase of the cultural heritage of the [European Union] Member States on the internet”⁶³ and to provide universal access to that heritage.⁶⁴ Unlike Google Book Search, Europeana covers not only books but textual, visual, and audiovisual works as well as sound recordings.⁶⁵ At present, Europeana’s library consists of six million digital items.⁶⁶ These items are provided by over one thousand cultural institutions such

⁶⁰ Michael Madison, *Google Print II*, MADISONIAN.NET (Oct. 20, 2005), <http://madisonian.net/2005/10/20/google-print-ii>.

⁶¹ See *infra* Part III.

⁶² See EUROPEANA, <http://www.europeana.eu/portal> (last visited Sept. 30, 2010). Europeana received 10 million hits per hour on its first day. See Press Release, European Commission, Europeana Website Overwhelmed on Its First Day by Interest of Millions of Users (Nov. 21, 2008), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/733>. This, alas, caused the site to go down, temporarily, within twenty-four hours of having been launched, but now it runs smoothly. The most interest came from Germany, France, Spain, Italy and the Netherlands. *Id.* Four percent of the hits came from the United States. *Id.*

⁶³ *Europeana Next Steps*, *supra* note 38, at 2.

⁶⁴ *Id.*

⁶⁵ *About us*, EUROPEANA, <http://www.europeana.eu/portal/aboutus.html> (last visited Sept. 30, 2010).

⁶⁶ *Id.*

as museums, galleries, archives, libraries and audio-visual collections across Europe. One hundred and fifty of these cultural institutions are participating in Europeana's partner network.⁶⁷

At first glance, this may seem like a great many digital items, and the number of items has indeed doubled since the launch of the site less than a year ago. That said, only about 1% of the books in European national libraries have been digitized.⁶⁸ The percentages for other types of works are even lower. In addition, both the number and the type of objects that individual Member States have contributed varies greatly. Almost half of the material gathered so far is in French; eighteen of the twenty-seven Member States have contributed less than 1% each to the digital library.⁶⁹ Some countries have linked to books, others to newspaper and magazine articles, and still others to high-resolution images of art works housed in national museums.⁷⁰ Consequently, curious lacunae have developed. Some classic works of European literature are available in multiple translations, but not in the original. Goethe's works, for example, can be found in French, Polish and Hungarian, but not in the original German.⁷¹

It is this state of affairs that led the European Commissioner for Information Society and Media, Viviane Reding, to express her frustration as follows:

⁶⁷ See *Partners*, EUROPEANA, <http://www.europeana.eu/portal/partners.html> (last visited Sept. 30, 2010); *Europeana Next Steps*, *supra* note 38, at 3. The Commission's policy target is to have ten million objects accessible through the site in 2010, and to have the numbers multiply in the years thereafter. See *Europeana Next Steps*, *supra* note 38, at 4.

⁶⁸ Press Release, European Commission, It Is Time for Europe to Turn Over a New E-Leaf on Digital Books and Copyright (Sept. 7, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter *It Is Time*].

⁶⁹ See Press Release, European Commission, Europe's Digital Library Doubles in Size but also Shows EU's Lack of Common Web Copyright Solution (Aug. 28, 2009) [hereinafter *Europe's Digital Library Doubles*], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1257&format=HTML&aged=0&language=EN&guiLanguage=en>. France contributes 47% of the objects in Europeana's collection, followed by Germany which contributed 15.4%. *Id.* Next is the Netherlands which have contributed 8%. *Id.* Interestingly, Norway, a non-Member, contributed 4.3% of the content which makes it the sixth most contributing country. *Id.*

⁷⁰ *Europeana Next Steps*, *supra* note 38, at 4.

⁷¹ *Id.*

I find it alarming that only 5% of all digitised books in the EU are available on Europeana. I also note that almost half of Europeana's digitised works have come from one country alone, while all other Member States continue to under-perform dramatically. To me this shows, above all, that Member States must stop envying progress made in other continents and finally do their own homework. It also shows that Europeana alone will not suffice to put Europe on the digital map of the world. We need to work better together to make Europe's copyright framework fit for the digital age.⁷²

It is clear that “the progress made in other continents” and which Member States “must stop envying,” refers to Google Book Search. Varying levels of Member State participation or, in Commissioner Reding's words, failure by the vast majority of Member States to “do their homework” is not, however, the only obstacle the library has to overcome. Since its inception, Europeana, like other digital libraries, has struggled to find a way to include copyrighted works in its database so as to avoid what the European Commission calls a “twentieth century black hole” in its collection.⁷³ The reasons for the struggle are partly financial and partly legal. In 2010, Europeana's annual budget was €2.5 million.⁷⁴ It is next to impossible to pay royalties on such a tight budget. Unsurprisingly, the collection to date consists almost exclusively of public domain works.

⁷² Europe's Digital Library Doubles, *supra* note 69.

⁷³ *Europeana Next Steps*, *supra* note 38, at 5.

⁷⁴ Tim Neale, *Europeana Digital Library Overwhelmed on First Day*, DIGITAL J. (Nov. 21, 2008), <http://www.digitaljournal.com/article/262554>. Until 2011, 80% of Europeana's budget is covered by the EU's eContent *plus* Programme. Member States and cultural institutions provide for the rest of the funding. Information on eContent *plus* as well as its successor program Information and Communications Technologies (ICT) Policy Support Programme (“ICT PSP”) is available at http://ec.europa.eu/information_society/activities/econtentplus/index_en.htm. The office of Europeana is hosted by the National Library of the Netherlands in The Hague and is run by the European Digital Library Foundation.

Almost equally important as these financial constraints are the legal constraints which the library is facing and which led Commissioner Reding to underscore that, “[w]e need to work better together to make Europe’s copyright framework fit for the digital age.”⁷⁵ For legal reasons, neither out-of-print nor orphan works are included in its collection.⁷⁶

Even though the budgets on which Europeana and Google are operating are incomparable (Google’s annual revenue was more than \$23.65 billion in 2009),⁷⁷ both are facing similar legal problems. The European Union was therefore particularly interested in observing Google’s attempts to overcome these legal difficulties.

II. PROPOSED LEGISLATIVE SOLUTIONS

Before Google’s entry onto the scene, both the United States and the European Union had sought measures to deal with the problems presented by orphan works. Unsurprisingly, their solutions to these problems reflected their different legal traditions and societal norms. The United States opted for a market-driven approach in which private ordering would play a large role while the European Union was in the process of developing a framework in which public, government-run initiatives would provide the core of the solution. So as to better understand these differences and how they might be reconciled in a unified response to the problems posed by orphan works, this Article details the respective situations in the United States and the European Union with the end of comparing the two approaches to the problem.

⁷⁵ Europe’s Digital Library Doubles, *supra* note 69.

⁷⁶ *Id.*

⁷⁷ 2010 Financial Table—Google Investor Relations, GOOGLE, <http://investor.google.com/financial/tables.html> (last visited Sept. 30, 2010). This revenue rivals the GDP of some Member States of the European Union—Malta’s GDP was \$8.370 billion in 2008, and Cyprus’s GDP was, in the same year, \$24.922 billion. *World Economic Outlook Database*, INT’L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2009/02/weodata/index.aspx> (last visited Feb. 21, 2011).

A. *The Legislative Process in the United States*

For some time, the United States Congress has endeavored to enact legislation regarding orphan works. In 2005, members of the respective Judiciary Committees in the House and the Senate formally requested that the Copyright Office examine the question of orphan works and that it make recommendations about how to deal with the problem.⁷⁸ In early 2006, after the Copyright Office had met extensively with industry representatives and had received and studied over 850 written comments by authors, distributors, cultural institutions and public interest groups, the Register of Copyrights issued a *Report on Orphan Works*.⁷⁹ Therein, it proposed a limitation on remedies for infringers of copyrighted works who have conducted a “reasonably diligent search” (a term which the report did not define).⁸⁰ Later that year a bill was introduced in Congress.⁸¹ It followed most of the Copyright Office’s proposals. Any departures were designed to strengthen the rights of photographers and other visual artists. The bill had not been addressed when the term of the 109th Congress ended.

New bills were introduced into both the House and the Senate in April 2008.⁸² The Senate bill passed on September 26, 2008 by unanimous consent, but did not pass in the House before the term of the 110th Congress ended.⁸³ Consequently, no orphan works legislation has been enacted.

⁷⁸ Members of the United States Congress Howard L. Bermann and Lamar Smith both wrote letters to the Register of Copyrights in which they urged the Copyright Office to review the issue of orphan works. The same is true for Senators Orrin G. Hatch and Patrick Leahy. See REPORT ON ORPHAN WORKS, *supra* note 6.

⁷⁹ See *id.*; see also Jerry Brito & Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 MICH. TELECOMM. & TECH. L. REV. 75 (2005).

⁸⁰ See REPORT ON ORPHAN WORKS, *supra* note 6, at 8–10.

⁸¹ Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006) (later that year, this bill was embedded in The Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006)).

⁸² See Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-5889>; Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-2913>.

⁸³ See H.R. 5889; S. 2913.

The bill from 2006 as well as the bills from 2008 provided for the introduction of a new section, 514, into the remedies section of the Copyright Act. Because the problem of orphan works cuts across multiple categories of copyrighted works, the proposed legislation would cover all groups of copyrighted works. As the affected users are both non-commercial entities (such as research institutions and public libraries that would like to restore and preserve old works as well as make them digitally available to a broader range of users) and commercial entities (such as, of course, Google), and as it is difficult at times to draw the line between commercial and non-commercial enterprises, the legislation, if enacted, would apply to all users, independently of whether they attempt to obtain commercial revenue from their uses of the work or works in question.⁸⁴ It would also apply to uses on all scales, from the use of a single work to uses of massive numbers of works.⁸⁵

The limitation on remedies would apply to users who have conducted and documented a “qualifying search”⁸⁶—that is, a “diligent effort” to locate the rights holder,⁸⁷ who have “provided

⁸⁴ See generally H.R. 5889; S. 2913.

⁸⁵ See U.S. Copyright Office, Roundtable Transcript: Orphan Works, at 21, (July 26, 2005) available at <http://www.copyright.gov/orphan/transcript/0726LOC.PDF> (Google’s position had, from the very beginning of the discussions, and with its own scanning efforts in mind, been what Google’s counsel expressed during one of the roundtable discussions: “I would encourage the Copyright Office to consider not just the very, very small scale, the user who wants to make use of the work, but also the very, very large scale and talking in the millions of works.”).

⁸⁶ See H.R. 5889 § 2(b)(1)(A)(i) (requiring for eligibility “that before the infringement began, the infringer, a person acting on behalf of the infringer, or any person jointly and severally liable with the infringer for the infringement—(I) performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright; and (II) was unable to locate and identify and owner of the infringed copyright”); see also S. 2913.

⁸⁷ See S. 2913. (“A search is qualifying if the infringer undertakes a diligent effort to locate the owner of the infringed copyright.”). Section 514(b)(2)(A)(i) of S. 2913 would provide that a search qualifies if the infringer or another person mentioned in § 514 (b)(1)(A)(i) “undertakes a diligent effort” that is reasonable under the circumstances to locate the owner of the infringed copyright prior to, and at “a time reasonably proximate to, the infringement” A diligent effort includes, at a minimum, a search of the records of the Copyright Office, of reasonably available sources of copyright authorship and ownership information, a use of appropriate technology tools and of appropriate

attribution,”⁸⁸ and who have “give[n] notice that the infringed work has been used under this section [514].”⁸⁹ Users who fulfill this requirement—who assert in the initial pleading eligibility for the orphan works limitation⁹⁰ and who give a “detailed description and documentation of the search”⁹¹—would only be subjected to “reasonable compensation” if the copyright holder reappears.⁹² In particular, the user will not have to pay statutory damages. However, injunctive relief remains available,⁹³ except in cases where the user/infringer has created a derivative work.⁹⁴ In these cases, the rights holder is only entitled to receive reasonable compensation and attribution while the user/infringer may claim copyright in the derivative work or compilation he or she created.⁹⁵

databases, as well as any other actions that are reasonable and appropriate under the circumstances. S. 2913 § 514(b)(2)(A)(ii–iii).

⁸⁸ See S. 2913 § 514(b)(1)(A)(ii) (requiring for eligibility that the infringer “provided attribution, in a manner that is reasonable under the circumstances, to the legal owner of the infringed copyright, if such legal owner was known with a reasonable degree of certainty, based on information obtained in performing the qualifying search”); see also H.R. 5889 (containing almost identical language to § 514(b)(1)(A)(iii)).

⁸⁹ See S. 2913 § 514(b)(1)(A)(iii) (requiring for eligibility that the infringer “included with the public distribution, display, or performance of the infringing work a symbol or other notice of the use of the infringing work, the form and manner of which shall be prescribed by the Register of Copyrights, which may be in the footnotes, endnotes, bottom margin, end credits, or in any other such manner as to give notice that the infringed work has been used under this section”); see also H.R. 5889 § 514(b)(1)(A)(iv) (containing similar language, without providing examples).

⁹⁰ See S. 2913 § 514(b)(1)(A)(iv); H.R. 5889 § 514(b)(1)(A)(v).

⁹¹ See S. 2913 § 514(b)(1)(A)(v); H.R. 5889 § 514(b)(1)(A)(vii).

⁹² See S. 2913 § 514(a)(3) (defining “reasonable compensation” as “the amount on which a willing buyer and a willing seller in the positions of the infringer and the owner of the infringed copyright would have agreed with respect to the infringing use of the work immediately before the infringement began”); see also Jane C. Ginsburg, *Recent Developments in US Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?*, REVUE INTERNATIONALE DU DROIT D’AUTEUR, (2008), available at <http://ssrn.com/abstract=1305270> (questioning whether “reasonable compensation” would include a continuing royalty).

⁹³ See S. 2913 § 514(c)(2)(A); H.R. 5889 § 514(c)(2)(A).

⁹⁴ See S. 2913 § 514(c)(2)(B) (providing for the exception if “the infringer has prepared or commenced preparation of a new work that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression”); see also H.R. 5889 § 514(c)(2)(B) (employing almost identical language).

⁹⁵ See S. 2913 § 514(e); H.R. 5889 § 514(f).

The proposed bills do not recommend any action to limit the orphan works problem more generally viewed—such as, for example, by providing for the establishment of a registry where authors and other rights holders could register their works free of cost and provide information that would make future searches easier. However, Congress hoped that private parties would establish a database of copyrighted works distinct from the register maintained by the Copyright Office (where registration is only issued for a fee). The Register of Copyrights would certify databases of pictorial, graphic and sculptural works and would create and maintain an online list of all certified databases.⁹⁶

B. The Legislative Process in the European Union

While Congress was working on solving the orphan works problem as it presented itself in the United States, the European Union was seeking to resolve the same issue in analogous fashion. The European Commission has been the driving force for the enactment of orphan works legislation and has, at least in some Member States, met with significant resistance to the changing of the status quo. From the very beginning, the Commission viewed solutions to the orphan works problem as a necessary means to the end of creating a comprehensive digital library, one key part of its policy framework for the information society.⁹⁷

In 2006, the European Commission asked the Institute for Information Law (“IViR”) at the University of Amsterdam to conduct a study on the extent of the orphan works problem and to determine whether a European Union-wide legislative solution would be in order.⁹⁸ The study concluded that the orphan works problem was real and significant, but that it would be best dealt with by the Member States individually since no significant impact on the internal market could be proven (such an impact triggers the European Community’s legislative competence).⁹⁹ In accord with

⁹⁶ See S. 2913 § 3; H.R. 5889 § 3(a)–(b).

⁹⁷ See *Europe’s Cultural and Scientific Heritage at a Click of a Mouse*, EUR. COMM’N ON INFO. SOC’Y & MEDIA (Sept. 2007), http://ec.europa.eu/information_society/activities/digital_libraries/doc/fact_sheet/fact_sheet_2007.pdf.

⁹⁸ See IViR, *supra* note 15 (discussing the orphan works problem).

⁹⁹ See generally *id.*

the study's findings, the European Commission issued a recommendation in 2006 urging its Member States to create mechanisms for facilitating the use of orphan works as well as to promote the availability of lists of known orphan works and works in the public domain.¹⁰⁰ Because an impact on the internal market might eventually arise and because of potential problems involving cross-border licensing of copyrighted works, the European Commission strongly urged individual Member States to find common solutions.¹⁰¹

Since it lacked the legislative competence to directly enact an EU-wide piece of orphan works legislation, the European Commission began developing a model solution for Member States to adopt and which would lead to an indirect harmonization of orphan works mechanisms within the European Union.¹⁰² To that end, the Commission created the i2010 Digital Libraries High Level Expert Group, which established a Copyright Subgroup.¹⁰³ The Copyright Subgroup found the orphan works problem to be one of the key challenges to the creation of a digital library.¹⁰⁴ Both in its interim report and in its Final Report on *Digital Preservation, Orphan Works, and Out-of-Print Works*, the Subgroup suggested multiple causes of action.¹⁰⁵ As some Member States already had legislation in place that at least

¹⁰⁰ See Commission Recommendation 2006/585, 2006 O.J. (L 236/28) (EC) [hereinafter Commission Recommendation 2006]. For a detailed study of legislative and other solutions for the orphan works problem throughout the European Union, see Agnieszka Velutani, *The Problem of Orphan Works in the EU—An Overview of Legislative Solutions and Main Actions in the Field*, THE EUROPEAN COMM'N DG INFO. SOC'Y AND MEDIA UNIT E4: DIGITAL LIBRARIES AND PUBLIC SECTOR INFO. (Feb. 2008), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

¹⁰¹ See Commission Recommendation 2006, *supra* note 100.

¹⁰² *Id.*

¹⁰³ I2010: DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP—COPYRIGHT SUBGROUP, REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS, SELECTED IMPLEMENTATION ISSUES 1 (Apr. 18, 2007) [hereinafter SELECTED IMPLEMENTATION], available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf. The group consisted of practitioners from libraries, film institutes, collective management organizations, author, and publisher groups.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.* at 1.

partially addressed the orphan works problem,¹⁰⁶ the Subgroup adopted a threefold approach.

Following the Commission Recommendation of 2006, the Subgroup proposed that Member States create (interlinked) national databases where potential users of orphan works would post whatever ownership information they could find about the work or works they wish to use, describe the work or works as well as possible using metadata and, in the absence of such data, use snapshots, video clips or the like, and describe the use they are making of the orphan work.¹⁰⁷ To that end, the Commission had, in 2007, already approved funding for ARROW.¹⁰⁸ ARROW is a project of national libraries, publishers and collective management organizations.¹⁰⁹ It was formed to find common ways for clarifying the rights status of possible orphan or out-of-print works, and to share information held by its partners.¹¹⁰

In addition, Member States were urged to establish a system of interoperable national “Rights Clearance Centers.”¹¹¹ Rights Clearance Centers (“RCCs”) are “national centralized access point[s] to a network of clearance centers made up of that of the RCC and those of individual authors or publishers and their representatives such as RROs [Reproduction Rights Organizations].”¹¹² These RCCs, for which the Subgroup

¹⁰⁶ *Id.* at 3, 5. In the United Kingdom, a government body may issue a license for the making of a sound recording from a previous recording of a performance. France has a regime for collective licenses of audiovisual works. *See id.* at 12–14. As for the Nordic countries, see *infra*, Part IV.D.

¹⁰⁷ i2010 DIGITAL LIBRARIES HIGH LEVEL EXPERT GROUP—COPYRIGHT SUBGROUP, FINAL REPORT ON DIGITAL PRESERVATION, ORPHAN WORKS, AND OUT-OF-PRINT WORKS 11 (April 6, 2008) [hereinafter FINAL REPORT], available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf.

¹⁰⁸ *About Arrow*, ARROW PROJECT, <http://www.arrow-net.eu> (last visited Oct. 3, 2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See* FINAL REPORT, *supra* note 107, at 20.

¹¹² i2010 DIGITAL LIBRARIES COPYRIGHT SUBGROUP’S RECOMMENDED KEY PRINCIPLES FOR RIGHTS CLEARANCE CENTERS AND DATABASES FOR ORPHAN WORKS Annex-6 (Nov. 26, 2007), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex6-ow-270508.pdf.

established key principles,¹¹³ would help users in their search of possible orphan works and could grant individual and collective licenses.¹¹⁴

Finally, like Congress, the Subgroup recommended that only users who have conducted and documented a “diligent search” be eligible for an orphan works license.¹¹⁵ The Subgroup proposed that sector-specific EU-wide guidelines for a “diligent search” be devised for all Member States.¹¹⁶ These EU-wide guidelines would be interlinked with contact information of national collective management organizations and databases they might create, thereby establishing “a map of available information resources across Europe.”¹¹⁷ Following an invitation from the Commission, stakeholders from various creative sectors devised sector-specific guidelines on due diligence criteria.¹¹⁸ National European libraries and artist, publisher and collective management organizations obliged themselves to follow these guidelines when searching for rights holders.¹¹⁹

Between the establishment of the Subgroup 2006 and its final report in 2008, few Member States made any significant progress with respect to the orphan works problem.¹²⁰ Only Hungary had

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The Commission uses the term “reasonable search” in some documents and the term “diligent search” in others; they seem to be used synonymously. *Compare* COMM’N OF THE EUROPEAN ECON., COPYRIGHT IN THE KNOWLEDGE ECONOMY 10 (2008) [hereinafter GREEN PAPER COPYRIGHT], available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf; with FINAL REPORT, *supra* note 107, at 25.

¹¹⁶ See FINAL REPORT, *supra* note 107, at 10–11.

¹¹⁷ *Id.* at 10.

¹¹⁸ See THE EUROPEAN DIGITAL LIBRARIES INITIATIVE, SECTOR-SPECIFIC GUIDELINES ON DUE DILIGENCE CRITERIA FOR ORPHAN WORKS JOINT REPORT ¶ 1.1, available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf (last visited Oct. 19, 2010).

¹¹⁹ *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works*, EUROPA (June 4, 2008), http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf.

¹²⁰ The German National Library (*Deutsche Nationalbibliothek*), the German Librarian’s Association (*dbv*) the German collecting society for written works (*VG Wort*), and the German Publishers Association (*Börsenverein des Deutschen Buchhandels*) are negotiating a trilateral agreement for orphan and out-of-print books. See Thomas Jaeger,

enacted a comprehensive orphan works statute.¹²¹ In order to push things along, the Commission issued a *Green Paper on Copyright in the Knowledge Economy* with the aim of “foster[ing] a debate on how knowledge for research, science and education can best be disseminated in the online environment.”¹²² In this document, the Commission invited interested parties as well as the general public to answer a series of questions on whether the enactment of EU-wide legislation regarding orphan works was necessary and on how to deal with possible cross-border aspects posed by the orphan works problem. For the first time, the European Commission openly considered finding and implementing a European Union-wide solution to the orphan works problem: “The majority of Member States have not yet developed a regulatory approach with respect to the orphan works issue. The potential cross-border nature of this issue seems to require a harmonized approach.”¹²³

The findings of this consultation were unsurprising.¹²⁴ Users of copyrighted works such as libraries, archives and museums

of Deutsche Nationalbibliothek, Presentation at 5th Meeting of the Digital Libraries Initiative’s Member States Expert Group: Orphan and Out-of-Print Works—The Situation in Germany (Oct. 1, 2009), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/mseg/meetings/5th/presentations/jaeger_mseg_01-10-09_new.pdf. In the United Kingdom, various options are being investigated. One would be that a government body would grant permission for the use of orphan works to applicants who have created appropriate procedures for a diligent search and have made provisions for a reimbursement of rights holders in the event of a legitimate claim. Others include government sanctioned collective license agreements administered by collecting societies. See Nick Poole, Chief Executive of the Collection Trust, Presentation at 5th Meeting of the Digital Libraries Initiative’s Member States Expert Group: Digital Britain & Orphan Works (Sept. 30, 2009), available at http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/meetings/index_en.htm.

¹²¹ See generally Mihály Ficsor, *How to Deal with Orphan Works in the Digital World? An Introduction to the New Hungarian Legislation on Orphan Works*, DIRECTORATE GEN. INTERNAL POLICIES (Oct. 2009), available at <http://www.europarl.europa.eu/document/activities/cont/200911/20091113ATT64497/20091113ATT64497EN.pdf>. The Hungarian orphan works statute was adopted in December 2008 and entered into force on February 1, 2009. It gives the Hungarian Patent Office the authority to grant licenses for the use of orphan works.

¹²² See GREEN PAPER COPYRIGHT, *supra* note 115, at 3.

¹²³ *Id.* at 11.

¹²⁴ The Commission had received 372 responses, most of which came either from libraries, archives and museums (114) or from publishers (56), collecting societies and licensing agencies (47). See COMM’N OF THE EUROPEAN COMMUNITIES, COMMUNICATION

advocated for mandatory “public interest” exceptions to copyright.¹²⁵ More specifically, libraries, universities, archives, some commercial users (among them, Google) and several Member States urged the European Commission to find an EU-wide legislative solution for orphan works that would address the issue of mass-scale digitization and would allow for broader use of orphan works.¹²⁶ Meanwhile, rights holders advocated for the maintenance of the status quo. They suggested that increased access should be achieved through licensing agreements based on current copyright law. With regard to orphan works, rights holders emphasized the need to ensure that potential users of orphan works conduct a diligent search for the rights holder before using the work, and that they use existing databases, including ARROW.¹²⁷

After listening to both sides, the European Commission decided to conduct an impact assessment of possible ways for facilitating digitization and dissemination of orphan works. Among the instruments that the Commission wanted to examine was “a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works.”¹²⁸ The Commission began with the impact assessment in late 2009.

C. Comparison of the Two Approaches

Both proposed solutions—limitation of remedies on one hand, and creation of national databases, rights clearance centers and nationally funded digital libraries on the other hand—clearly reflect the legal systems and cultural norms of the countries that produced them. Different attitudes towards culture or, as Europeans often call it, “national heritage,” and the role government should play in preserving and, more generally, regulating it, have led to different models for the digitization of works. With respect to the digitization of works, some EU Member States—above all, France—and the European

FROM THE COMMISSION, COPYRIGHT IN THE KNOWLEDGE ECONOMY 3–4 (Oct. 19, 2009) [hereinafter COPYRIGHT IN THE KNOWLEDGE ECONOMY].

¹²⁵ *Id.* at 4.

¹²⁶ *Id.* at 6.

¹²⁷ *Id.*

¹²⁸ *Id.*

Commission have focused on national or transnational, publicly funded digital libraries that serve as an extension of the municipal, regional or national library of the analog world.¹²⁹ The Library of Congress also has its own digital collection (focused on its rarest works) and has made it generally accessible online.¹³⁰ Nevertheless, digitization in the United States has not been highly publicized or politicized government policy. Instead, the government, as well as the public at large, appeared, and continue to appear, open to privately funded projects for the digitization of library holdings.

These same cultural differences have understandably led to different models for solving the problem posed by orphan works. Simply stated, the United States proposes a market-driven approach. Potential users of orphan works may use such works without any other costs than those incurred during their reasonably diligent search. Once the copyright owner resurfaces, he or she is required to notify the user, negotiate a “fair compensation” and, in cases where no agreement was reached, sue for copyright infringement. The American solution is thus relatively inexpensive to implement and use. If the work in question is truly orphaned, it avoids the payment of large sums in the form of license fees (that would most likely never be claimed) to an organization the establishment and maintenance of which would itself be relatively costly. The downside of the American solution, however, is that it relies on litigation with all the costs and uncertainties that come with it. On the one hand, many copyright owners will hesitate to sue users for the payment of small license fees for the use of works with little commercial value if the users refuse to pay. Users on the other hand do not have clear guidelines concerning the conditions under which a court would find their searches “diligent,” a requirement they would have to fulfill in order to be shielded against statutory damages.

The proposed European solution instead relies heavily on public ordering. Its main focus is the establishment of publicly

¹²⁹ See, e.g., Commission Recommendation 2006, *supra* note 100.

¹³⁰ See *Digital Collections*, LIBRARY OF CONGRESS, <http://www.loc.gov/library/libarch-digital.html> (last visited Oct. 19, 2010).

funded national databases that are meant to reduce the orphan works problem by providing information on rights holders. Databases, rights clearance centers and the collective licenses granted are all subject to government supervision. What is more, EU Member States have taken up the Herculean task of digitizing and making available an almost impossibly vast repository of European culture—consisting not only of books, but also of images, sound recordings and videos—on a public budget.

It is instructive to observe the extent to which the differing solutions selected by the United States and the European Union reflect general tendencies and attitudes in their legal systems. In the case of the U.S. we find faith in the market, and in the case of the EU a belief that the preservation of culture should not be governed by market forces alone. Viewed differently, it is equally instructive that the proposed solutions differ *at all*. Both were drafted in the digital age, and both with digitization and online availability in mind. Nevertheless, in neither instance was the fact taken sufficiently into account that a real and durable solution to the problem of orphan works involves a great many cross-border issues and would necessitate as broad a common solution as possible. If it is unrealistic to implement a truly global solution, it is not unrealistic to implement a common transatlantic piece of legislation. While both parties closely followed the developments taking place on the other side of the Atlantic, neither made real efforts to work together to find such a common solution. In the following, we will see that things have, of necessity, changed since the parties to the Google Books case first proposed a settlement agreement.

III. THE GOOGLE BOOK SEARCH SETTLEMENT AGREEMENT

As mentioned above, many observers were sympathetic to Google's fair use claims when the Google Books case was first filed. They anxiously awaited that the case would go to trial, hoping that Google would win and open the door for similar business models. After three years of negotiations, however, the parties proposed the Google Book Search Settlement in October

2008.¹³¹ The settlement agreement covers the consolidated lawsuits noted above.¹³² The length of the original settlement's text (141 pages plus fifteen attachments, with a total of 323 pages) surprised some observers of the case, but what surprised still more was its breadth.¹³³ The settlement's scope was much broader than the original lawsuit had been, both regarding the number of books covered under the settlement and the things Google was allowed to do with these books.

That fact alarmed even those who had been sympathetic to Google's position, and soon led to a public outcry. By the September 4, 2009 deadline for submissions, more than 400 objections, amicus curiae briefs and statements had been filed with the court.¹³⁴ Their authors were groups and individuals with the most diverse concerns, ranging from possible competitors of Google to authors' and publishers' groups, from human rights, privacy and general public interest organizations to Attorneys Generals of various states in the United States as well as foreign countries such as France and Germany.¹³⁵ Concerns ranged from

¹³¹ Memorandum of Law in Support of Plaintiff's Motion for Preliminary Settlement Approval, *The Authors Guild, Inc. v. Google, Inc.*, No. 06-CV-8136 (S.D.N.Y. Oct. 28, 2008), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/57>.

¹³² See *supra* notes 50–51 and accompanying text.

¹³³ For an analysis of how the Google Book Settlement differs from the most likely outcome of the litigation, see generally Sag, *supra* note 58. He identifies four areas in which the two differ: Google is allowed to engage in new uses which had not been part of the litigation, it has to pay copyright owners for the uses it makes which it would not have been required to do had its actions been held defensible under the fair use doctrine, it creates a new institutional framework for the administration of its uses and for the distribution of payments, and it gives Google access to a new group of works: orphan works. See *id.*

¹³⁴ See Docket of *Author's Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. 2005) [hereinafter Docket], available at http://dockets.justia.com/docket/court-nysdce/case_no-1:2005cv08136/case_id-273913.

¹³⁵ See *id.* (stating all objections). This wave of opposition gave rise to the formation of new and sometimes surprising alliances. One of the more interesting of these is the Open Books Alliance, a group whose sole purpose it is to oppose the settlement and containing the unlikely bedfellows Microsoft, Amazon, Yahoo! (not hitherto known as advocates for transparency and free competition), The American Society of Journalists and Authors, the National Writers Union, the New York Library Association, the Science Fiction and Fantasy Writers of America, and, indeed, many others. See *Members*, OPEN BOOK ALLIANCE, <http://www.openbookalliance.org/members> (last visited Oct. 15, 2010).

problems under antitrust law to those regarding privacy and intellectual freedom, from consumer protection issues to separation of power questions, violations of civil procedure, and, of course, copyright law.¹³⁶ Ultimately, and after congressional hearings on the matter, even the Antitrust Division of the Department of Justice filed a Statement of Interest regarding copyright and antitrust problems raised by the settlement.¹³⁷

The parties to the lawsuit have since gone back to their drawing boards and have, on November 13, 2009, submitted a new and narrower settlement proposal designed to appease, first and foremost, the Department of Justice's objections and concerns.¹³⁸ The court granted preliminary approval of the amended settlement on November 19, 2009, and set a new deadline (January 28, 2010) by which to file additional objections.¹³⁹ The final fairness hearing took place on February 18, 2010.¹⁴⁰

A. *The Original Settlement Agreement*

One of the main reasons why the original settlement agreement puzzled its readers was the size of the class covered.¹⁴¹ The settlement class comprised not only the owners of the seven million works Google had scanned when the lawsuit was filed.

¹³⁶ See Docket, *supra* note 134.

¹³⁷ See Statement of Interest of the United States of America Regarding Proposed Class Settlement, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. Feb. 4, 2010) [hereinafter Statement of Interest], available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/922>.

¹³⁸ See Plaintiffs' Memorandum in Support of Unopposed Motion to Adjourn October 7, 2009 Final Fairness Hearing and Schedule Status Conference at 2, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Dec. 1, 2009), available at <http://pdfserver.amlaw.com/ca/books0923.pdf> (last visited Oct. 19, 2010) ("The parties are committed to rapidly advancing the discussions with the DOJ."); Docket, *supra* note 134; see also Tom Krazit, *DOJ: Google's Book Settlement Needs Rewrite*, CONSUMER WATCHDOG (Sept. 18, 2009), <http://www.consumerwatchdog.org/corporateering/articles/?storyId=29585&index=101&topicId=10097> (last visited Oct. 15, 2010) ("The Department of Justice's filing recognizes the value the settlement can provide by unlocking access to millions of books in the U.S. We are considering the points raised by the Department and look forward to addressing them as the court proceedings continue . . .") (quoting Google's statement).

¹³⁹ See Docket, *supra* note 134.

¹⁴⁰ See *id.*

¹⁴¹ See Statement of Interest, *supra* note 137, at 5.

Instead, anyone owning a copyright interest in a book in the United States had become part of the plaintiffs' class.¹⁴² Because of various treaty obligations, the class essentially comprised anyone holding a copyright interest anywhere around the world.¹⁴³ That would include the right owners of out-of-print and orphan works (the settlement conflates the two terms).¹⁴⁴

The size of the class, however, was not the only surprise. Equally surprising was the scope of rights that Google received with respect to these works.¹⁴⁵ The settlement created a new system for the exploitation of copyrighted works in the future.¹⁴⁶ Google would—unsurprisingly—be granted a license for its scanning efforts from the past.¹⁴⁷ In addition, though, Google would obtain a license for future scanning and making available of all books that formed part of the class.¹⁴⁸ Under the settlement, it would be allowed to display up to 20% of the content of books under copyright, unless the copyright owner objects.¹⁴⁹ If a book is truly orphaned, there is no copyright owner to object. The settlement would thus grant Google the rights to display up to 20% of all orphan works.¹⁵⁰

Moreover, Google would obtain a license for the sale of books it had already scanned.¹⁵¹ This activity—the sale of electronic books—was one that Google had not attempted to do before and which had thus not been part of the lawsuit up until the original settlement had been proposed. The books could either be sold on a subscription basis designed for institutions such as libraries and universities,¹⁵² or as individual e-books to consumers.¹⁵³

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See* Original Settlement Agreement, *supra* note 3, § 2 [hereinafter Original Settlement Agreement], available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/settlement/Settlement%20Agreement.pdf>.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.* § 2.2.

¹⁴⁸ *See id.* § 10.2.

¹⁴⁹ *Id.* 4.3(b)(i)(1).

¹⁵⁰ *See id.* §§ 4.3(b)(i)(1), 7.2(v).

¹⁵¹ *See id.* § 2.1(a).

¹⁵² *See id.* § 4.1(a)(iv)(2).

¹⁵³ *See id.* § 4.2(a).

Copyright owners would be able to set prices themselves (“Specified Price”).¹⁵⁴ If they did not elect to do so, Google would set prices for them, using an algorithm it would develop (“Settlement Controlled Price”).¹⁵⁵ Since the Settlement Controlled Price would be the default price for consumer purchases under the settlement, Google could set prices in that (virtual) bookstore as it saw fit without any control from readers or libraries, or even the unknown (and, presumably, unknowing) copyright owner.¹⁵⁶

In return for the rights granted under the settlement, Google would pay \$45 million in lawyers’ fees.¹⁵⁷ It would pay another \$34.5 million to fund the establishment of a Book Rights Registry.¹⁵⁸ The Registry would be comprised of author and publisher representatives (and without representation by libraries or the general reading public).¹⁵⁹ Its main purpose would be twofold: first, it would apportion settlement funds to registered copyright owners for the past use of their books.¹⁶⁰ Second, the Registry would receive and allocate 70% of Google’s net revenue generated from advertising, from future sales of books, from subscription services and from other “qualifying searches,” including the revenue generated from qualifying searches of orphan works.¹⁶¹

B. Criticism

As mentioned above, the provisions of the original settlement posed several problems demanding careful examination—and

¹⁵⁴ See *id.* § 4.2(b)(i)(1).

¹⁵⁵ See *id.* § 4.2(b)(i)(2).

¹⁵⁶ See *id.* § 4.2(b)(i), (iii).

¹⁵⁷ See *id.* § 5.2. In total, Google would be required to pay roughly \$125 million. See James Grimmelman, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, AM. CONST. SOC’Y FOR L. & POL’Y (Apr. 2009), at 4 [hereinafter Grimmelman, *The Google Book Search Settlement*].

¹⁵⁸ See Original Settlement Agreement, *supra* note 3, § 5.2.

¹⁵⁹ See *id.* § 6.2(b).

¹⁶⁰ See *id.* § 4.5.

¹⁶¹ See *id.* §§ 4.5(a), 6.1(d).

many individuals and groups have indeed carefully studied the settlement since its release in October 2008.¹⁶²

Possible concerns extended beyond the exploitation of orphan works. One of the concerns raised by the Department of Justice—as well as by both academic observers and Google’s competitors—was that the settlement provides for horizontal agreements creating a system of fixed prices for its sales program.¹⁶³ Another significant question concerned users’ privacy rights as, under the settlement, Google would be able to collect information about millions—perhaps, hundreds of millions—of users.¹⁶⁴

Highly problematic, and of more importance for this article, was the inflation of the class covered by the settlement.¹⁶⁵ Concerns about the size of the class covered by the settlement did not only regard questions of (American) civil procedure.¹⁶⁶ Points of criticism included the violation of the Berne Convention according to which copyright protection may not be conditioned upon formalities (in order to receive remuneration from the digitization of their works, authors have to register with the Books

¹⁶² See, e.g., Einer Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. LEGAL ANALYSIS 1 (May 20, 2010); James Grimmelmann, *How to Fix the Google Book Search Settlement*, J. INTERNET L. 1 (Apr. 2009) [hereinafter Grimmelmann, *How to Fix*]; Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555; Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMPETITION L. & ECON. 383 (2009); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308 (2010) [Samuelson, *Google Book Search*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535067; Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Booksearch Settlement*, O'REILLY RADAR (Apr. 17, 2009), <http://radar.oreilly.com/2009/04/legally-speaking-the-dead-soul.html> [hereinafter Samuelson, *Legally Speaking*].

¹⁶³ See Statement of Interest, *supra* note 137, at 17–22; see also Memorandum of Amicus Curiae Open Books Alliance in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al., and Google, Inc., Authors Guild, Inc., v. Google, Inc., No. 05-CV-8136 (S.D.N.Y. Jan. 28, 2010), at 3–14. Many scholars are of the opinion that the settlement will lead to enhanced competition in book licensing. See Declaration of Daniel Clancy, *supra* note 5; see, e.g., Grimmelmann, *The Google Book Search Settlement*, *supra* note 157, at 5–7; Grimmelmann, *How to Fix*, *supra* note 162; Elhauge, *supra* note 162.

¹⁶⁴ See, e.g., Grimmelmann, *The Google Book Search Settlement*, *supra* note 146, at 6.

¹⁶⁵ See, e.g., Samuelson, *Legally Speaking*, *supra* note 162.

¹⁶⁶ See generally *id.*

Rights Registry),¹⁶⁷ the lack of translation of the settlement terms and the lack of representation of foreign rights holders.¹⁶⁸ Such rights holders could only become part of the Authors Guild if their works had been published in the United States and could never become part of the Association of American Publishers (the membership of which is open only to American publishers).¹⁶⁹

Even though the legal status of, and rights regarding, orphan books was not the only cause for concern, it was indeed one of the most problematic parts of the settlement.¹⁷⁰ Had Google won the case, it would have provided at least a partial solution to the orphan books problem for Google as well as for all its possible competitors. The court would have allowed Google's practice of scanning orphan works and of displaying snippets of these works under the fair use doctrine. Since Google would not have needed to obtain a license for its practice, none of its competitors would have needed a license either if they chose to digitize books, turn them into searchable texts, and display short parts of these texts.

The settlement, however, conferred what are in essence monopoly rights for all orphan books upon Google.¹⁷¹ Under the terms of the settlement, Google, and only Google, would be allowed to display up to 20% of the content of books that are under copyright, unless the copyright owner objected.¹⁷² In the language of the settlement, this default situation is called "Standard Preview."¹⁷³ In the case of a truly orphaned book, there is no copyright owner who could object to the work's display.

¹⁶⁷ For a specific discussion of this point, see Daniel Gervais, *The Google Book Settlement and the TRIPS Agreement*, 2011 STAN. TECH. L. REV. 1, available at http://ssrn.com/abstract_id=1612358; Sam Ricketson, *Memorandum of Advice: The Computability [sic] of the Proposed Google Book Settlement with the Provisions of the Berne Convention* (Sept. 9, 2009), available at <http://thepublicindex.org/docs/commentary/Ricketson.pdf>.

¹⁶⁸ All three points were raised in many of the amicus briefs submitted by foreign publishers and by Germany and France. See Docket, *supra* note 134.

¹⁶⁹ See Original Settlement Agreement, *supra* note 3, § 1.16.

¹⁷⁰ See Statement of Interest, *supra* note 137, at 23–26; Statement of Marybeth Peters, *supra* note 14, at 4–6; Grimmelman, *The Google Book Search Settlement*, *supra* note 157; Sag, *supra* note 58, at 30–32.

¹⁷¹ See Statement of Interest, *supra* note 137, at 23–26.

¹⁷² See Original Settlement Agreement, *supra* note 3, § 4.3(b).

¹⁷³ See *id.*

In addition, Google would be allowed to generate revenue both through ads run alongside the display of orphan books and by selling access to their full texts.¹⁷⁴ Any revenue made from these services would be forwarded to and held by the Registry for five years.¹⁷⁵ If the owner did not claim the funds after five years, the Registry would be allowed to use them to cover its own administrative costs.¹⁷⁶ Any remaining funds would be distributed on a proportional basis to those rights holders who are registered with the Registry and who would thus receive compensation for works they did not own.¹⁷⁷

The system set up by the settlement would thus lead to a monopoly on a giant scale.¹⁷⁸ Google's Senior Vice President of Corporate Development and Chief Legal Officer, David Drummond, estimated that about 20% of all books published in the United States, Canada, Australia and the United Kingdom will ultimately remain unclaimed and will be deemed orphaned.¹⁷⁹ Some evidence suggests that more than 70% of all books are orphan books.¹⁸⁰ Google would become the only seller for these books since only Google would be allowed to lawfully use and generate revenue from them (as well as from out-of-print books). Possible competitors, however, would either have to try the impossible and strike deals with unknown owners of mostly economically useless works, or would have to hope that they, too, would find themselves one day as the defendants of a class action lawsuit.

By approving the settlement, the district judge would effectively curtail Congress' powers to enact copyright legislation for orphan works (which would cover, of course, more types of

¹⁷⁴ *Id.* §§ 3.14, 4.2(a).

¹⁷⁵ *Id.* § 6.3(a)(i).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See Grimmelmann, *The Google Book Search Settlement*, *supra* note 157; Picker, *supra* note 162 (stressing this point in their respective articles).

¹⁷⁹ See *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 12 (2009) (testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google, Inc.).

¹⁸⁰ See Band, *supra* note 58, at 294 (“[As] much as 75% of the out-of-print books” will not be claimed).

works than books and which would grant all users of these works the same rights).¹⁸¹ Instead, the court would create a judicial compulsory license for one single user of orphan works: Google.¹⁸² That would run counter to core principles of copyright law.¹⁸³

C. *The Amended Settlement Agreement*

The parties to the Google Book Search lawsuit reacted to some points of criticism when they proposed an amended settlement agreement on November 13, 2009. Among the most important changes introduced by the revised settlement proposal are limitations on the settlement's scope as well as changes to the Book Rights Registry. Under the revised settlement, books that were not published in the United States, Canada, the United Kingdom or Australia are only covered if they are registered in the United States.¹⁸⁴

The changes to the Book Rights Registry are designed to accommodate the interests of orphan works' rights owners as well as rights owners of works that are out of print. These changes regard the institutional make-up of the Book Rights Registry, the rights that the Registry can grant and the administration of the funds it holds on behalf of orphan works owners.¹⁸⁵ Under the first settlement agreement, the Book Rights Registry would only have consisted of (known) authors and publishers.¹⁸⁶ Under the revised settlement, the Registry would have an "independent fiduciary" to oversee unclaimed works.¹⁸⁷ The fiduciary may license the use of books to possible competitors of Google "to the extent permitted

¹⁸¹ See Statement of Marybeth Peters, *supra* note 14.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ Amended Settlement Agreement § 1.19, *The Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136 (S.D.N.Y. filed Nov. 9, 2009) [hereinafter Amended Settlement Agreement] available at <http://books.google.com/googlebooks/agreement>.

¹⁸⁵ See Supplemental Notice to Authors, Publishers and Other Book Rightsholders about the Google Book Settlement, *Authors Guild, Inc. v. Google, Inc.* (S.D.N.Y. 2010), available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/intl/en/Supplemental-Notice.pdf (last visited Oct. 19, 2010).

¹⁸⁶ See Original Settlement Agreement, *supra* note 3, §§ 1.132, 1.142, 2.1(c).

¹⁸⁷ Amended Settlement Agreement, *supra* note 184, § 6.2(b)(iii).

by law.”¹⁸⁸ However, the extent to which the use of orphan books is presently permitted by law is non-existent. As things stand, Google would still hold a monopoly with respect to orphan and out-of-print books. Possible competitors would only benefit from this provision if Congress enacted orphan works legislation that would provide for license agreements.¹⁸⁹

The changes to the registry’s administration and distribution of unclaimed funds are designed to prevent unjust enrichment on the side of known rights holders of copyrighted books to the detriment of unknown ones. Under the original settlement, funds for unclaimed works would have been held for five years.¹⁹⁰ Then they would have been distributed to members of the Book Rights Registry, that is, rights holders of books other than the ones for which the royalties were paid.¹⁹¹ Under the revised settlement, the funds would be held for a total of ten years.¹⁹² At the end of the term, they would be donated to charity.¹⁹³

A third change would provide for the Book Rights Registry to compile a database of unclaimed works.¹⁹⁴

D. Comparison with the Proposed Legislative Solutions

Interestingly, the proposed settlements envision a solution for orphan and out-of-print books that shares characteristics both of the American and the European legislative proposals. Procedurally, the settlements are very much a product of American law, if a curious one. Class action lawsuits as we know them in the United States do not exist in Member States of the European Union.¹⁹⁵ The lack of this procedural device accounts for part of

¹⁸⁸ *Id.* § 6.2(b)(i).

¹⁸⁹ *See* Band, *supra* note 58, at 296.

¹⁹⁰ Original Settlement Agreement, *supra* note 3, § 6.3(a)(i).

¹⁹¹ *Id.*

¹⁹² Amended Settlement Agreement, *supra* note 184, § 6.3(a)(i)(3).

¹⁹³ *Id.*

¹⁹⁴ *See id.* § 3.1(b)(ii).

¹⁹⁵ In 2008, the European Commission has published a Green Paper on Collective Consumer Redress in which it proposes the introduction of class action lawsuits based on the American model. Currently, only thirteen Member States provide for collective redress, and the level of protection varies significantly from Member State to Member State. *See, e.g.*, Harald Koch & Joachim Zekoll, *Europäisierung der Sammelklage mit*

the outrage and general surprise expressed in Europe and elsewhere when the first settlement agreement was proposed (the scope of which was, admittedly, mindboggling even for American lawyers).

1. Book Rights Registry

Substantively, however, the settlements do resemble in certain respects what the European Commission is proposing in order to deal with the orphan works problem within Europe. This is especially true for one of the settlements' less controversial parts. This feature is one that the proposed American orphan works legislation did not contain—the creation of a Book Rights Registry which would be able to grant collective licenses for digitization and online display of books (the precise make-up of the registry and the rights it could grant were subject to much debate, but the creation of the registry as such inspired relatively little controversy).¹⁹⁶

According to the bills introduced in Congress, potential users of orphan works who have conducted a reasonably diligent search could use these works without having to obtain a license.¹⁹⁷ Only if the rights owner reappeared and asserted his or her rights would the user have to pay a “reasonable compensation.” Both the European Commission and the parties involved in the Google Book Search Case envision a system in which the user of a copyrighted work would pay a royalty before the use of said work and independently of the chances that the rights owner will eventually reappear.¹⁹⁸ They each provide that these royalties be paid to and distributed by a centralized institution.¹⁹⁹ Under the Google Book Search Settlement, that centralized entity would be the Book Rights Registry.²⁰⁰ In the European context, national

Hindernissen [The Stony Road to a Europeanization of Collective Actions], 2010 ZEUP: J. EUROPEAN PRIVATE L. 107, 107–28 (2010) (Ger.).

¹⁹⁶ See *supra* Part II.C.

¹⁹⁷ See *supra* Part II.A.

¹⁹⁸ See *supra* Part II.B; see also Original Settlement Agreement, *supra* note 3; Amended Settlement Agreement, *supra* note 184.

¹⁹⁹ Compare Original Settlement Agreement, *supra* note 3, with Amended Settlement Agreement, *supra* note 184.

²⁰⁰ See Amended Settlement Agreement, *supra* note 184, § 6.1.

rights clearance centers that would serve as access points to multiple existing collective management societies would perform the same function.²⁰¹ Much like the Book Rights Registry, these collective management societies are private, voluntary entities.²⁰² European authors and publishers, composers, performing and visual artists and photographers are free to join collective management societies for their particular group of works but do not have to.²⁰³ In countries that provide for extended collective licenses, rights holders have the right to opt out of the system.²⁰⁴

To be sure, there are important differences between the Book Rights Registry and national Rights Clearance Centers as envisioned by the European Union. The first is of course the scope of the settlement. The Google Book Search Settlement would only deal with books whereas the proposed European solution would be applicable to all copyrighted works.²⁰⁵ For now, the Registry would only grant Google a license to use orphan works. Google's competitors would have to hope for either a change in the law that provides for licensing agreements with respect to orphan works, would have to strike individual deals with individual (unknown or unlocatable) rights owners, or would have to use orphan works without permission in the hopes of eventually finding themselves defendants in a class-action lawsuit. The Rights Clearance Centers, by contrast, would not establish a monopoly. They would be able to negotiate licenses with all possible users.

Another difference regards the oversight to which the respective institutions would be subject. Collective management societies in Europe are overseen by an administrative agency, regarding not only their organizational make-up but also the rights they grant and the dividends they pay. In many EU Member States, parliaments have enacted statutory law to prescribe the

²⁰¹ See *supra* text accompanying note 112.

²⁰² See *supra* text accompanying note 112.

²⁰³ See *supra* text accompanying note 119; see also text accompanying note 112.

²⁰⁴ See, e.g., Mihály Ficsor, *Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 38, 47–48 (Daniel Gervais ed., 2006).

²⁰⁵ Compare Amended Settlement Agreement, *supra* note 184, § 1.19, with *supra* Part II.B.

precise contours for this oversight.²⁰⁶ National Rights Clearance Centers too would be subject to such an administrative control.²⁰⁷ The Book Rights Registry, by contrast, is overseen by the United States District Court for the Southern District of New York,²⁰⁸ an institution arguably less well suited than an administrative body for permanent regulation of such a massive enterprise as the Book Rights Registry in its currently envisioned form.

2. Centralized Database

Another similarity between the framework envisioned by the Google Books settlements and the recommendations issued by the European Commission regards the creation of a centralized database. If the settlement gets approved, the Book Rights Registry it establishes will “own and maintain a rights information database for Books and Inserts and their authors and publishers.”²⁰⁹ The database would contain and make publicly available information about all works for which a rights holder has registered with the Book Rights Registry, the identity of any registered rights holder for a given book, the rights granted to Google by the owner of the book, as well as the copyright status of works that may be covered by the settlement.²¹⁰ One important purpose of such a registry is to reduce the number of orphan books. The interlinked national databases envisioned by the European Commission serve the same purpose.²¹¹ Of necessity, the scope of the European databases would be broader than the one established pursuant to the terms of the Google Books settlement. These databases would contain ownership information regarding all

²⁰⁶ See, e.g., VERWERTUNGSGESELLSCHAFTSGESETZ (Austria), Art. 65/2002; Wet betreffende het auteursrecht en de naburige rechten [LAW ON COPYRIGHT AND RELATED RIGHTS] of June 30, 1994, BELGISCH STRAATSBAD [B.S.] [OFFICIAL GAZETTE OF BELGIUM], Jul. 27, 1994 (Belg.); Art. L. 321 Code de la propriété intellectuelle [INTELLECTUAL PROPERTY CODE], 2010 (Fr.); Urheberrechtswahrmungsgesetz [COPYRIGHT ADMINISTRATION ACT], Sept. 9, 1965 (Ger.); Ley de propiedad intelectual (INTELLECTUAL PROPERTY ACT) art. 142 (L.P.I. 1996) (Spain).

²⁰⁷ See generally i2010 *supra* note 112, at 6–7.

²⁰⁸ See Amended Settlement Agreement, *supra* note 184, § 9.12.

²⁰⁹ *Id.* § 6.1(b).

²¹⁰ *Id.* § 6.6 (c)(1), (c)(3), (d)–(e).

²¹¹ See *supra* text accompanying note 112.

groups of copyrighted works.²¹² They would not only cover books but images, photos, movies, etc.

Here, again, the parties to the Google Books case and the drafters of the European Commission's guidelines provide for solutions that are more akin to each other than to the bills introduced in Congress. These bills do not provide for the establishment of any such database. Congress hoped for privately created, competing databases that would ideally contain information about works registered with the Copyright Office as well as information about works owned by people or corporations that had, for whatever reason, been reluctant to register. Some but not all of the databases would be certified by a government agency. Both the *Orphan Works Act of 2008* (H.R. 5889) and the *Shawn Bentley Orphan Works Act* (S. 2913) provided that the Register of Copyright would certify databases of pictorial, graphic and sculptural works.²¹³ No such certification process was envisioned for databases of books, musical and audiovisual works. The Register would have created and maintained an online list of all certified databases.²¹⁴ One such private initiative, one could say, has led to the proposal of the Book Rights Registry's database, a database to be certified by a court rather than by the Register of Copyrights.

3. Reasonably Diligent Search

There is, however, one area in which the United States Copyright Office (and, by extension, the representatives and senators who have introduced orphan work bills into Congress) and the European Commission have proposed similar requirements, and that is one which does not have an equivalent in the settlement proposed by the parties to the Google Books case. Both under the American proposals and under the guidelines that

²¹² See 2010 DIGITAL LIBRARIES COPYRIGHT SUBGROUP'S RECOMMENDED KEY PRINCIPLES FOR RIGHTS CLEARANCE CENTERS AND DATABASES FOR ORPHAN WORKS 4-5 (Nov. 26, 2007), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/key_principles_ow.pdf.

²¹³ Orphan Works Act of 2008, H.R. 5889, 110th Cong., § 3(a)(1) (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. § 3 (2008).

²¹⁴ H.R. 5889 § 3(b)(1); S. 2913 § 3.

the European Commission and its committees established, a person or entity interested in using an orphan work would only be allowed to do so after having conducted and documented a reasonably diligent search. In Europe, this documentation would be the requirement for obtaining an orphan works license.²¹⁵ In the United States, proof of a reasonably diligent search would be required in order to benefit from the limitation on remedies, should a lawsuit arise.²¹⁶

The main difference between the two proposals (and one that, if implemented, would prove to be significant) is that, according to the European Commission's High Level Expert Group's Copyright Subgroup, Member States should respect diligent search criteria set up by other states, be they members of the European Union or not.²¹⁷ According to the American bills, search criteria established by third countries would not be recognized.²¹⁸

Google and its partners, by contrast, and not surprisingly, do not require Google to conduct a diligent search before scanning and displaying books that are out of print or where the rights holder is unknown or cannot be located. Under the system proposed by the parties to the Google Books case, the settlement would grant Google a license to use books, including out-of-print and orphan books, in exchange for sharing the income it generates from the use of such books with the Book Rights Registry.²¹⁹ Google would not have to search for the individual owner of each book it scans, and would not have to fear that it could be subjected to any lawsuit in which it might have to pay damages, including statutory damages.

IV. A TRANSATLANTIC LEGISLATIVE SOLUTION

The settlement proposal differs in important respects from the legislative solutions proposed in the United States and the European Union. However, it does share some characteristics with

²¹⁵ See 12010, *supra* note 112, at 6.

²¹⁶ H.R. 5889 § 2(b)(1)(A)(i); S. 2913 § 2(b)(1)(A)(i).

²¹⁷ See FINAL REPORT, *supra* note 107, at 14.

²¹⁸ See H.R. 5889 § 2(b)(2)(A)(ii)(II); S. 2913 § 2(b)(2)(A)(iii).

²¹⁹ See Settlement Agreement, *supra* note 3, § 2.1(a).

both of them. Because of these similarities, the proposed settlement presents opportunities for a common, transatlantic, legislative solution to the orphan works problem. In some respects, it could serve as a model for such a solution. This section will explain how and why the settlement could do so as well as what such a transnational legislative solution might look like.

Before envisioning a common solution, it is important to trace the settlement's impact in the European Union. This section will describe the initial resistance in some Member States towards the settlement as well as towards Google Book Search more generally. It will show that this reticence has given way to a general willingness to collaborate with Google. It will also show that the European Commission, unlike some Member States, has quickly recognized the opportunities the settlement presented, and has tried to seize the momentum it created. The Commission clearly hoped to pressure Member States into working harder on finding a solution to the orphan works problem. In fact, the Commission went so far as to openly question core provisions of European copyright law in order to find a better solution to the orphan works problem—one, as the Commission stressed, that would put similar duties on potential users of orphan works as they would have in the United States (and not stricter ones, as would be the case now).²²⁰ These reactions in Europe are as much an opportunity for a transatlantic solution as the framework that the settlement might establish if it is approved.

This is all the more true since the settlement has had a similar effect here in the United States. By including foreign authors, the first settlement proposal changed the orphan works debate in the United States. It focused attention on the need for a solution that takes into account, and makes provision for, situations elsewhere—notably, in America's most natural partner in this regard, the European Union.

A. Initial Opposition in EU Member States

Outside the United States, the settlement proposals were particularly closely scrutinized in Europe. European countries

²²⁰ See *Europeana Next Steps*, *supra* note 38, at 6.

were especially interested in the settlement because a high percentage of foreign books held by Google's partner libraries and, consequently, scanned by Google, were written and published in Europe. The original settlement agreement would have covered these books, independently of whether they were registered with the Copyright Office in the United States. Some European authors felt reminded of the nineteenth century when books that were published outside the United States were not protected under American copyright law. (One only needs to think of Charles Dickens' lobbying efforts to secure copyright protection for British authors in the United States which led him to comment about "the exquisite justice of never deriving sixpence from an enormous American sale of all my books").²²¹ Because their books were covered, many European publishers, authors, publisher and author organizations, and collective management societies filed amicus briefs in opposition to the original settlement proposal.²²² The same is true of two EU Member States where the settlement sparked strong opposition: France and Germany.²²³

The parties to the lawsuit took these objections into account when they decided to significantly reduce the size of the class in the amended settlement proposal. Meanwhile, opposition in Europe initially continued. This opposition was especially vocal in France where publishers and authors had expressed their opposition to Google Books by bringing suit against Google for scanning books of French authors and seeking €15 million in resulting damages.²²⁴ On December 18, 2009, a French court ordered Google to pay €300,000 in damages and €10,000 in fines per day until it removed the plaintiffs' books from its online

²²¹ CHARLES DICKENS, 2 THE LETTERS OF CHARLES DICKENS 1840–1841, 421 (Madeline House & Graham Storey eds., Oxford University Press 1969).

²²² In addition to several publisher and author organizations, more than ninety German, twenty-five Dutch, and fifteen Swedish publishers filed objections. *See* Band, *supra* note 58, at 314 n.827.

²²³ *See supra* note 168 and accompanying text.

²²⁴ The suit was brought by the publishing group La Martinière, publishers of Le Seuil, among others, backed by the France's 530 member publishing association Syndicat national de l'édition (SNE) and the authors group Société des gens des lettres (SGDL) in 2006 and went to trial on September 24, 2009. *See* Bruce Crumley, *Europe vs. Google: The Next Chapter*, TIME, Dec. 11, 2009, <http://www.time.com/time/world/article/0,8599,1946920,00.html#ixzz12AL190p4>.

database.²²⁵ Google has appealed the verdict. During the Paris Book Fair at the end of March 2010, Gallimard and two other French publishers announced that they too were planning to sue Google for scanning their books despite explicit requests that their books not be scanned.²²⁶

At a press conference in September 2009, Serge Eyrolles, president of the publishing association Syndicat national de l'édition ("SNE") had already described Google Books in the following manner: "It is an infernal machine, it never stops . . . It is a disgrace. It is cultural rape."²²⁷ In early December, France's President Nicholas Sarkozy struck a similar tone when he said, in an apparent reference to Google, "[w]e won't let ourselves be stripped of our heritage to the benefit of a big company, no matter how friendly, big or American it is."²²⁸

At the same time, the French government has underlined its intention to maintain control over the digitization of its cultural heritage. On December 14, 2009, president Sarkozy vowed to spend nearly €750 million of a government bailout program on computer scanning of French literary, audiovisual and other cultural works.²²⁹ France's culture minister Frédéric Mitterand summarized the government's position as follows: "It is not up to any individual organization to determine policy on a matter as important as the digitization of our global heritage. I'm not going to leave this issue up to simple laissez-faire."²³⁰ He went on to explain: "For my part, there is not any Anti-Americanism.

²²⁵ See Matthew Saltmarsh, *Google Loses in French Copyright Case*, N.Y. TIMES, Dec. 18, 2009, <http://www.nytimes.com/2009/12/19/technology/companies/19google.html>.

²²⁶ See Barbara Casassus, *French Publisher Gallimard to Sue Google*, THE BOOKSELLER.COM (Mar. 3, 2010), <http://www.thebookseller.com/news/115133-french-publisher-gallimard-to-sue-google.html.rss>.

²²⁷ See Ben Hall, *Paris Court to Hear Case on Google Books*, FIN. TIMES, Sept. 24, 2009, http://www.ft.com/cms/s/0/5f377278-a869-11de-9242-00144feabdc0.html?Ftcamp=rss&nclick_check=1.

²²⁸ See Scott Sayare, *France to Digitize Its Own Literary Works*, N.Y. TIMES, Dec. 15, 2009, http://www.nytimes.com/2009/12/15/world/europe/15france.html?_r=1.

²²⁹ See *id.*

²³⁰ Abhijeet Kashyap, *European Ministers Plans [sic] to Counter Google's Book-Scanning Project*, EBRANDZ.COM (Nov. 30, 2009, 12:11 PM), <http://news.ebrandz.com/google/2009/2997-european-ministers-plans-to-counter-googles-book-scanning-project.html>.

Nevertheless, I believe America is not a monolith, and different opinions must be expressed. That is why I do not want the State to surrender before the markets.”²³¹

The €750 million are designated to finance a public-private partnership for the digitization of cultural works.²³² Bruno Racine, president of the *Bibliothèque Nationale de France*, recently underlined the importance of forming partnerships with the private sector in order to finance large-scale digitization projects.²³³ According to him, people in France were less concerned with the fact that Google was a private company; what troubled them was Google’s dominant position in the marketplace.²³⁴

Similar to France (albeit on a much more modest scale), the German cabinet decided on what it deemed “a reasonable response to Google.”²³⁵ On December 2, 2009, it agreed to fund the *Deutsche Digitale Bibliothek* (German Digital Library), a collection of literary, pictorial, sculptural, audiovisual and musical works to be made available online and to be linked with Europeana. In what cultural minister Bernd Neumann called a “quantum leap into the world of digital information,” Germany will spend an initial €5 million to set up the library and will provide it with an annual budget of €2.6 million.²³⁶ The money will come from an economic bailout program.²³⁷ As of now, no public-private partnership is planned.

It is both striking and instructive to observe how emotionally laden is the language used by the French government. Statements like Sarkozy’s that, “[w]e won’t let ourselves be stripped of our heritage to the benefit of a big company” or Mitterand’s, “[i]t is not up to any individual organization to determine policy on a matter as important as the digitization of our global heritage” sound as if the two gentlemen were describing a cultural war. The

²³¹ *Id.*

²³² *See* Sayare, *supra* note 221.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See* Kate Bowen, *Berlin Plans Response to Google Books Project*, DEUTSCHE WELLE (Dec. 3, 2009), <http://www.dw-world.de/dw/article/0,,4964982,00.html>.

²³⁶ *Id.*

²³⁷ *Id.*

word “heritage” itself is a much more emotionally charged term than the ones used in the United States. The German government did not worry about the country’s possible “surrender before the markets.” However, it too, like its French counterpart, employed emotionally charged language when it described its efforts at digitizing works of authorship, an explicit response to the Google Books settlement, as a “quantum leap into the world of digital information.”

B. National Agreements with Google

Despite the vehemence noted above, at present opposition in Europe seems to be fading. Since books published in the United Kingdom and those registered in the United States would be the only European books covered under the amended settlement, most European countries have the opportunity to negotiate their own contracts with Google.

Spain was among the first to seize this opportunity. The *Universidad Complutense de Madrid* (Complutense University of Madrid) and the *Biblioteca de Catalunya* (National Library of Catalonia) have been partner libraries to Google Books since 2006 and 2007, respectively. Both libraries do, however, only grant Google the rights to digitize public domain books. Recently, the *Prado* allowed Google to digitize and show parts of its collection on Google Earth.²³⁸ In addition, the *Biblioteca Nacional de España* (National Library of Spain) has announced that it will make snippets of each book in its Hispanic Digital Library available on Google Books.²³⁹

²³⁸ See Victoria Burnett, *Prado and Google Bring Masterpieces to Web*, N.Y. TIMES, Jan. 3, 2008, <http://www.nytimes.com/2009/01/13/technology/13iht-google.4.19325719.html>. According to Javier Rodríguez Zapatero, director of Google Spain, Google took hundreds of photographs of each of the paintings and patched them together. The resolution of the reproductions is 1,400 times higher than it would be if a 10 megapixel digital camera had been used. Reproducing Hieronymus Bosch’s triptych “The Garden of Earthly Delights” alone required 1,600 photos. Miguel Zuzaga, director of the Prado, explained: “What this project offers is a level of definition that normally only we, the staff of the museum, see.” *Id.*

²³⁹ See Ana Mendoza, *Spain’s National Library to Sign Google Books Deal*, LATIN AM. HERALD TRIB., <http://www.laht.com/article.asp?ArticleId=336895&CategoryId=13003> (last visited Oct. 3, 2010). Users interested in reading the full text of the work in question will be able to do so on the library’s website, free of charge. *Id.*

The Italian government, profoundly skeptical of Google in other matters (three of Google's executives were recently convicted to suspended jail sentences for violation of Italy's privacy laws because they had allowed users to post a video on Google Video that showed the beating of an autistic boy),²⁴⁰ struck a deal with Google Book Search that provides for the digitization of up to one million public domain books held by the *Biblioteca Nazionale di Firenze* and the *Biblioteca Nazionale di Roma* (National Libraries of Florence and Rome), including works by Dante, Petrarch, Galileo and Macchiavelli as well as rare scientific works from the eighteenth century and rare first editions from the nineteenth century.²⁴¹ Under the agreement, Google obtained exclusive rights to digitize these works.²⁴² In exchange, the libraries may provide Europeana with digital copies of the books that Google will scan.²⁴³

It is the first time that a national government has negotiated such a contract with Google.²⁴⁴ Italy's Minister of Cultural Heritage cited budgetary concerns as one of the main reasons for entering into the agreement.²⁴⁵ He underlined the importance of that deal as follows, using just as emotional a language to stress its opportunities as the French government had used to describe the dangers of Google Books:

²⁴⁰ See Elisabetta Povoledo, *Italian Judge Cites Profit as Justifying a Google Conviction*, N.Y. TIMES, Apr. 12, 2010, <http://www.nytimes.com/2010/04/13/business/global/13google.html?scp=1&sq=italian%20judge%20cites%20profit&st=cse>.

²⁴¹ See *Google and the Italian Ministry of Cultural Heritage Reach Agreement to Digitize Works from Italian Libraries*, GOOGLE (Mar. 10, 2010), <http://sites.google.com/a/pressatgoogle.com/italianlibraries/press-release-and-or-googlegram>. Three hundred thousand of these books are held by the National Library of Florence which has granted Google exclusive rights to these books. See Laura Montanari, *Su Google 300mila libri della Biblioteca Nazionale*, LAREPUBBLICAFIRENZE.IT, <http://firenze.repubblica.it/dettaglio/su-google-300mila-libri-della-biblioteca-nazionale/1709966> (last visited Oct. 3, 2010).

²⁴² See Montanari, *supra* note 241.

²⁴³ See Christopher Emsden, *Google Reaches Books Deal with Italy*, WALL ST. J., Mar. 10, 2010, <http://online.wsj.com/article/SB10001424052748703701004575113511364939130.html>.

²⁴⁴ *Id.*

²⁴⁵ See *Google to Digitise Ancient Italian Books*, BBC NEWS, Mar. 10, 2010, <http://news.bbc.co.uk/2/hi/8561245.stm>.

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The agreement carries a strong political message. It is the first one with a government that allows a Web leader access [to] a national library collection. Italy is positioning itself at the forefront of digitization, believing that the Internet can enrich and spread cultural heritage. In order to achieve this goal, we have chosen to work with a technology leader. We hope that this agreement represents just a point of departure, and that soon many other books may be available on the Internet. This agreement will help Italian institutions spread Italian culture throughout the world and bring the new generation of Italians living abroad closer to their heritage.²⁴⁶

Mario Resca, Italy's Executive Director for Management and Promotion of Cultural Heritage, expresses Italy's hopes in signing the deal with Google:

I would describe [this] agreement with Google as historic. It combines three objectives: first to digitize and disseminate the enormous Italian book treasures; second, to preserve this heritage from the weather and wear of time. We all remember the 1966 flood in Florence. If this would happen again, we might lose the paper copies of the books, but not their contents. Third, by spreading this heritage for free on the Internet, we promote awareness throughout the world of our culture and mak[e] it accessible to everyone. By working with Google, we will make our books the equivalent of a business card presenting Italian culture. This will encourage many to deepen their understanding of Italian culture by visiting our country.²⁴⁷

The Director General of the venerable *Bayerische Staatsbibliothek* (Library of the State of Bavaria), one of the first libraries outside of the United States that entered into an agreement

²⁴⁶ See *Google and the Italian Ministry of Cultural Heritage Reach Agreement to Digitize Works from Italian Libraries*, *supra* note 241.

²⁴⁷ *Id.*

with Google (in 2007), struck a similar tone: “With today’s announcement we are opening our library to the world and bringing the true purpose of libraries—the discovery of books and knowledge—a decisive step further in into the digital era. This is an exciting effort to help readers around the world discover and access Germany’s rich literary tradition online—whenever and wherever they want.”²⁴⁸ Existing agreements seem to raise the pressure for other libraries to collaborate with Google as well. When the *Österreichische Nationalbibliothek* (Austrian National Library), Austria’s National Library, allowed Google to digitize its complete holdings of sixteenth to nineteenth century books, it released a statement stressing that it was following the example of other renowned libraries such as those of Harvard, Stanford, Oxford, or the Library of the State of Bavaria.²⁴⁹ The agreement allows the library to make the digitized books available on its own website as well as on Europeana.²⁵⁰ As the library’s General Director, Johanna Rachinger, stated, “[t]his project fulfills an important goal of the Austrian National Library: the democratization of knowledge.”²⁵¹

Even France has recently begun to explore this opportunity. As noted above, the *Bibliothèque Nationale de France* is the European national library that has been by far the most active in digitizing its collection of over fourteen million books and several million other documents.²⁵² Its website, Gallica 2, not only grants users free access to public domain material, but also contains links

²⁴⁸ See *Library Partners*, GOOGLE BOOKS, <http://www.google.com/googlebooks/partners.html> (last visited Oct. 3, 2010) (quoting Rolf Griebel, Director General of the Bavarian State Library). For more information on this agreement, see *Kooperation mit Google*, BAYERISCHE STAATSBIBLIOTHEK (Mar. 6, 2007), [http://www.bsb-muenchen.de/Einzeldarstellung.402.0.html?tx_ttnews\[tt_news\]=617&tx_ttnews\[backPid\]=74&cHash=9b12987fd2](http://www.bsb-muenchen.de/Einzeldarstellung.402.0.html?tx_ttnews[tt_news]=617&tx_ttnews[backPid]=74&cHash=9b12987fd2). In it, and very much in line with Sergey Brin’s statement in *The New York Times*, he named the fire that destroyed parts of Weimar’s famous Anna Amalia library in 2004 as one motivation for entering into the agreement with Google.

²⁴⁹ See *Austrian Books Online*, ÖSTERREICHISCHE NATIONALBIBLIOTHEK, <http://www.onb.ac.at/bibliothek/austrianbooksonline.htm> (last visited Oct. 3, 2010).

²⁵⁰ See *id.*

²⁵¹ See *Library Partners*, *supra* note 248 (quoting Johanna Rachinger, General Director of the Austrian National Library).

²⁵² *Id.*

to copyrighted content published by French publishing houses.²⁵³ Being the most active of the European national libraries, it was also the first national library to realize the immense costs that come with mass-digitization. According to Mr. Racine, digitization of the library's entire catalogue would cost more than \$1.5 billion.²⁵⁴ This led the library to initiate widely publicized talks with Google in August 2009.²⁵⁵ Public outcry led the government to put pressure on the library to end its negotiations with Google, commissioning at the same time a *Report on the Digitalization of the Written Heritage (Rapport sur la numérisation du patrimoine écrit—Report Tessier)*.²⁵⁶

This report was released on January 12, 2010.²⁵⁷ It criticized the current agreements that libraries reached with Google—Lyon's municipal library just struck a deal which gives Google exclusive rights to its collection for twenty-five years.²⁵⁸ Nevertheless, the report advocated a partnership with the company, provided that the government would keep commercial control and digital distribution rights for the works offered to Google.²⁵⁹ The government endorsed the report's findings and officially announced the beginning of negotiations with Google. Mitterrand told *Le Monde*:

Google entered the European scene as a conquering hero and many institutions threw open their doors on the basis of agreements which I find unacceptable. Many of these agreements demand excessive confidentiality and a degree of exclusivity

²⁵³ See GALLICA, <http://gallica.bnf.fr> (last visited Oct. 3, 2010).

²⁵⁴ *Id.*

²⁵⁵ See, e.g., Benjamin Ferran, *La BNF se laisse séduire par Google*, LE FIGARO (Aug. 18, 2009), <http://www.lefigaro.fr/hightech/2009/08/18/01007-20090818ARTFIG00332-la-bnf-se-laisse-seduire-par-google-.php>; Charles Bremner, *Google Bruises Gallic Pride as National Library Does Deal with Search Giant*, TIMES, Aug. 19, 2009, http://technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article6800864.ece.

²⁵⁶ See DU MINISTERE DE LA CULTURE ET DE LA COMMUNICATION, RAPPORT SUR LA NUMERIZATION DU PATRIMOINE ECRIT (Jan. 12, 2010), available at <http://www.culture.gouv.fr/mcc/Actualites/A-la-une/Mission-sur-la-numerisation-du-patrimoine-ecrit/Rapport-Tessier>.

²⁵⁷ *See id.*

²⁵⁸ *Id.* at 15, 17.

²⁵⁹ *Id.* at 30–32.

which is essentially impossible, as well as clauses that are superbly vague concerning copyright. . . . We propose a quite different dialogue: a truly transparent exchange of files without confidentiality or exclusivity and which respects copyright.²⁶⁰

He was uncertain whether Google would accept France's offer and declared that he would travel to the United States to discuss details of a possible deal.²⁶¹ If France's conditions proved unacceptable for Google, he claimed that he would then address himself to other private partners (the *Report Tessier* mentions Microsoft and Yahoo!, among others, as possible alternatives to Google).²⁶²

Mitterrand's statement may sound bold. Ultimately, though, it represents a capitulation before the realities of the market. The French government realized that the task of digitization required the financial strength and the know-how of private companies and that it could not be done on a public budget alone.

C. *The European Commission's Position*

The settlement proposals have changed the mindset of the European Union and its Member States with respect to the feasibility of mass-scale digitization efforts on a public budget. They have done the same with respect to some cherished features of Continental European copyright law more broadly that pose problems for the utilization of orphan works.

The European Commission was at the forefront of this realization. Despite vehement protest from some Member States, the Commission elected not to write an amicus brief on behalf of the European Union in opposition to the original settlement.

²⁶⁰ "Google est entré en Europe en conquérant et beaucoup lui ont ouvert la porte en signant des accords que je trouve inacceptables. Ils reposent sur une confidentialité excessive, des exclusivités impossibles, des clauses désinvoltes, voire léonines au regard du droit d'auteur. . . . Nous allons leur proposer un tout autre dialogue: un échange de fichiers sans confidentialité ni exclusivité, dans la transparence et le respect des auteurs." See *La Révolution Numérique selon Frederic Mitterrand*, LE MONDE (Jan. 12, 2010), http://www.lemonde.fr/culture/article/2010/01/12/la-revolution-numerique-selon-frederic-mitterrand_1290461_3246.html.

²⁶¹ *Id.*

²⁶² *Id.*

Instead, Viviane Reding, the Commissioner for Information Society and Media, and Charlie McCreevy, the Commissioner for the Internal Market and Services, issued a joint statement in which they stressed the necessity of, and potential for, public-private partnerships (with, for example, Google) as a means to effect the digitization of books.²⁶³ For the first time, the Commission considered turning the running of Europeana over to the private sector.²⁶⁴ There can be little doubt that the Google Book Search Case and the original settlement has had no small part in leading the Commission to change tack on this issue.

As noted above, the European Commission had for some time expressed frustration with Member States' lackluster efforts to digitize the collections of their national libraries.²⁶⁵ The Google Book Search settlement seemed like a welcome opportunity to change that state of affairs. During an information hearing on the original settlement, the Commission stressed the importance of quickly developing a European framework similar to the one provided for by the proposed settlement.²⁶⁶ A month later, Commissioner Reding again noted that:

Important digitization efforts have already started around the globe. Europe should seize this opportunity to take the lead, and to ensure that books digitisation takes place on the basis of European copyright law, and in full respect of Europe's cultural diversity. Europe, with its rich cultural heritage, has most to offer and most to win from books digitisation. If we act swiftly, pro-competitive European solutions on books digitisation may well be sooner operational than the solutions presently envisaged under the Google Books Settlement in the United States.²⁶⁷

²⁶³ It Is Time, *supra* note 68.

²⁶⁴ *Europeana Next Steps*, *supra* note 38, at 8–9.

²⁶⁵ Europe's Digital Library Doubles, *supra* note 69.

²⁶⁶ It Is Time, *supra* note 68.

²⁶⁷ Press Release, European Commission, European Commission Puts Challenges of Books Digitisation for Authors, Libraries and Consumers on EU's Agenda (Oct. 19, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1544>.

Viviane Reding indeed underlined the importance of ensuring “that books digitisation takes place on the basis of European copyright law.”²⁶⁸ At the same time, commissioners Reding and McCreevy stated their intention to find “a truly European solution.”²⁶⁹ What is more, they stressed that, “we also need to take a hard look at the copyright system we have today in Europe” that includes “finding an online family for orphan and out-of-print works.”²⁷⁰ Because the Commission, in its last statements on the matter, strongly emphasized the cross-border relevance of the digitization of works (which is needed to trigger the European Community’s competence to enact laws in that area), we might see a proposal for an EU-wide piece of legislation that in all likelihood would deal with the legal status of both orphan and out-of-print works.²⁷¹ There is every reason to expect that these changes will be radical.

In Winter 2009, Google made an announcement on the availability of Google Book Search for mobile phones where it indicated that it would make over 1.5 million public domain books available in the United States, but only “over a half a million outside the US.”²⁷² Alarmed by these differences, the Commission began to publicly discuss the idea of introducing a cut-off date for copyright protection similar to the one in place in the United States for works that were published prior to 1923 and before which a lower threshold for a digital search would be required in order to enhance the number of works which would be available through Europeana.²⁷³

Given that some EU Member States are founding members of the Berne Convention, this statement is nothing short of revolutionary.²⁷⁴ In general, it seems as if support for the oldest

²⁶⁸ *Id.*

²⁶⁹ *See It Is Time*, *supra* note 68.

²⁷⁰ *Id.*

²⁷¹ *See Europeana Next Steps*, *supra* note 38, at 6.

²⁷² *See 1.5 Million Books in Your Pocket*, GOOGLE (Feb. 6, 2009), <http://booksearch.blogspot.com/2009/02/15-million-books-in-your-pocket.html>.

²⁷³ *See Europeana Next Steps*, *supra* note 38, at 6.

²⁷⁴ For a list of the founding members of the Berne Convention, see *Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Oct. 21, 2010).

and most venerable international copyright treaty is waning in the European Union. Part of the Commission's efforts to "make Europe's copyright framework fit for the digital age," was the launch of a consultation on Europeana.²⁷⁵ It posed sixteen questions for discussion.²⁷⁶ Question 8 is especially interesting in this regard. In it, the Commission asked:

How can the difference in the level playing field for digitising and making accessible older works between the US and Europe (in particular the 1923 cut-off date in the US, that places all material before 1923 in the public domain) be addressed in a pragmatic way (e.g. better databases of orphan and out-of-print works, a cut-off point that imposes lower requirements for diligent search in relation to orphan works)?²⁷⁷

A few years ago, it would have been impossible to openly think about addressing "the difference in the level playing field" by introducing a "cut-off point that imposes lower requirements for diligent search[es]." The question alone showed that the Commission had come a long way.

The responses the Commission received were not terribly surprising. The consultation yielded 118 responses, mostly from cultural institutions, above all from libraries.²⁷⁸ Their attitude was very similar to the one they had expressed in the public consultation the Commission had initiated in its *Green Paper on the Knowledge Economy* mentioned above.²⁷⁹ Cultural institutions would like to see further European harmonization of copyright law, and would advocate for a revision of the Berne Convention in

²⁷⁵ See Europe's Digital Library Doubles, *supra* note 69.

²⁷⁶ See EUROPEAN COMM'N, QUESTIONS FOR THE PUBLIC CONSULTATION 'EUROPEANA—NEXT STEPS,' available at http://web3.nlib.ee/cenl/docs/Europeana_consultation_CENL.pdf.

²⁷⁷ *Id.* at 2.

²⁷⁸ See *Online Consultation Europeana—Next Steps*, EUROPE'S INFO. SOC'Y, http://ec.europa.eu/information_society/activities/digital_libraries/cultural/consult_nextst eps/index_en.htm (last visited Sept. 29, 2010).

²⁷⁹ COPYRIGHT IN THE KNOWLEDGE ECONOMY, *supra* note 124, at 3–4. The Commission had received 372 responses, most of which came either from libraries, archives and museums (114) or from publishers (56), collecting societies and licensing agencies (47). *Id.*

order to address the challenges posed by the digital age. Rights holders would like to maintain the status quo.²⁸⁰ The future will show how successful the Commission will be in striking a balance between these two positions. In any event, its consistent questioning of the status quo seems to suggest a willingness to change.

D. The Path Forward

What can we learn from the European and American attempts to solve the orphan works problem? What do the settlement proposals teach us and how can we use the momentum they have created, both regarding the digitization of works and regarding obstacles to such digitization such as the orphan works problem? Is there an ideal solution to the orphan works problem?

Google Book Search (as well as European and other similar endeavors) have shown that a satisfying solution to the orphan works problem needs to cut across national boundaries for the simple fact that digitization and online display of such works inevitably creates cross-border issues. Google Book Search and the settlement it has given rise to have also proven the desperate need to find a legislative solution for that problem. Without legislation, we will either live in a world where works that could be digitized and digitally available for all of us will be locked up in dusty archives and/or where a potent market player like Google may obtain a monopoly for the use of orphan works.

The precise contours of an ideal legislative solution depend upon which activities we most want to encourage. If the aim is to allow individual, often non-for-profit uses of individual works such as the restoration of old movies, the publication of old manuscripts and the display of old photographs, the most efficient and cheapest solution would be the one that the two American bills have proposed: users who have conducted a reasonably diligent search would be allowed to use these works, knowing that, if sued, they would benefit from a (statutorily prescribed) limitation of

²⁸⁰ See *i2010: Digital Libraries Initiative: Europe's Cultural and Scientific Riches at a Click of a Mouse*, DIGITAL LIBRARIES INITIATIVES, http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm (last visited Oct. 21, 2010).

remedies. Under that system, no administrative agency, collective management society or other registry would have to be established and no royalties would have to be paid and administered that, ultimately, might never be claimed. The European approach, according to which users have to obtain a license before each individual use of an orphan work, would be expensive to establish and inefficient in practice.

If the main goal is to allow for mass-scale digitization and online display of vast repositories of works, the situation may be different. All efforts to build a digital library, be it a universal or regional one, a library limited to books or encompassing various groups of copyrighted works, have shown that a reasonably diligent search for and permission from every rights owner of every work individually is impossible. Google Book Search and Europeana, like many other projects conducted by national libraries, archives, cultural institutions and commercial enterprises around the world, have illustrated that the orphan works problem is most pressing in the area of mass-scale digitization of copyrighted works. At the same time, this is an area in which all of us have most to gain from the digital age and the opportunities it poses. Any solution to the orphan works problem should not only be mindful of users of individual works but first and foremost of users who attempt to digitize and make accessible massive numbers of such works.

If our aim is to create a world where a maximum number of works is available for a maximum number of people, and where rights owners are nevertheless compensated for the use of works they have created or otherwise own, we have to strengthen collective rights management, even if that weakens the individual rights holders' ability to negotiate contracts with possible users of their works. The reasons for that are simple: requiring potential users of such works to conduct a reasonably diligent search for the rights holder of each individual work would be prohibitively expensive.²⁸¹

²⁸¹ According to Jonathan Band it will cost roughly \$1,000 to clear the rights for each individual work. The license fee itself is not even included in that number. Band, *supra* note 58, at 229.

The Google Book Search Settlement proposal is clear evidence that collective rights management is in the common interest of rights holders and (large-scale) users of copyrighted works. If such a system is devised so that it does not create barriers to entry, provides for privacy protection and puts collective management organizations under strict governmental oversight to ensure that prices will be set fairly and revenues paid to those who own the works, it will be a system that would benefit not only rights owners and major companies such as Google, but public libraries, archives, museums and, ultimately, the public at large.

That said, establishing such a system will take time. Collective management organizations are much more prevalent in Europe than in the United States, but even in Europe, collective rights management differs for different groups of works. While rights holders of literary works are collectively organized in many European countries (much the same way in which they will be in the United States once the settlement gets approved, and with similar problems regarding the representation of authors' as opposed to distributors' rights), and while the same is true for rights holders of musical works (who are organized in equivalents of The American Society Of Composers, Authors And Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI")), photographers and other visual artists often are not. Depending on the outcome of the case, Google may have had the power to jump-start a collective management organization for books by way of litigation. It might be harder to do the same with respect to other groups of works. The system does, however, depend on the willingness of copyright owners to grant their rights to collective management organizations, and on the ability of such organizations to make contracts with interested users of the works they represent.²⁸²

Time, however, might not be the biggest hurdle to the establishment of such a system. In order to be effective, the system would have to break with cherished traditions. It would not

²⁸² See Henry Olsson, The Extended Collective License as Applied in the Nordic Countries, Presentation at the Kopinor 25th Anniversary International Symposium ¶ 7 (May 20, 2005), available at <http://www.kopinor.no/en/copyright/extended-collective-license/documents/The+Extended+Collective+License+as+Applied+in+the+Nordic+Coutries.748.cms>.

suffice to create a system of comprehensive voluntary collective rights management as that would not cover unknown and unlocatable rights holders. Instead, the system would have to be similar to the one Google and its partners proposed. It would have to be one in which all rights owners of a certain group of works, such as books, are covered unless rights holders opt out (that is, formally object to being covered).

Google and the publishers who sued them were not the first to devise such a system of extended collective licensing. The model for that system has been in place in parts of Europe for quite some time. In the Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden), licenses granted by collective management organizations cover not only rights owned by members of each organization and who thus have voluntarily transferred their rights. If membership in the society extends to a “substantial” number of rights holders of a certain category of works, a license extends to other rights holders of that category of works, even if they are not members of the society.²⁸³ In Nordic countries, these licenses apply to domestic and foreign rights holders as well as to unknown, unlocatable and deceased ones.²⁸⁴

That system could serve as a model not only for Google and its partners, but for legislatures in the United States and the European Union more broadly. In establishing such a system, legislatures would of course have to be mindful of obligations under international law. According to Article 5 II of the Berne Convention, protection of copyright may not be conditioned upon formalities. Mandatory collective licensing would clearly violate these requirements.²⁸⁵ A system of extended collective licenses, however, may comply with them.²⁸⁶ Nordic countries have long argued, and other countries as well as scholars have accepted, that extended collective licenses do not violate international law as

²⁸³ See *id.* ¶ 6.2 (discussing the system of extended collective licenses in general). A less restrictive system is in place in the Netherlands and Belgium. There, collective management organizations grant indemnity clauses to users who obtain a blanket license for their whole backlist. See *id.*; see also IViR, *supra* note 15, at 185.

²⁸⁴ See Daniel Gervais, *The Changing Role of Copyright Collectives*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 28 (Daniel Gervais ed., 2006).

²⁸⁵ Ficsor, *supra* note 204, at 47–50.

²⁸⁶ See Gervais, *supra* note 284, at 29–35.

long as they allow individual rights management in addition to collective rights management and provide for simple opt-out mechanisms.²⁸⁷ The statutes of all Nordic countries fulfill these criteria. They permit individual rights management and have simpler opt-out options than the ones which would enter into effect under the Google Books Settlement.²⁸⁸

Extended collective licenses would of course be most useful if users could obtain licenses for more than one country at a time. It will take some time before such a truly international system will be established—presuming, of course, that it can ever be. Since the ultimate goal is the digitization and online availability of human knowledge, and since such availability of necessity cuts across borders, legislatures should already direct their efforts towards establishing at least compatible national systems.

The ultimate goal would be the reduction of the number of orphan works. Therefore, legislatures should, in addition to strengthening collective rights management, aim to create, or at least incentivize the creation of, databases for ownership information of as many copyrighted works as possible. In addition to reducing the number of orphan works, that would have the benefit of facilitating individual license agreements between copyright owners and possible users of copyrighted works. Ideally, these databases would be interlinked so that they would be globally accessible.

States could use other supplemental strategies to create incentives for rights owners to provide information about themselves to possible users of their works. For instance, protection of rights management information could be made dependant on the condition that such rights management information includes information about the current copyright owner and how to reach him or her. The establishment of such a

²⁸⁷ Ficsor, *supra* note 204, at 47–50; *see also* T. Koskinen-Olsson, *Collective Management in the Nordic Countries*, in *COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS* 268–70 (Daniel Gervais ed., 2006); Olsson, *supra* note 282, ¶ 6.4; Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience—It's a Hybrid but Is it a VOLVO or a Lemon?*, 33 *COLUM. J.L. & ARTS* 471 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230.

²⁸⁸ Ricketson, *supra* note 167. *But see* Gervais, *supra* note 167 (presenting a more skeptical viewpoint).

requirement would be compatible with Article 12 of the World Intellectual Property Organization Copyright Treaty (“WCT”) in that it would not condition the protection of copyright on a formality but would merely create a condition for the protection of rights management information.²⁸⁹

CONCLUSION

For quite some time the United States and the European Union have struggled to find a solution to the orphan works problem. While each studied, and was influenced by, the other’s proposals, they did not work together to create a common solution. In hindsight it is easy to see the extent to which it clearly required pressure from a potent market player to change the approaches of the United States and the European Union and to move them closer together in their attitudes towards the orphan works problem. That market player proved to be Google.

Google Book Search and the Google Book Search settlement have shown that the orphan works problem is a truly international problem that requires an international solution. In addition, the Google Book Search settlement has highlighted that such an international solution has to be a legislative one. Major market players will push for solutions that exclusively benefit their own interests (at the expense of other players) if legislatures do not react. We should use the momentum the settlement has created and adopt a solution that not only benefits major companies, but public libraries, archives, museums and, ultimately, the public at large.

²⁸⁹ See IViR, *supra* note 15, at 180.