

## DIGITAL LIBRARIES AND THE CHALLENGE OF ORPHAN BOOKS: GOOGLE'S BOOKS SETTLEMENT AND THE EUROPEAN COUNTERPART

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### (Abstract)

The real leap in creating a digital library with Word Wide Web dimensions is Google's Books Search initiative. In a pragmatic approach based on 'first do than ask' Google began digitizing library collections from around the world. Recently Google and its partners have settled an agreement that put an end to class actions introduced by copyrights holders.

One of the most interesting parts of the settlement relates to orphan books, books whose copyright status is uncertain. Google would be able, under certain conditions, to digitize and distribute electronically these books.

It would have been one of the most important breakthroughs in copyright domain based on an 'opt out' option left for the authors. But the agreement was more recently rejected in some important parts by an American judge. The decision will open once again the whole debate.

The paper examines the orphan books copyright issues and evaluates the importance of solutions in Google's agreement.

Last but not least it compares the bottom-up solution in Google's settlement with the top-down approach embraced in European context.

*Keywords:* digital libraries, orphan works, out-of-print works, 'opt out' clause, class action

### I. Google's answer to the challenge of orphan and out of print books

#### 1. Digital libraries and the breakthrough of Google

In his 1939 essay Borges has imagined "The Total Library" ("La biblioteca total"), a library that would contain all the knowledge of humankind<sup>1</sup>.

<sup>1</sup> Borges acknowledges the earlier development of this theme by Kurd Lasswitz in his 1901 story "The Universal Library" ("Die Universalbibliothek"). See Borges, Jorge Luis. *The Total Library*:

World Wide Web seems to be the first draft of such a library. But closer occurrences of Borges ideas are the emergent Digital libraries.

These are collections of digital content made available to the public. They consist of material that has been digitized, such as digital copies of books<sup>2</sup> or other 'physical' material from classic libraries and archives. Alternatively, they can be based on information originally produced in digital format<sup>3</sup>.

Digital libraries have many advantages over classical libraries. For example they have easy and extended access and contain search capabilities overcoming those of traditional libraries.

Large scale digitization projects of books are happening all around the world (such as the Library of Congress's American Memory project, Project Gutenberg, the Million Book Project, the Universal Library and the Internet Archive).

By far, the most interesting initiative in the field belongs to Google. Google, whose core business is based on advertising in relation with information search on the Internet, decided to open a new field for its abilities: the books. Huge costs are involved in the process of digitizing books and Google was well placed to use a tremendous economic power in this direction. The idea was to create a search service able to identify and make available all the books ever published in any language<sup>4</sup>. As such on October 14, 2010 Google announced that the number of digitized books is more than 15 millions<sup>5</sup>.

The result of the initiative is Google Book Search service which was developed in two different directions: Partner Program and Library Project.

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*Non-Fiction 1922-1986*. Allen Lane The Penguin Press, London, 2000, pages 214-216, translated by Eliot Weinberger.

2 The following analysis will be mainly legal and will focus digital libraries regarding only books or texts.

3 European Commission, i2010: DIGITAL LIBRARIES, Brussels 30.9.2005 COM(2005) 465 Final, p. 3: Retrieved October 5, 2010, from [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/copyright/copyright\\_subgroup\\_final\\_report\\_26508-clean171.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf)

4 In 2010 Google estimated that there are about 130 million unique books in the world (129,864,880) cf. [en.wikipedia.org/wiki/Google\\_Books](http://en.wikipedia.org/wiki/Google_Books).

5 „On the Future of Books”. Google. <http://booksearch.blogspot.com/2010/10/on-future-of-books.html>. Retrieved 2010-10-16.

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## 2. The law

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Through its Partner Program Google opened a window to authors and publishers of in-print books. Over twenty thousand publishers and authors around the world promote their books with this Partner Program by giving to Google copies of their books to digitize and preview online. It uses character recognition to convert images of each page of text so that each book is searchable and cross-referenced. For these books Google display a limited number of pages to users. If a book is of interest, users can click through to the publisher's website, or a retailer's, and buy it. It also directs readers to libraries near them where the book can be found.

With Library Project, some of the world most prestigious libraries opened their book collection to Google. Google scans the books at a rate of about a thousand pages per hour and per machine. After that it adds the digital version to its database. Google take a copy for itself and give the other to the partner Library. Users can read and download the entirety of out-of-copyright books.

But there is something more than that. Based on its Library access Google began digitizing in-copyright, out-of-print books. Readers are able to view bibliographic information about these books and, generally, a few snippets of text showing the searched term in context. And this initiative creates occasions for future copyright litigation.

## 2. The lawsuit

Many Google's Book Search proceedings create no copyright problem. For example copyright law allows rights owners to authorize others to copy their works. As a result, Google can scan and make available books on the ground of its Partner Program, which involves contracts and agreements with the rights holders.

Additionally, copyright does not cover very old books belonging to public domain. Google may scan them and may allow its users to do almost anything with those scans without fear of copyright liability.

Google faced challenges with books that were neither in the public domain, nor covered under agreements with publishers. Google still scanned

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5 „On the Future of Books”. Google. <http://booksearch.blogspot.com/2010/10/on-future-of-books.html>. Retrieved 2010-10-16.

Through its Partner Program Google opened a window to authors and publishers of in-print books. Over twenty thousand publishers and authors around the world promote their books with this Partner Program by giving to Google copies of their books to digitize and preview online. It uses character recognition to convert images of each page of text so that each book is searchable and cross-referenced. For these books Google display a limited number of pages to users. If a book is of interest, users can click through to the publisher's website, or a retailer's, and buy it. It also directs readers to libraries near them where the book can be found.

With Library Project, some of the world most prestigious libraries opened their book collection to Google. Google scans the books at a rate of about a thousand pages per hour and per machine. After that it adds the digital version to its database. Google take a copy for itself and give the other to the partner Library. Users can read and download the entirety of out-of-copyright books.

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these books, indexed them, and made them searchable online. It displayed to the users just a few lines of the book in the form of snippets.

Google may have violated the rights holder's exclusive rights of reproduction every time it scanned the pages of a book and every time it made a digital copy on its computer systems. In a few words, Google may have infringed a book's copyright several times before even displaying a snippet of the book to the user. Displaying the snippets of the book on the Google Books service may have infringed as well the copyright by violating the rights holder's exclusive rights to publicly distribute and display the book.

Based on these grounds on September 20, 2005 the Authors Guild filed a class action<sup>6</sup> against Google. The Authors Guild considered that Google's Library Project involved "massive copyright infringement" because it created digital copies of copyrighted works<sup>7</sup>. On October 19, 2005, the Association of American Publishers filed another class lawsuit against Google for copyright infringement.

Google answered to both lawsuits by claiming that it does not need permission from copyright owners to scan and display portions of the books. Google based the claim on 'fair use' limitations to copyright protection. "Google relied on the fact that its snippets offer only a few lines out of a book... or that offering short snippets would not diminish the market for the book itself..."<sup>8</sup>. Although the lawsuits create remarkable discussions about the important 'fair use' topic the case will probably not be decided by the court.

### 3. The settlement

In October 2008, after two years of negotiation, a first agreement was reached between the publishing industry and Google. The agreement out-

<sup>6</sup> A class action is a form of lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued. This form of collective lawsuit originated in the United States and is still mainly a U.S. phenomenon. However, in several European civil law countries changes have been made in recent years that allow consumer organizations to bring claims on behalf of (only) large groups of consumers. Cf [http://en.wikipedia.org/wiki/Class\\_action](http://en.wikipedia.org/wiki/Class_action).

<sup>7</sup> See for details <http://www.authorsguild.org/advocacy/articles/settlement-resources>.

<sup>8</sup> Cf ERIC M. FRASER *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, 2010 Stan. Tech. L. Rev. 4.

reaches the initial litigation, the public exposure of the authors and publishers available to the public through its library partners from

The Settlement of \$15.5 million would go to the authors; \$15.5 million to the authors' lawyers; and \$3 million to the copyright entity of the authors to the rights holder

This proposed settlement scheduled for a hearing in October 2009, Google, the Authors Guild, and the DOJ<sup>11</sup> voted to change the agreement. In October 2009, Google, the Authors Guild, and the DOJ proposed Amended Settlement for the Google Book Search

<sup>9</sup> The settlement has been a complete victory for the authors. A complete victory would only mean that the authors' snippets in search results are addressed in the settlement, allowing non display of all of those fair use snippets. Search Settlement

<sup>10</sup> The majority of the authors' rights holders of the Copyright Office plaintiff class did not follow the Copyright Procedure, which

<sup>11</sup> France and Germany have argued about the scope of the settlement for non-US authors

<sup>12</sup> See Randal C. F.

reaches the initial litigation scope and let Google pursue the digitization and the public exposure of books. In the mean time Google agrees to compensate authors and publishers in exchange for the right to make millions of books available to the public. In the mean time, the agreement released Google and its library partners from liability for its book digitization.

The Settlement Agreement<sup>9</sup>, asked Google to pay \$125 million: \$45 million would go to pay rights holders whose copyrights had supposedly been infringed; \$15.5 million to the publishers' legal fees; \$30 million to the authors' lawyers; and \$34.5 million to create a Book Rights Registry, a new form of copyright entity entitled to collect revenues from Google and distribute them to the rights holders.

This proposed Original Settlement Agreement ("OSA") has been scheduled for a hearing in October 2009, but hundreds of objections were filed, especially by foreigners,<sup>10</sup> and a statement of interest from Department of Justice (DOJ)<sup>11</sup> was also filed. Therefore the settlement's parties decided to change the arrangement and postpone the hearing. In November 13, 2009, Google, the Authors Guild and the group of publishers filed a proposed Amended Settlement Agreement ("ASA") to resolve the litigation over Google Book Search<sup>12</sup>.

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<sup>9</sup> The settlement has one advantage over a litigation victory because it's much faster. "A complete victory for Google in this case was probably years away. More importantly, a victory would only have given the green light for scanning in order to index and provide snippets in search results; it would not have provided clear answers for all the other activities addressed in the settlement, such as providing display access for out-of-print books, allowing non display research on the corpus, and providing access for libraries. Litigating all of those fair use questions could easily have taken a decade or more". Cf Google Book Search Settlement: A Reader's Guide Legal Analysis by Fred von Lohmann.

<sup>10</sup> The majority of class members who objected to the original settlement were foreign rights holders of books published outside the U.S. The Department of Justice and the Copyright Office argued that the inclusion of the foreign rights holders within the plaintiff class did not meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, which governs class actions.

<sup>11</sup> France and Germany had objected too (based on territoriality of copyright protection) about the scope of the original settlement agreement especially as applied to works of non-US authors.

<sup>12</sup> See Randal C. Picker *Assessing Competition Issues in the Amended Google, Book Search*

The "ASA" narrows the scope of the works covered to foreign books that are registered with the U.S. Copyright Office <http://www.harolds.ro/index.php?p=menu&cat=4> or published in the U.K., Canada, or Australia<sup>13</sup>. Additionally, the amended agreement added board members to the Books Rights Registry from the U.K., Canada, and Australia. Most of other changes in "ASA" were clearly designed to respond to the Department of Justice's statement of interest.

This final agreement has 141 pages, and includes fifteen attachments. The settlement reorganizes copyright law by giving Google a license to copy and distribute some forms of in-copyright books.

On November 19, 2009, the Court granted a preliminary approval for this Amended Settlement.

#### 4. The agreement: breakthrough for 'out-of-print' and especially 'orphan books'

Besides technical and economic barriers, there are likewise legal barriers that interfere with the digitization of texts. Current copyright law does not provide clear directions about possible legal ways to deal with digitization, preservation of copies and their availability to the public. In fact copyright law principles sometimes ruin these digitizing efforts.

The most restrictive effects in this matter are linked to the so called 'orphan' works and 'out-of-print' works.

*An orphan work*<sup>14</sup> is a copyrighted work for which is difficult or impossible to contact the copyright holder. Almost any work for which a reasonable effort to locate the current copyright owner fails can be considered orphaned.

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*Settlement*, Electronic copy available at: <http://ssrn.com/abstract=1507172>\*

13 Perhaps as much as 50% of the titles in the research libraries partnering with Google are not in English; and most of these foreign language titles probably were published outside the U.S. and were not registered with the Copyright Office. Therefore the ASA likely applies to half as many books as the original settlement.

14 For a detailed analysis of orphan works see Maria-Daphne Papadopoulou, *The Issue of 'Orphan Works in Digital Libraries*, in "E-Publishing and Digital Libraries: Legal and Organizational Issues", Hershey New York, 2011, p.198 and following.

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Because the cost of finding the owner is high, other creators can't build on orphan works, even when they are willing to pay to use them.

*The 'out-of-print' works* are copyrighted works not commercially available, as declared by the appropriate right holders, regardless of the existence of tangible copies of the works.

Both category imply certain transaction cost in order to allow an interested person to use (copy, distribute, etc) them legally. The fact that these types of works are out-of-print signifies that their commercial value is weak and transactions costs for getting a licence can quickly overcome the limited intrinsic value of the works. For 'orphan works' the high efforts from interested person to find the right holder will be useless. So the transaction costs are tremendous (infinite) since the outcome is nothing. We can qualify them as the 'dead memory' of the Libraries.

The vast majority of the world's books fall into this last category of works in-copyright books and books of unknown copyright status ('orphan'). Since for these books, the rights holder is very hard, if not impossible, to identify as a result, millions of books remain difficult to access

The ASA realizes unprecedented advance in order to answer these challenges. The book industry agreed that, with certain restrictions, Google could scan orphan works without being held liable for breach of copyright claims if the rights owner subsequently came forward. In return Google agreed to create an independent (and open to all) Rights Registry letting authors of orphaned books to pledge their copyright claim.

ASA will dramatically expand access of US (and, eventually, Anglo-Saxon countries), particularly with respect to in-copyright, out-of-print books<sup>15</sup>.

Behind the scene a new legal and economic architecture has been built:  
-Reorganization of copyright<sup>16</sup>

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15 Google will offer the following new options for accessing books: - Preview: readers can preview up to 20% of the pages of most out-of-print books for free. Like browsing in a store, readers will be able to skim a few pages and decide if the book is right for them to buy; -Consumer Purchase: readers can buy complete online access to a book. This means a person in the US can read an entire book from any Internet-connected computer if they purchase access to the book; -Institutional Subscription: academic, government and other organizations can purchase subscriptions that will give their members online access to the complete text of millions of titles.

16 See Eric M. Fraser, op cit.

In-copyright books will have two different regimes.

For in-copyright books that are still being published ('in-print'), readers will be able to search for and find these books, but they won't be able to view any portion of the book by default. There is an opt-in regime for these books. Rights holders can choose to enable the new access models through their participation in the agreement or through the Book Search Partner Program.

More interesting is the settlement in relation to in-copyright, "out-of-print" works. Here there is a new opt-out regime. The settlement modifies the copyright setting for Google in relation to out-of-print works with locatable copyright owners and for orphan works. The class action and the subsequent settlement create a collective license that solves amazingly all the problems<sup>17</sup>.

Before the settlement, Google could do almost nothing with an out-of-print copyrighted book without contracting with the rights holder. Eventually, it offered snippet views of books, and even this practice was contested by lawsuits against Google. To be able to scan, index and display more of copyrighted works without fear of copyright liability, Google had to search copyright owners and make individual agreements with each one.

This change in the default copyright arrangement is essential. Contracting with the copyright owner of every book involves huge transaction costs (even limiting the group to owners who can be found and letting aside orphan works). The default position will matter due to these high transaction costs implied. The change in default position enables Google to create its universal digital library in a way not possible in the normal opt-in world (with particular licenses).

The settlement also dramatically alters the setting of 'orphan works'. Currently, no one can copy orphan works without fear of litigation. Contracting with 'orphan works' rights holders is plainly impossible because, by definition, the rights holders cannot be located. The settlement agreement, if approved, would release this orphan works treasury.

-There is an economic dimension of the arrangement which allowed the 'switch' in the default position in copyright law.

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17 For in-copyright books that are out-of-print, the new access models will be "turned on" by default, unless a book's rights holder chooses to disable them. That means that once this agreement is approved, readers will be able to search, preview, and purchase complete access to millions of books that today are very difficult to find or buy.

The agreement creates holders. They will receive the their books. For out-of-print market, this opens incor agreement, these books can holders will earn money from out-of-print works have a str

The real stronghold orphan books (almost) nob holder. And Google will be every orphan work.

-New institutions: Re

The settlement creates istry, the first organization will stand between Google. It will receive payments fro To do that, it will attempt to maintain a database of those and act on behalf of the right the settlement agreement.

Regarding the orphan Unclaimed Works Fiduciar responsibilities for managing first institution of this kind.

-New business model

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18 Creating the UWF is a w had expressed a concern t same interests as those of rate representation of tho the UWF to merely step They could have broaden shoes of the rights holder *Google Books Settlement 2.* org/deeplinks/2009/08/go

The agreement creates new revenue opportunities for 'out-of- print' right holders. They will receive the majority of revenues when readers purchase access to their books. For out-of-print books, which in most cases do not have a commercial market, this opens income opportunities that didn't exist before. Under the agreement, these books can once again become accessible to the public, and right holders will earn money from access to them. As a result the right holders of these out-of-print works have a strong interest to remain part of the agreement.

The real stronghold of Google is represented by 'orphan books'. For orphan books (almost) nobody will show up to claim the position of a right holder. And Google will be able to scan, copy, index, display, and sell access to every orphan work.

-New institutions: Registry and Fiduciary

The settlement creates a new organization called the Registry. The Registry, the first organization of its kind, will have several responsibilities and will stand between Google and the rights holders included in the agreement. It will receive payments from Google and distribute them to rights holders. To do that, it will attempt to locate the appropriate copyright owners and will maintain a database of those copyright owners. The Registry will keep track of and act on behalf of the rights holders to every American book covered under the settlement agreement.

Regarding the orphan works, the parties have created a new player, the Unclaimed Works Fiduciary (UWF). The UWF will assume some of the responsibilities for managing unclaimed works<sup>18</sup>. If approved this will be the first institution of this kind.

-New business models

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18 Creating the UWF is a way to solve the conflicts problem identified by DOJ. DOJ had expressed a concern that holders of unclaimed works didn't necessarily have the same interests as those of active rights holders. The UWF mechanism enables separate representation of those interests. But the settling parties have limited the role of the UWF to merely stepping into the shoes of the registry in some circumstances. They could have broadened the role for the UWF to have the UWF step into the shoes of the rights holders of unclaimed books instead. Cf Fred von Lohmann, 2009, *Google Books Settlement 2.0: Evaluating Competition*, November, 19th <http://www.eff.org/deeplinks/2009/08/google-book-search-settlement-evaluating-competiti>.

The agreement is built upon a complex arrangement for the management of Google's book project, including a variety of income models. Google will generate revenue through an institutional subscription for libraries, a consumer subscription for perpetual access to individual books, referral links to retail booksellers, and advertising on book pages. Regardless the business model, the agreement specifies that Google will keep 37 percent of the revenues and the rights holders will get most of the other 63 percent.

### 5. The 'saga' continues

Even the new agreement was criticized on the ground of its uncompetitive issues, privacy concern, public access, censorship and so on. In any case Google and its partners in the settlement seem to be aware about the need to be flexible<sup>19</sup>. The parties were very attentive to the observations made by DOJ. They have complied each time with its requirements (mainly relating with competition issues). Google is ready to give up a lot of its positions in order to preserve its core business model based on research and advertising (Google is not a real content provider, but an advertisement and information provider).

Unexpectedly, the agreement was rejected in March<sup>20</sup> by district federal Judge Denny Chin citing antitrust and copyright concerns. Judge Chin considered that the settlement as proposed „would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission.” He said the settlement would have not only released Google „from liability for past copyright infringement” but from future liability as well, and it would „grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit.” The settlement would also give Google „a de facto monopoly over unclaimed works,” (orphan works), whose copyright owners aren't known or can't be found.

In sum, Judge Chin concluded, the settlement does not meet the „fair, adequate, and reasonable” standard he is charged with applying. But he under-

<sup>19</sup> See for more details the series of *Fred von Lohmann, op cit.*

<sup>20</sup> <http://chronicle.com/article/Judge-Rejects-Settlement-in/126864/>

lined that many of the (ASA) would require scanned and included to opt out. „I urge the judge wrote.

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## II. Implications

### 1. Digital libraries or alliances

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<sup>21</sup> <http://www.researchgate.net/publication/2110915?feedType=medium=feed&+Technology%2>

lined that many of the concerns he raised would be dealt with if the agreement (ASA) would require rights holders to opt in—by asking to have their works scanned and included in the Google Books project—rather than forcing them to opt out. „I urge the parties to consider revising the ASA accordingly,” the judge wrote.

Lawyers for all parties met September 15 and say “substantial progress” towards an agreement has been made. Judge Chin is “still hopeful” that lawyers can reach an agreement<sup>21</sup>.

The saga is not ended yet. In any case the impact of a solution closer to Google’s thinking will be tremendous. A whole new kind of institutions will emerge and will be ready to cope, among others, with ‘orphan works’ and related issues. The US and most probably Anglo-Saxon (UK, Canada, Australia) users will be able to access a tremendous mass of information. We will be a step closer to the Universal Library imagined by Borges. And a tremendous competitive advantage will emerge regarding other part of the world and especially Europe.

## II. Implications for Europe

### 1. Digital libraries in Europe: Gallica, Europeana and the competition or alliance with Google for public domain books

There are also certain European public initiatives in the field of Digital libraries. These, mostly national, initiatives are focusing on digitization of out of copyright (public domain) works.

For example Gallica, the digital division of French National Library, links to about 800,000 digitized books, newspapers, manuscripts, maps and drawings, etc. Created in 1997, this digital library continues to expand at a rate of about 5000 new documents per month. Since the end of 2008, most of the new scanned documents are available in image and text formats.

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21 [http://www.reuters.com/article/2011/09/15/us-google-books-dUSTRE78E4VZ20110915?feedType=RSS&feedName=technologyNews&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed:+reuters/technologyNews+%28News+/%29+US/+Technology%29](http://www.reuters.com/article/2011/09/15/us-google-books-dUSTRE78E4VZ20110915?feedType=RSS&feedName=technologyNews&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+reuters/technologyNews+%28News+/%29+US/+Technology%29)

Some European politicians and intellectuals (especially French) criticized Google's effort on 'language-imperialism' grounds, arguing that the vast majority of books proposed to be scanned are in English, it will in disproportionate representation of this language in the digital world. German, Russian, and French, for instance, are popular languages in school, the disproportionate online emphasis on English could shape access to historical scholarship, and, ultimately, the growth and direction of future scholarship.

Among these critics was Jean-Noël Jeanneney, the ancient president of the National Library of France.

As a response to Google initiative in the field on November 2005, the EU launched its own Internet library, 'Europeana', giving access to hundreds of thousands of books. 'Europeana' is mainly a window to digital libraries of public libraries on the continent. Its weakest point is the fact that 18 percent of its digital fund came from France (especially Gallica) and 17 percent from German digital funds.

The Europeans is out competed on financial grounds by Google. Google has announced that it would add other European to its library scan plan. For example under the deal with the Bavarian State Library (Munich), Google will scan more than a million public-domain books.

Today in France, only the municipal library in Lyon has agreed to Google's digitization of 400 000 to 500 000 volumes. Without the help of Google, this scan would cost \$ 60 million for a period of 20 years. With Google, the scanning is free and will last for 6 years. The counterpart is the exclusive commercial rights for 25 years for Google. This is the type of clause that France does not want for National Library.

Jean-Noël Jeanneney was replaced as president of the National Library of France by Bruno Racine<sup>22</sup>, who is actively promoting an alliance with the American search engine. There are some economic grounds for such a choice. A report by the General Inspectorate of Finance noted that "The National Library of France can not compete with Google, since its digital library at best reach only the size of the fund of former National Library of Lyon that

<sup>22</sup> BNF, BNF, and Google, By Christopher Di Pietro, March 1, 2010.

Google is committed to scan in  
number of books available on

Therefore an agreement  
Google seem to be inevitable. A  
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French culture less exposed  
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## 2. Individual positions of initiatives for 'in-copyright'

In June 2006, French public  
announced the intention  
but in 2006 a German  
court considered that Go  
copyright law. In December 20  
copyrighted books published i  
was the first major legal defeat

Google can be individual  
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<sup>23</sup> According to an information report  
required to meet the challenge of  
estimates that with current means c  
and 375 years to digitize all the b  
therefore an appeal to Google, in

<sup>24</sup> Sage, Adam (December 19, 2006)  
The Times of London. <http://www.timesonline.co.uk/story/0,,2088477,00.html>

<sup>25</sup> Danny Sullivan (2006-06-28) "The  
challenge" (blog). *Search Engine Watch*  
152950.

<sup>26</sup> Faure, Gaelle (December 19, 2009)  
*Los Angeles Times*. <http://www.latimes.com/technology/la-te-tech-google19-2009dec19,0,548533,fullpage.html>

<sup>27</sup> Google will continue scanning

Google is committed to scan in the coming years, which represents 5% of the number of books available on Google Book Search<sup>23</sup>.

Therefore an agreement with France, who was the most opposed to Google, seem to be inevitable. As a final judgment the tentative to stop Google has strengthens its position. Postponing an understanding with Google makes the French culture less exposed in cyberspace. As a matter of fact in order to fight Google one needs the means of one's ambitions.

## 2. Individual positions of European actors regarding Google's initiatives for 'in-copyright books'

In June 2006, French publishers known La Martinière and Éditions du Seuil<sup>24</sup> announced the intention to sue Google France. Other lawsuits followed but in 2006 a German complain was withdrawn<sup>25</sup> because the German court considered that Google's snippet view does not infringe German copyright law. In December 2009 a French court shut down the scanning of copyrighted books published in France saying it violated copyright laws. It was the first major legal defeat for the scanning project<sup>26</sup>.

Google can be individually sued and eventually will pay. In the mean time he will be more attentive about copyright issues in Europe<sup>27</sup>.

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23 According to an information report of the Senate Finance Committee, an appeal to Google is required to meet the challenge of digitization of the National Library of France. The report estimates that with current means of the National Library of France, he would 750 million euros and 375 years to digitize all the books. The statement which stated that a „change of scale, and therefore an appeal to Google, in fact seem indispensable.”

24 Sage, Adam (December 19, 2009). „French publishers toast triumph over Google”. *The Times of London*. [http://business.timesonline.co.uk/tol/business/industry\\_sectors/technology/article6962221.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article6962221.ece). Retrieved 2011-12-18.

25 Danny Sullivan (2006-06-28). „Google Book Search Wins Victory In German Challenge” (blog). *Search Engine Watch*. <http://blog.searchenginewatch.com/blog/060628-152950>.

26 Faure, Gaelle (December 19, 2009). „French court shuts down Google Books project”. *Los Angeles Times*. <http://www.latimes.com/news/nation-and-world/la-fg-france-google19-2009dec19,0,548537.story>. Retrieved 2010-12-19.

27 Google will continue scanning the foreign books into its search base, and display

In May 2009 May, fearing that it will harm the European publishing industry, EU countries asked the European Commission to investigate the economic implications of Google Books<sup>28</sup>. Germany and France filed official complaints against the project. As a result the ASA responds by narrowing the scope of the works covered and excludes European works. The Europeans are not part of ASA agreement and they need to find a solution of their own. We will examine below the possible success of such initiatives.

### 3. Orphan books in European context: a 'status quo' and the need for European harmonization

The fact that Google began scanning out-of-print books urged an awareness of the importance of orphan books issues for European continent. The European Commission created a report on Digital Preservation of Orphan Works and Out-of-Print Works<sup>29</sup>. On June 4, 2008 European representatives of museums, libraries, archives, audiovisual archives and right-holders signed a Memorandum of Understanding<sup>30</sup>, about orphan works legislation supported by rights-holders. In April 2009 the Strategic Content Alliance<sup>31</sup> and the Collections Trust<sup>32</sup> published the "In from the Cold"<sup>33</sup> research report. This assessed the scale, scope and impact of orphan works and their affect on the delivery of web services to the public.

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snippets in response to search queries. In other words, Google intends to continue the existing Library Project with respect to the foreign books. Because the ASA does not cover these books, their rights holders could sue Google for copyright infringement for scanning and snippet display, and Google may defend itself by claiming that its activities are covered by the fair use privilege.

28 "Google faces new EU battle over e-books", *EurActiv*, Published in 8 September 2009.

29 [http://en.wikipedia.org/wiki/Orphan\\_works](http://en.wikipedia.org/wiki/Orphan_works).

30 [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/high\\_level\\_group\\_meetings/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/high_level_group_meetings/index_en.htm)

31 <http://www.jisc.ac.uk/contentalliance>.

32 <http://www.collectionstrust.org.uk/>.

33 [http://sca.jiscinvolve.org/wp/files/2009/06/sca\\_colltrust\\_orphan\\_works\\_v1-final.pdf](http://sca.jiscinvolve.org/wp/files/2009/06/sca_colltrust_orphan_works_v1-final.pdf)

The EC has determined the cost of clearing digitization itself.

There are no class actions in Europe but this country is part of ASA. ASA is found in US for orphan and out-of-print books.

The only remedy in the EU is through normative instruments. But the EU legal system is fragmented in 27 different member states. It is difficult to harmonize it directly since this is more a matter of competences (while in the US it is a matter of law).

In order to compete with the US, the EU needs to create normative instruments able to create a model of collective licence) as in ASA. The model is found in Nordic countries<sup>34</sup>.

Each state should create a model of collective licenses. In the EU, it is up to member states the possibility of creating a system of rights, such as extended collective licence (ECL) (Directive 2001/29). Eventually a specific model should be developed.

But, given the territoriality of copyright, at European level those collective licences should be harmonized.

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34 The system of extended collective licence (ECL) is found in Denmark, Finland, Sweden, Norway and the Netherlands. It is based on an agreement between a collecting society and the right holders, but also, on the basis of a law, on the basis of a collective licence. The agreement provides the users with a right to use the works of the owners. These persons have a right to 'opt-out' right, a right to prohibit the use of their works. It applies to all right holders in the territory, including untraceable right holders. There are some exceptions. See Koskinen-Olsson, T. (2006) *Copyright in the Digital Age*. Koskinen-Olsson, T. (Ed.), *Collective Management of Copyright*. The Hague, Netherlands: Kluwer.



The EC has determined there are three million orphan books in Europe and the cost of clearing digital rights is costly, often far higher than digitization itself.

There are no class action available in European states (except maybe UK- but this country is part of ASA) in copyright matters. Therefore the solution found in US for orphan and out-of-print books would be impossible here.

The only remedy in the EU context is a top-down approach based on normative instruments. But there is a huge problem yet. Copyright in Europe is fragmented in 27 different national systems. The EU has no power to regulate it directly since this is mostly a private law matter belonging to national competences (while in the US copyright is a federal matter).

In order to compete with Google the European need national normative instruments able to create the same opt-out facility (a general copyright licence) as in ASA. The model might be the extended collective licenses used in Nordic countries<sup>34</sup>.

Each state should create and operate collecting societies able to conclude collective licenses. In the European context, Directive 2001/29 already gives to member states the possibility to introduce provisions concerning management of rights, such as extended collective licenses (Preamble 18, Directive 2001/29). Eventually a specific directive could be adopted.

But, given the territorial coverage of copyright, in order to reach the European level those collecting societies (not existing yet) should conclude

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<sup>34</sup> The system of extended collective licensing is applied in the Nordic countries, i.e. in Denmark, Finland, Sweden, Norway and Iceland. In this extended license system the agreement between a collecting society and a user does not cover only the contracting parties, but also, on the basis of the Statute, produce a binding effect on non represented owners. The agreement covers only concrete works and concrete uses. This extension effect provides the users a protection against claims by those non represented owners. These persons have a right to individual remuneration and in most cases an 'opt-out' right, a right to prohibit the use of their works. As a result, extended license applies to all right holders in the concrete field, even deceased ones or unknown or untraceable right holders. Therefore this system applies also for 'orphan' works. Cf Koskinen-Olsson, T. (2006) *Collective Management in the Nordic Countries*. In Gervais, D. (Ed.), *Collective Management of copyright and related rights* (pp. 257-282) The Hague, Netherlands: Kluwer Law International.

over 279 reciprocal cross-border licenses. As a matter of fact the whole undertaking seems ineffective<sup>35</sup>. Not to mention the lack of economic incentive that already exists in ASA.

### Conclusion

The Europeans have any reasons to complain about Google Books. If Google reach a settlement in the US, American users (and most probably Anglo-Saxon ones) will be able to access thousands of European digitized books published in Anglo-Saxon world from European libraries and 'de facto' not accessible to EU citizens. The US deal includes European books under US copyright. Without a similar agreement in Europe, Europeans will have no access to their books, creating a cultural gap between the two sides of the Atlantic.

The economic implications of ASA are even more important since it will create new business, new market and new application relating to out-of-print books never seen before.

The tentative of rejecting Google in order to impose a European top-down approach seems to be unsuccessful yet. As an irony they seemed to strengthen the position of Google. But nothing is decided yet for Google either (see its uninterrupted judicial 'saga').

Almost certainly in the future the American agreement or a similar one (without the background of a class action) will be open to European copyright holders. Absent a strong initiative from the European states or institutions, this might be the simplest and the most direct way to enter the new age of Knowledge economy and society.

35 Maria-Daphne Papadopoulou, *The Issue of 'Orphan' Works in Digital Libraries in the Publishing and Digital Libraries: Legal and Organizational Issues*, Hershey New York, 2011, p.210 and following.

Pascal est le penseur le long de toute sa vie, en ce et en le défendant avec vir avec sa manière de surprendre dans le monde, admirant sifique à toutes ses sentences penchant histrionique, le p jusqu'à la fin, Cioran voit qui extrait toute sa connaissance delà de toute influence livr

La vision esquissée p çaise de Cioran. L'homme scindé entre ses penchants lédiction originelle qui le risible de la création, dans u assimilant en grande partie de l'humanité, Cioran radi ment tous les messages des tant sans ménagements l'al individus d'atteindre le bon par la triade pascalienne de cette hégémonie sont c comédie délirante offerte insuffisances, plongeant va pour essayer de s'échapper

**Keywords :** Pascal, Cioran, vanity.