Copyright Clearance Center Beyond the Book
A podcast series on the business of writing and publishing

BTB #263: Google Book Settlement: Good Riddance or Lost Opportunity

For podcast release
Monday, December, 5, 2011

Recorded Wednesday, November 30, 2011
"Copyright & Technology" New York City

In March, Judge Denny Chin rejected the proposed settlement between Google and book publishers and authors over Google's book scanning and book search programs. At the recent "Copyright & Technology" conference, a panel of legal experts considered the unanswered questions that decision left behind.

Presenting their views were James Grimmelmann of New York Law School; Edward Rosenthal, whose firms represents the Authors Guild in their suit against the HathiTrust; attorney Mary Rasenberger, who from 2002-2008 served in the Copyright Office and the Office of Strategic Initiatives of the Library of Congress, and as director for the National Digital Preservation Program; and Frederic Haber, general counsel, Copyright Clearance Center. CCC's Chris Kenneally moderated.

KENNEALLY: My name is Chris Kenneally. I am director of business development at Copyright Clearance Center. We are online at copyright.com. And it's a pleasure to moderate a panel discussion we call Google Book Case Settlement: Good Riddance or Lost Opportunity.

I'd like to begin with a confession, and admission really, that – and I think this is an unusual case for a program that is going to be offering CLE credits. I am not a lawyer, so either I've just won you over right away or I have an hour to try to win you back, right?

By way of background on myself, I came to Copyright Clearance Center about 10 years ago as an author and was invited in to help develop some programs for individual creators, and it's been a fascinating assignment, but at that time, 10 years ago, I thought working for a company called Copyright Clearance Center would be a nice quiet job to have, and it's turned out to be quite different.

Copyright is an extremely dynamic area of the law. It's kept me fascinated. It's kept all my journalistic curiosity fascinated for the last 10 years, and certainly the Google Book case and the proposed settlement stands at the top of it.

I was with members of my organization at a meeting called the IFRRO AGM, the International Federation of Reproduction Rights Organizations, of which Copyright

Clearance Center is a member, in 2008 when the settlement was announced. And I can recall the excitement, the buzz that was generated.

It's remarkable to me to be standing here today three years later and to be considering it with that question that Bill Rosenblatt has posed for us, good riddance or lost opportunity. So much has changed in those three years. Certainly, the acceleration of innovation in publishing has forged a marketplace in both e-books and e-readers. The ubiquity of mobile devices is providing access to content in forms that go now well beyond the book itself.

And yet, we're still considering the question of this case – and we'll do it from a variety of angles with the distinguished panel – because the Google Book case involves so much more than a question about copyright. It was about nothing less than the future of our culture.

So I want to start with James Grimmelmann. James is an associate professor at New York Law School and he holds a JD from Yale and AB in computer science from Harvard College and prior to law school, worked as a programmer for Microsoft, a varied background, an appropriate one for this particular case. James, welcome.

GRIMMELMANN: Thanks. It's good to be here.

KENNEALLY: And I should point out that your commentary on the case has been one of the sort of shining elements of this whole last three years. You and your students created the Public Index website to inform the public about the Google Book settlement and certainly, you've become a leading expert on all of it.

I want to cite from an article you have just published in the *Journal of the Copyright Society*, but before I do, James, tell us your view of the settlement as proposed. It was trying to do some good things, but your notion is that it put in place the wrong mechanisms to do that. It was a case of the road to hell being paved with good intentions.

GRIMMELMANN: I think this may be a view shared by a fair number of people that I think the settlement had in it some remarkable ideas. Tom Rubin in his earlier remarks alluded to the potential of the Book Rights Registry in it to really help with metadata clearance and with making it easier to find copyright owners and do licensing. And the settlement was really I think quite ambitious in trying to find a way to make orphan works – so books that are in copyright but with unlocatable owners – available again. And it was really innovative in that way and it opened up conversations about how better to make orphan books available again.

For me and I think for a lot of other people, the question really came down to, is a class action settlement an appropriate way of getting to these goals, and what compromises does one wind up making to fit this within a settlement that hurt those goals?

So it was really, I guess, very interesting and important goals being served through a mechanism that in the end, probably made it not worth doing that way.

KENNEALLY: Right, James. In fact, in your article here in the summer 2011 issue of the *Journal of the Copyright Society*, which is called "The Elephantine Google Book Settlement," you ask what the case was all about and you say in a sentence, the settlement used an opt-out class action to bind copyright owners, including the owners of orphan works, to future uses of their books by a single defendant. That was the heart of the settlement. It didn't break down neatly into a class action issue, a copyright issue and an antitrust issue. Instead, it raised a single issue of law and policy, one that touched on all three areas.

And this is where you got colorful. You say, class action law recognizes its trunk, copyright its legs, antitrust its tail, but an elephant is not a trunk plus legs plus a tail. It's a single animal. So here, the settlement was a classcopytrustlephant. And I love that.

Tell us what that means. That sounds rather cute in some fashion. It sounds like a character out of *Winnie the Pooh*. It could also be Frankenstein's monster.

GRIMMELMANN: I've spent three years now trying to understand both what the settlement would have done and what made it so interesting and so novel. And this piece is really my attempt to try and summarize succinctly how it used a class action to do really interesting things.

So the basic element of it is this very clever flip that members of the class, copyright owners whose books had been scanned by Google, would be bound by the settlement to accept certain uses of their works, settlement's terms, which included for out-of-print works that by default, Google would be permitted to sell copies of them through its digital e-book store.

So, if your book is out of print and you're a class member, then unless you file paperwork or go to the website and claim your book and opt out, Google gets permission to start selling the book to users. So that's the opt-out feature of class action law.

Now, typically, opt-out in a class action would be used to say something like, unless you opt out of the class of people who've bought an Apple power adaptor as a replacement because the old one frayed, unless you opt out and reserve your right to sue Apple for making a defective product, you will get a check for $25 and a free replacement if it ever happens again. So like, there's a deal that's being offered to everyone and you can opt out of taking that deal by stepping forward and saying, no, I don't like this. I want to save my right to sue.

This settlement was a little different in that it was not just, here, you take your $60 for having Google scan your book in the past, but it's also, unless you opt out, you become a member of this new Google e-book store.

So thinking about the legal issues that that raises, you can sort of see they immediately start to split out into different areas. You can describe it in class action terms and say, well, this is really about the limits of class action settlements. How far should a settlement be able to go in setting up new business arrangements and how should we describe it? Is this about having adequate class representatives? Is this about the jurisdiction of the court? You raise civil procedure issues.

Or this could be described as a copyright problem. Conventionally, we say that copyright is about exclusive rights, the right to stop others from making use of your work. In that sense, it's an opt-in system. Anyone who wants to print an edition of your book needs to come to you to get permission, get clearance to do that.

So this, in a sense, flips that default. Google has permission to use the book unless the copyright owner opts out of that use. That's a copyright issue. And we could ask about that in terms of orphan works policy. What's the best way to make orphan works available while fairly compensating owners?

We could look at this in terms of the exclusive rights of the Copyright Act. We could look at this in terms of the international copyright treaties that the United States belongs to. So copyright issues.

And there's an antitrust question. Because the nature of the class action settlement is an agreement between Google and the class members, the copyright owners, this winds up setting up a special bookstore that really only Google can offer. This is not a kind of program that Amazon could hop on to start selling out-of-print orphaned works. It really is for Google's benefit only. And that potentially raises antitrust issues if you look at it in certain respects.

That is, does it instantly catapult Google to a dominant position in the books market? Maybe, maybe not. Is this an appropriate way of establishing a new program, one that concentrates certain kinds of power in Google's hands? Interesting antitrust questions.

So my basic point is that this one very clever use of a class action settlement raises these legal issues from all across the board, and to really see them together, you have to think about the fact that it's this one basic term of the settlement that does all of these things. And to look at the issues in isolation may not really help you understand this basic question about what is the right way to settle these kinds of questions of orphan works policy. How do we decide who gets to use books on what terms? And that's really what the case has been about for me.

The settlement is gone and very unlikely to return in anything resembling the same form, but the larger issues are still with us and this is going to be the thing that will be taken up by Congress and by the Copyright Office, by other institutions thinking about doing licensing of books. It's going to be a very interesting next few years in conversations about how will the books be made available again.

KENNEALLY: Right. And you give a very close reading to Judge Chin's decision to reject the settlement and I wonder if you could summarize your reaction to what he wrote. It was closely written, it's been closely read by yourself. Tell us how you feel about the way he wrote that, how he composed that decision.

GRIMMELMANN: I think the opinion makes a great deal of use of deliberate ambiguity, that he is very clear that he can't accept the settlement and he, I think, gives some very clear statements about class action reasons why he can't accept it. This is not a legitimate use of a class action settlement and it's beyond his power to approve.

But then when he gets into the antitrust and the copyright and some of the international concerns, he's troubled, he's worried by things, he can't really approve this, but the exact legal basis of these holdings isn't quite spelled out. So I think there are two ways of looking at this.

One is that he's being traditionally minimalist. He thinks that the settlement rejection was such an easy call. He doesn't want to make a lot of antitrust law or a lot of copyright law. He just wants to settle the case in front of him.

Another possibility is that this is a way of appeal proofing it, that he was going to reject it but on vague enough terms that if his decision was appealed, the Second Circuit would remand, that he would get a chance to explain his reasoning more clearly, at which point he would simply write a detailed rejection that did go into all of the doctrine. So it would get appealed again. He's basically saying, if you challenge me on this, it will take you at least five years. Is that worth it for you? And the parties decided no.

KENNEALLY: What's your take, James, on the way the other parties participated in the case, for example, Google and its band of lawyers? How do feel about the way they presented their case, which is essentially, if I have it right as a non-lawyer, a fair use defense?

GRIMMELMANN: It's very interesting here. Google started off being – with the argument that was made on the Web, which is, we have a right to make copies internally, to make a search engine index from them and to show users small excerpts in order to help them understand the search results. The same way they show you a small postage stamp-sized thumbnail when you do an image search, they'd show you a couple of sentences – a snippet – as a book search result. That was a fair use case.

And then when the case went to the settlement, it became about selling complete books. Well, obviously, that's not going to be justified by fair use. In some ways, that, I think was very strategically smart on Google's part to go off in the settlement, because they've lost nothing in the last few years. They've just worn down the litigation against them.

On the other hand, going into the settlement route while it was on the table I think cost them a lot of trust from copyright owner communities, particularly authors, because it made it look like the goal all along was to sell all the books and the search engine was just a stalking horse to get the books in and start negotiations.

So, I think they saw this, we'll have a fair use case and we'll fight that. We'd rather have a deal negotiated so we don't need to litigate in court. But I wonder how this has affected their image to have mooshed the two together in peoples' minds.

KENNEALLY: Well, to that point about Google's image or just the way that the public has perceived the case, you've commented to me that if this had been less in the press, if they had been not quite such a top-of-mind brand name, that this might have slipped by. Tell us more about your thinking there.

GRIMMELMANN: I think Google has a hard time thinking small and this is a particular example of a project that has cultural significance to them. This is very important to Sergey Brin who sees this as being about the world's heritage and about Google's mission to make information more widely available. So they really did this in a big style. They have pumped large sums of money into scanning. Their scanning has been on a scale of tens of millions of books.

This is, as *The New Yorker* called it, Google's moon shot and so it's sort of hard to imagine something they have done that could be done with more drama or more flair.

KENNEALLY: Indeed. Well, James Grimmelmann, associate professor at New York Law School who blogs at the Laboratorium, which is laboratorium.net, thank you.

And I want to turn now to Ned Rosenthal, who chairs the intellectual property and litigation groups at Frankfurt Kurnit Klein and Selz, and Ned, welcome.

ROSENTHAL: Thank you.

KENNEALLY: Ned, you're here for a program about the Google Books settlement, but we can't talk about that with you, but we do want to talk about a case – because we should explain, you are representing the Authors Guild, one of the parties, in a separate case, but what I believe you called a collateral case, which is the Hathi Trust case. Can you tell us about that and what's involved there?

ROSENTHAL: Yes, sure. The reason I can't really talk about the Google Books case is that our client, the Authors Guild, is involved in that. They have separate lawyers. It's a separate matter and I don't think it would be appropriate for me to really talk about either the settlement that was rejected or the current status.

The case that we brought against the Hathi Trust, which is a group of university libraries – it's kind of an organization of libraries and several universities, including University of Michigan – involves – it's a separate though related – I don't know that we've ever used the word collateral case. It involves the fact that these libraries have the fruits of the Google digitization, so the libraries have about nine million books that have been digitized in their archives.

And the trigger for the lawsuit was this spring or early summer, the Hathi Trust announced that it was going to begin to – it was going to have its own orphan works program. It was going to go through a process of identifying works that it believed to be orphan works, and I assume everybody knows an orphan work is a work where you can't find the copyright owner for one reason or another.

It was going to have criteria for identifying them. It was going to list the books that it felt met those criteria on its website and then authors or owners of orphan works would have 90 days to come forward and announce that in fact they were the owners, in which case the trust would not make those books available, but if nobody came forward, then those books would become available to users of the Hathi Trust, patrons of the University of Michigan and other university libraries, people who walk in off the street in Ann Arbor and other places, alums, etc.

Our client, the Authors Guild, and the other rights organizations are very concerned about this and there are a number of reasons. First of all, they don't believe, as Judge Chin pointed out, that deciding how to deal with orphan works is the job of private litigants or of a private library, and in fact, what James said about whether the class action mechanism is the right way to solve these issues, I think this is even more kind of more disturbing because it's just somebody deciding, we're going to deal with orphan works the way we want to deal with them, not wait for Congress.

The plaintiffs have concerns over the fact that there are digital archives and as far as we understand, multiple copies of millions of books that have been digitized as part of this program and because of the nature of the way the libraries operate, there are multiple copies, maybe as many as eight or 12 of them, that contain nine million books, over seven million of which are protected by copyright and are susceptible to hacking, theft and so on. And some of you may be aware of the situation up in Boston where a person kind of hacked into the MIT library with the kind of stated goal of freeing the books from the library and making them available. He's now been criminally prosecuted. But there are grave security concerns.

And then there's just the overall concern about the idea that books, whether they're old or new, published, unpublished, are going to be – that a university's going to decide on its terms that it's going to make copies and that it's going to theoretically make them available.

And then there are just a couple – the most interesting legal issue, and I don't know whether people here – I won't talk about it for long – is Congress – and Mary may know a lot more about this than I do, but after quite a negotiation between various interest groups, came up with an entire mechanism to permit libraries and archives to allow when and when they can't make copies of books for archival, for preservation and for other purposes.

There's a very limited right to – it depends on whether it's a published or unpublished work. There's a very limited right with respect to what they can do, what libraries can do with respect to those rights, who can access them. The statute specifically prohibits widespread digitization of books and it clearly doesn't anticipate or permit kind of this like, we're going to make copies of all the books in our library and make them available.

And by the way, if you go to the Hathi Trust website, you'll see there are books that are currently on the *New York Times* bestseller list that are digitized as part of this as they happened in the Google Books case, so we're not talking about obscure, out of print or orphan works.

So the question is really Section 108 of the Copyright Act, which tried to anticipate and to deal with issues of what libraries could or couldn't do digitally. Original legislation before the 1976 act and then it was amended a couple of times including both when the DMCA was passed and then more recently when copyright law was extended in an effort to kind of find a balance between the rights of the libraries and the concerns over digitization.

And I think the case will come down to a rather simple interpretation of the interplay between Section 108 and fair use under the Copyright Act. The defendant's basic argument is, as it was in the early part of the Google case, this is fair use making these copies, making them available under limited purpose, for limited purposes, is fair use. And the plaintiffs say, you have no right to make a mass digitization of our clients' and other peoples' work.

KENNEALLY: And clearly, your client does feel that this is these parties taking the law into their own hands, essentially, right?

ROSENTHAL: Exactly. Right, exactly. It's a matter that we believe is for Congress to decide, not for somebody to decide and say, come and sue me.

And the case, by the way, this is a case purely about injunctive relief. The defendants are state-owned universities except for perhaps Cornell, which have sovereign immunity. You

can't sue them for damages. Nobody's seeking damages here. Google's not a defendant. It's a case about a legal issue. It's not an attempt – it's not a monetary case.

KENNEALLY: Right. And the point here is that copyright law is, if it's anything at all, it's – the fundamental point is the copying of the work and the distribution of the work is the right of the copyright holder. That's the point that the Guild is making here.

ROSENTHAL: Exactly. Right.

KENNEALLY: Can you sort of zero in a little bit more on your understanding – I hope it's appropriate to ask you – of the response, the fair use response, for this group here? The Hathi Trust says, well, this is not – we're not distributing. This is access. I mean, how do they try to slip over that really fundamental point?

ROSENTHAL: Well, we don't know exactly what they're going to say, so we could kind of anticipate the answer.

KENNEALLY: OK. Well, do that for us.

ROSENTHAL: Other case. First of all, one argument they have is that they also have these books available to do word and term searches so you can search the archive in order to find books. So that's one argument that they have that's similar to going back to the snippet argument.

They would argue that making books available widely is a fundamental fair use purpose. You're furthering the flow of information and the flow of ideas and expression of ideas, and that the fact that the law hasn't caught up with the technology is something that maybe the court should decide, but that they believe they're doing a service by making these books available.

KENNEALLY: Right. And there was quite a reaction. Once the Hathi Trust announced what it was going to be doing and made these books available, the Guild went right away and started searching and found many works by its current living author members available in all of this, and that generated further press.

You've represented a number of distinguished parties. You defended J.K. Rowling in Scholastic against claims of copyright and trademark infringement, among many others. Are you surprised by the temperature in the room, as it were, around this particular case?

ROSENTHAL: No, I'm not really surprised. I think as James said, these are really tricky, complicated issues that are very much on peoples' minds and this intersection between both the copyright law and technology is very complicated, and I'm not surprised the way things have kind of lined up on this.

KENNEALLY: And the relief that the Guild is asking for is essentially that these copies remain inaccessible until such time as the Congress passes legislation. Do I have that right?

ROSENTHAL: Right. In other words, that there be no self-help orphan works program. And you're right when you say that as we filed the lawsuit, a number of – there were very few books listed, by the way, as potential orphan works by the trust. I think only been 150 and quite a number of them, a significant percentage of them, the orphans immediately came out of the woodwork and said, wait a minute, that's my book.

And then there are other issues with books that are on the site that are listed as being public domain not being public domain, mistakes by the trust. And there are issues that are very interesting, again, that relate a little bit to the other case involving foreign rights owners, because you can have books that are in the public domain in the United States but not in the public domain elsewhere because of the life-plus-70 scheme for the older works, and those books may be available now in the countries where those authors reside or live or their rights holders live through the trust and they may –

So there are a number of different arguments, but that may not have been the answer to your question.

KENNEALLY: No, it does help, and as I said at the start, I am a non-lawyer so hearing about these complications reassures me. I sort of feel like, well, if I'm confused, I'm beginning to understand the problem here. Isn't that about right?

ROSENTHAL: Yeah. I think that from a legal perspective, the case is very simple if you – from a statutory interpretation question. The others on the panel may feel dramatically different or they may agree with me. I think from policy, political, future technology, it's much more complicated.

KENNEALLY: Right. It's that aspect of the future of our culture, not so much the future of copyright law, that's so interesting. Ned Rosenthal, thank you.

I want to turn to Mary Rasenberger, who is a partner at New York-based Cowan, DeBaets, Abrahams, and Sheppard. Mary, welcome.

RASENBERGER: Thank you.

KENNEALLY: We should tell people that from 2002 to 2008, you served in the Copyright Office in the Office of Strategic Initiatives of the Library of Congress, including as a senior policy advisor overseeing digital policy initiatives and recommendations to Congress on copyright and other policy matters as well as director for the National Digital Preservation Program.

So I think it's great to follow up what Ned's just been talking about with your own background and experience and for us to get your reaction to Judge Chin's opinion with regard to the proposed settlement. How did you feel when you read it?

RASENBERGER: Let me first start by answering Bill's question, which is good riddance or lost opportunity, and I would say neither. I would say neither because although I agree with Judge Chin's decision – I think he was absolutely right. I think the settlement was a really positive thing in that it started mobilizing people to think about having a universal digital library, what it would look like, how can we make this possible both from a technological point of view and also from a legal point of view.

It mobilized Europe. The Europeans saw, well, Google's going to build this universal library in the States. We need to have our own. They've actually done it with the government, through agreements with right holders and libraries and collecting societies and are actually moving forward relatively quickly. I would say relatively because actually, it's a very, very slow process building a digital library and few entities could do it the way that Google has, just move into these libraries and just start digitizing these books, scanning them on the mass level that they have.

Now, I agree completely with James that the real problem with the settlement, as Judge Chin pointed out, was with the opt-out. This opt-out – what we're calling the opt-out is that Google was given the right under the settlement to do whatever it wanted, basically, with out-of-print works unless the right holder came forward and said, no, I don't want you to do this or I don't want you to do that.

So if the right holder was present in the class action set, meaning that they came forward, they claimed the work, there was a lot of nuance to this. You could say, you can sell my book, you can sell it at X price, you could even dictate the price if you wanted, you can make it available in this database for libraries, but maybe there are other things you might not want them to do. Or you could come forward and say, keep it in the database but I don't want you selling it.

The problem was with the non-present class members. The class was defined as right holders of all books published in the U.S. and certain other English language common law countries. Very, very big class. So it included on the imprint side, which was opt-in, by the way, the publishers, owners of the imprint books had to actually affirmatively agree to give Google the books.

The problem was with these out-of-print works where it's not always easy even to figure out who the right owner is. Most publishing agreements give an author a right of reversion. After a year or two that the book's been out of print, generally speaking, the author has the right to get back the copyright. But this isn't always true. I just last week was reviewing a bunch of agreements from the '50s and '60s that had no reversionary right, which I found kind of surprising.

But with these reversion rights, the author has to come forward and say, I want the copyright back. They have to give notice.

So in a lot of cases, it's unclear who even owns the rights to these out-of-print books. It might be the author, it might be the publisher and it would probably be a lot of work to find those agreements and find the notices to figure out who. Then it's really hard. Let's say Google wanted to do this the right way and clear rights to all of these out-of-print books. It would basically be absolutely impossible for them to do it. Just the man hours required of finding – figuring out who the right owner is, finding that author and trying to clear the rights.

So, that was the issue that the settlement was trying to address, is how can we create this massive database of a universal digital library, in a sense, which is taking the collections of all of these major academic libraries and making them available online. How can you do this for works that are still in copyright? This is an issue that's been brought to the fore by the settlement and has gotten people to start thinking about other more appropriate ways to do it.

The problem with the settlement was that it gave Google and only Google rights to these out-of-print books. It gave them a competitive advantage. Nobody else was going to be able to clear all these rights to create a complete database of books. It also gave them certain search benefits, because no other search engine was going to have this massive quantity of data to improve algorithms and create linguistic robotics. And of course, it's unfair to the absent class members.

So I think that the settlement was really, really interesting. I'm agreeing with my colleagues. I think it raised a lot of important issues. It got us thinking, got us mobilized and the issue now is, so what do we do? What do we do next?

Ned mentioned orphan works. You may know that there's been legislation kicking around for several years now. It should have gone through already, but it unfortunately hasn't. But what that would do is give potential users the ability to use orphan works but they have to first make a reasonable search, and if they do that, then if the owner of this orphan work does come forward, they're limited to some kind of reasonable license fee.

Now, the problem is, even – and this is what Hathi Trust was doing with their orphan works project. Even though the legislation hadn't been passed, they said, well, we'll do something similar. Their problem was that they weren't spending enough time, in my view, trying to find the owners. They didn't go to really obvious databases. I heard that they were only spending an hour on each book, where – there's a – the British library recently published a report that estimated that you really need to spend four hours per book to locate the copyright owners if you – if you had to ensure that it isn't orphan works status that the copyright owner cannot be located.

So there were some problems. They were just not putting in enough work. But the British library also estimated that it would take one person a thousand years to clear 500,000 books at that rate.

KENNEALLY: Right. The point that we're all circling around, I think, is there is identified a public good here in a project of the kind that Google began, and there's also this concern about the private benefit to the sole party. And I thought it would be interesting to read two mission statements. One we may recognize.

"To organize the world's information and make it universally accessible and useful." And the other one is, "To make resources available and useful to the Congress and the American people and to sustain and preserve a universal collection of knowledge and creativity for future generations." The first mission, of course, is the mission of Google. The second is the mission of the Library of Congress.

And since you worked in that body, tell us about your vision and how it could possibly – one of the questions Bill left us with was, what should happen next? How could we approach this public good? How could we get to that place where a national digital library would be possible?

RASENBERGER: That's a great question. Ideally, something like this would be done through the National Library, the Library of Congress, or at least in partnership. And my first reaction to the settlement was, of course that's where it should be, and I was actually still working at the Library.

But of course, as people quickly pointed out, the Library doesn't have the resources. The government will never fund it. These are the types of things that have to be done in partnership with the private sector and you need private entities like Google who have the resources to go in and scan millions and millions of books.

But it is a public good, and that was my main issue with the settlement was that it gave Google, a private, commercial, for-profit entity, this exclusive right to – essentially a de facto exclusive right to the out-of-print books. Nobody else would have that right unless they similarly just went ahead and sued and had a class action settlement that was similar, which would never have, of course, happened.

So it's not going to be the Library of Congress. What do you do? You do public-private partnerships, which is what they're doing in Europe, looking at. But it's also gotten us in the U.S. thinking about various types of options. The options are, of course, some form of private arrangements, but that doesn't get at everyone, because the issue here is to do a massive universal database – and this is true, by the way, for preservation, library archive preservation or Web preservation. Whenever you're doing any mass-scale type of digitization or preservation, how do you get all the rights?

KENNEALLY: Completeness. I think if I can underscore that point, the database is only really of any worth if it's a complete one.

RASENBERGER: Right. OK. So, and collecting societies, which Fred will talk about, CCC, they don't represent everyone, so you can't get everything from them.

You could have statutory licenses. We have them in some cases such as for retransmission of broadcasts for cable television, for mechanical licenses, for musical compositions, for sound recordings. People don't tend to like statutory licenses because you are stuck with the rates set by the government or by some governmental entity or structure that sets the rates.

There are, of course, just straight exceptions in our law, which allow people to do certain things, including fair use, which is a broader right, but generally are exceptions that allow you to do things like play music at an agricultural fair. They're very specific.

So I think where people are sort of starting to look at now is this combination of collective licensing with statutory support. We don't have a lot of examples of that in our law, but a number of other countries do.

For instance, Canada, under their copyright act, collective – if you're not a member of a collective rights organization and the organization goes ahead and has a license for rights – let's say it's for, in this case, out-of-print published books, to license them to Google for digitization. You're not a member of that collecting society. Your damages are limited to whatever the reasonable license fee would be if you were a member.

What that does, effectively, is it gives the collecting societies the ability to license out everything, the completeness. And then it still gives the owner, who's not a member, the ability essentially to have an opt-out, because what you can do is you can bring a claim and you do have the right to enjoying further uses and you just get your licensing.

Another thing that I know the Copyright Office has been looking at and there have actually been some conferences on this, is extended licensing regimes. Now, these are used in the Nordic countries and also in Eastern Europe. They've been around since the 1960s. I think they're interesting because what they essentially do is they give a particular rights organization the ability to license on behalf of all rights owners in that class.

So if you represent all rights owners of books, for instance, you are able to license out on behalf of your members, but you're also able to license out on behalf of nonmembers. You have to give the nonmembers the same fee that the members get and you have to make some effort to find them. But it's an interesting way to get at this problem.

And basically, if you look at the laws, it has certain exceptions. It calls for certain types of licenses and then it says for the appropriate collecting society, they have the ability to license out on behalf of anyone and the rights owner cannot then sue the user who negotiated a license with that collecting society.

The benefits of that are that these licenses, the collecting societies negotiate on a case-by-case basis, so there's not like one set statutory license fee. They're able to negotiate for a particular use. So for instance, they could negotiation with Google or some other entity to digitize all the books in the country. That's a possible thing.

But it also, in most cases, not all countries, but in most cases it gives rights holders the ability to opt out. So it includes that opt-out that we saw in the settlement agreement.

KENNEALLY: So if the settlement is – you were answering Bill's question about good riddance or lost opportunity. If it's neither, it's also not the end of the road here. There are many options ahead of us and you've outlined a number of important ones. Mary Rasenberger, partner at Cowan, DeBaets, Abrahams, and Sheppard, thank you.

And finally, I want to turn to Fred Haber. I always turn to Fred Haber finally, five days a week in Danvers, Massachusetts, at Copyright Clearance Center. If there's a question that really needs an answer, you have to go to Fred for that. He is vice president, secretary and general counsel at Copyright Clearance Center where he's responsible for all of our organization's legal affairs, including the legal aspects of our copyright licensing business. He's participated in the development of each of CCC's licensing programs and counsels senior management in the development of new programs. So Fred, welcome here.

As we look at it at Copyright Clearance Center, obviously, we've watched with great interest over the last several years as the settlement was first proposed and then disposed of, that we're looking to the future and if one of the directions is to turn to Congress, which is what Judge Chin explicitly said, can you talk about how a solution might be arrived at in Congress? There are some recent examples that point to possible outcomes.

HABER: Congress is, as everybody up here knows, and probably everybody in the audience knows, is totally unpredictable, I think except in the following way when it comes to intellectual property. The history, and it probably goes back over 100 years of intellectual property legislation in Congress, is Congress waits for private parties to get together, figure out an answer and then come to Congress and tell them what to do.

We saw that this summer with the first revision of the Patent Act in 60 years. I think if you go back and look at the history books, both the 1909 Copyright Act and the 1976 Copyright Act were exactly done that way.

The hard part for me to imagine is how we would proceed today even if everybody in this room all acting in good faith wanted to, how we would present to Congress overarching solutions to a lot of the problems that everybody up here has been talking about.

KENNEALLY: And that's not because Congress is the problem. It's that the challenge is so tremendous.

HABER: I think that's right. Copyright is not a single regime, really. Mary, who worked in the Copyright Office, knows so well that every time there's been an issue, there's another section of the Copyright Act adopted that's longer than the tax code to deal with exactly a very narrow issue in exactly the level of precision that the private parties want to do, and that takes forever to get accomplished, and then the Copyright Office gets stuck with having to manage it. Not something that's worked really well in the past.

KENNEALLY: Right. And the settlement as proposed was trying to address, as James was talking about, a single issue, but as we chatted before the program, you were telling me that there's no way to solve one particular problem within copyright law because you start to pull that thread and so much else begins to unravel.

HABER: It is easy to see that way, yes. The metaphor I used was Google was trying to solve from its perspective a single problem that had all these other issues associated with it. As James went through, a lot of the problems in this settlement had to do with issues outside of copyright law, but even within copyright law, the complications are pretty much legion.

Some of the examples that Mary gave about alternatives that are being thought about and looked at for a lot of years, both in the United States and in Europe, come with them all kinds of complications that I think American business would at least think about a long time before accepting, I think.

An example is the extended collective license, which has been in place in a couple of countries in Europe for going on 50 years. Each of these countries is a very homogeneous society. They're all small societies, and the right that is the subject of the extended collective license is extraordinarily narrowly drawn so that everybody can know exactly what it is that's being negotiated.

It's hard to imagine how – outside of the area of orphan works where I can see the purpose of an extended collective license and how it might work because it's a narrow use. Trying to solve a lot of the problems that Google was thinking about with an extended collective license I think would be very, very difficult no matter how liberal the ECL was created.

Because what Google was trying to do – and this is really the problem with copyright today, I think – it was trying to do a whole lot of things and keep the door open for a whole lot of things it hadn't thought of yet for the future. And I think that was a huge reason that a lot of rights holders said, on top of the copyright issue, which is, you're not entitled to

take my stuff without my permission, even if you were entitled to take it, I need a lot more information. I need a lot more control. I need a lot more ability to manage my rights and not just give them to you to manage in the hopes that I'll do OK in the end.

One of the aspects that we at Copyright Clearance Center have learned over 30 years of trying to do this is that there, with all good intentions and with all good faith, people have a lot of different needs for the stuff that they produce. One of the things I talked about with Chris ahead of time was the notion that copyright is a single regime that's trying to do an awful lot of things simultaneously, and that's really, really hard.

And just in the world that we function in, which is related to text – and you can imagine this in an ECL kind of context – how much a scientific article is worth, whatever that means – quote-unquote, is worth – compared to how much an article in this morning's newspaper is worth, whatever that means is – you know there are at least two opinions about the relative worth of those two things and trying to accommodate them in a model that sort of says, well, we're going to sort of say they're all articles. Sort of like we learned when we were studying the Uniform Commercial Code, right? Everything is just an article of commerce, right? Whether it's a huge truckload of stuff or it's a piece of paper that you hand somebody. And the difficulties that that engenders are really, really hard.

KENNEALLY: In your own close reading of Judge Chin's opinion, you've pointed out to me some of the directions that he suggests for people. Clearly, Congress is one place to go. He didn't want to see this solved in the court. But there are some other sort of compass points that he points to.

HABER: Well, I think he certainly encouraged the notion of voluntary licensing, and I think all of us up here have pointed to the idea that voluntary licensing is a good idea. It's really red, white and blue. It's something that we all are very used to in America. And I think that encouraging something like collective licensing where it's possible, with appropriate opt-outs, with the ability of individual rights holders to have as much control as possible, is an attractive outcome that resolves a lot of the issues of the Google case.

Not all of them, and as Mary was pointing out, the notion that we or any other organization that's based on a voluntary model is ever going to have everything that everybody wants is not terribly likely. You're going to do the best you can. CCC's goal over the years has been to ask you what is it you want and that's where we spend our time going and getting the rights, rather than sort of saying, gee, let's think of who we would be interested in getting rights from and then see if we can sell them. We've been trying to do the marketplace model of what does the customer want and can we get it for them.

I think that what Judge Chin didn't get onto, and I think is an interesting way of looking at it and some of us have alluded to it here, is there are other models. Something that has a niche that has just come out, and some of you may know about it, is something called the

Digital Public Library of America, the DPLA, which is a voluntary effort coming out of not the rights holder community but the user community and the libraries, to try and figure out a way to make materials accessible to everybody.

They're going to run into copyright also. They're trying to start in a different place, which is start with the non-copyright-protected materials, whether they're in the public domain by aging out or in the public domain because they're government works or they are things where the rights holders are willing to give up the rights. And what they've decided is, rather than create the huge database in the sky – the huge database in the cloud that Tom was talking about this morning – they're trying to create a huge directory so that if you need something and it's held in the library in Hanson, Massachusetts, which is a small town outside of Boston, because you're doing research in genealogies of American Puritan families, with help locally, the Hanson public library will get its stuff digitized and there will be manners in which you will be able to get that through the Internet without it ever leaving, if you will, without it ever having to be lodged someplace other than Hanson.

And it creates a model that is a little less intensive. It works well for that kind of material. Commercial material, not so much. And I think what we're going to all have to decide is what do we want copyright to accomplish. Do we really need one big database in the sky or do we need to simply be able to find materials?

KENNEALLY: It's a great question and a great way to end this portion of the program. What do we want copyright to accomplish? Fred Haber, vice president, secretary and general counsel at Copyright Clearance Center, thank you.

And before I turn to the audience – and I hope there will be some questions from the audience – I want to throw out a thought, which is that as this case has evolved, going back to its very beginning in 2005, there have been various perceived heroes and villains throughout, and sometimes the same characters have played both parts in all of this. At first, Google seemed perhaps in heroic fashion, finally, by the end, as you have alluded, with some skepticism, in fact almost with a sense of distrust.

James, can I start with you in terms of your sense of in this cast, the heroes and the villains of it all? Is Judge Chin a hero, for example, or is there someone else you would point to as a hero in this case? Or perhaps all the objectors, because he pointed out just how important to him the objectors who came into the process really were.

GRIMMELMANN: Two thoughts. One is that this is actually something to emphasize about Judge Chin's opinion is the extent to which it goes out of its way to make sure that a large number of voices are heard. It, far more than a usual opinion, quotes from a very wide range of objections, both well briefed represented by counsel objections and individual letters sent by individual class members. And he often sets them up in conversation. It will quote from an objection and then it will say, and Google responds, and quote from Google's reply.

It doesn't always attempt to resolve these questions or to say which of them is the more legally correct view. In many cases, he's merely citing it for the fact that a particular view is out there. And it's a general a model of opinion for the process values of the legal system, that's it's really making clear that he is listening to the parties that have come before him and that you come to court in the United States and you will be heard.

And then in terms of the heroes and villains question, I don't think there are really clear heroes and villains on any side from around all of this. In some ways, it feels a lot like film noir where it's very shadowy, all of the relationships aren't clear, people – the alliances are shifting all the time, people have these surprising connections and hidden depth and people are trying to figure out who has the golden orphans.

KENNEALLY: It's kind of like *The Maltese Falcon* or something like that, or perhaps even *The Big Sleep*. I'm going to stop there because that's a great image to think about, this case as a kind of a film noire. So thank you, James, for that.

I'm going to get off the podium and turn to people for questions from the audience, and hoping there will be some of those. Yes?

HEALY: Michael Healy from the Copyright Clearance Center and formerly executive director of the Book Rights Registry under the Google Book settlement. At the recent hearing, or most recent, September 15, attorneys for the publishers' subclass got up and suggested that a deal with Google was imminent. Three months later, it doesn't seem as imminent as it was then. And the attorneys for the authors' subclass got up and put forward a schedule for further litigation. So for the first time, we have divergent view in the classes.

So looking into the future, essentially, where are those two avenues heading, the litigation avenue and the apparent unseen deal for the publishers? Where are those two things heading?

RASENBERGER: I'll take a first shot at answering. It's hard to know because the discussions obviously are private, but it looks pretty clear like – I was at that hearing, so it looks to me like the publishers will go ahead and settle with Google, and that's easy. That's the easy part of the case, right? Because we're talking about in-print works, mostly, or out-of-print works owned by the publishers. There's a limited group of publishers and by and large, most of these publishers already have agreements with Google for the Google Book search, so that's an easy –

The complicated part of the settlement had to do with the authors and the authors' rights. Why? Because that's where you have the out-of-print works and the opt-out apply, and Google kept insisting that there was going to be no deal unless it got the opt-out for the out-of-print, even though in that hearing last year, Judge Chin was really pushing them and

saying this is the issue. What can you do? And Darlen Durig (sp?) got up and said we need the opt-out.

I'm sure Ned has more information that he can't share with us, but it's unclear what's going to happen with the Authors Guild part of the suit. Now, they did ask to split the class. They haven't filed the papers yet, but that is something that looks like it might be happening, splitting up again. I forget what, Amendment 3 or whatever that brought them together as a single class. Judge Chin has said that he's open to splitting them.

KENNEALLY: And that kind of division, it seems to me, is a reflection of the publishing marketplace right now. There are some who have made peace with digitization and others who are holding out. Does that seem fair, James?

GRIMMELMANN: I think so. Part of it also reflects the fact that the author class is simply much more numerous and more diverse than publishers. The motivations for authors are incredibly diverse and people write for every reason under the sun. And as a group, they don't all want the same things and that complexity, I think, leads to complexity in the lawsuit.

KENNEALLY: Right. More questions from the floor, here? Yes? Hang on one second, please. Let me get you the microphone.

M: For Mary. The one thing I've never understood about this case is why does it have to be a class action? Couldn't something have been accomplished here without a class action that would have been very useful?

RASENBERGER: Yes, that's a great question because I think the whole problem with the settlement agreement was that it was a class action, that it was bringing in everyone. It was bringing in all authors, whether they knew about the suit, whether their heirs were their right holder and knew about this suit, whether they understood.

I got involved in the Google Book settlement shortly after it came out because first I read it and I thought, oh, my God, this is amazing. It's so forward-looking. It's really brilliant. And then I was asked to come speak about it from the author's point of view and I thought, well, what about all the authors that don't know about it? My husband's an author, my brother's an authors. I started talking to a lot of my author friends and none of them knew anything about this. They didn't begin to understand.

So I started talking to the lawyers at the agencies, because most writers really rely on their agents for all legal issues. The agents at IC and William Morris, they knew nothing about it. So that's when I started getting nervous, that this thing was just going to go forward. I think it was scheduled – this is now December. It was scheduled to just go forward in May and no one was talking about it. No one was thinking about it. So a group of us got a conference going at Columbia just to try to get some discussion going on this.

So to answer your question, though, if it had been just a private, wasn't class action, it was among just named plaintiffs, so the publishers who had originally brought the suit, the Authors Guild on behalf of only its members, yeah, much easier thing. Then you have people actually affirmatively agreeing to the terms of the settlement.

KENNEALLY: And if it had been individual parties rather than a class, it simply wouldn't have drawn the kind of attention and scrutiny that it did, too.

RASENBERGER: No, because you're not affecting non-present clients potentially.

KENNEALLY: And it's a matter of size. It's just not as big as that. A class just sounds important.

RASENBERGER: But if I can just add, it would not have given Google the universal library that it was looking for. And I think Serge was really – he had this vision of creating the universal library and saw that they had the ability to do it, and I think it was a noble, noble idea. I just think that putting it in a for-profit commercial entity isn't the right place to put it.

KENNEALLY: Ned Rosenthal.

ROSENTHAL: I just wanted to – there are some complications to doing as not as a class action. Like our case is not a class action and we're facing issues where defendants are making noise about whether the associations like through Authors Guild and the other rights organizations that are plaintiffs, have standing, associational standing to bring the case.

There's an interesting issue where if you're claiming rights on behalf of an orphan works owner and the orphan works owner comes forward, it's not an orphan anymore, so therefore, how can that person have standing to complain about orphan works because they've been identified.

So the class action mechanism, which we're not using, has some advantages, obviously also in terms of remedies and so on.

KENNEALLY: We have a few minutes left. Any other questions from the floor, here?

Well, I'm going to go claim my CLE credits even if I don't have a degree or anything like that. Maybe I can work my way towards it eventually.

I want to thank our panel, Ned Rosenthal, Mary Rasenberger, James Grimmelmann and Fred Haber, and thank you all.

(applause)

END OF PANEL DISCUSSION