



**Testimony of David Drummond
Senior Vice President of Corporate Development and Chief Legal Officer, Google Inc.**

**Before the House Committee on the Judiciary
Hearing on “Competition and Commerce in Digital Books”
September 10, 2009**

Imagine if a student living in a rural area or inner city could go to her local public library and read from millions of books in the combined collections of some of our nation’s greatest libraries, including the University of Michigan, the University of Texas at Austin, Stanford University, the University of Wisconsin-Madison, and the New York Public Library. Or if a blind student suddenly could access millions of digital books, using a refreshable Braille reader to unlock knowledge foreclosed from the visually impaired today. Then consider the author whose life’s work, a book no longer in publication, suddenly becomes available online so that anyone could find it, buy it and read it.

That’s why I am excited to be here today – because these are the types of opportunities that will be created by the settlement of a lawsuit brought against Google by authors and publishers. If approved by the U.S. District Court for the Southern District of New York, the settlement will create an educational, cultural and commercial platform to expand access to millions of books for anyone in the United States, enriching our country’s cultural heritage and intellectual strength in the global economy.

As explained below, we believe Google Books is fully compliant with copyright law today, and, if approved, the settlement will expand access for the public while providing rightsholders choice and compensation; lower barriers for other entrants; complement orphan works legislative efforts; and preserve Congress’s role in setting copyright policy.

But this settlement is not what is driving our digital books efforts. The world of online books is changing in far more revolutionary ways. From the Kindle to the cloud, companies are racing to offer new ways for readers to access digital books. Despite its cultural significance, our settlement is about the past – it only covers books published before January 5, 2009, most no longer in publication and with low commercial demand. It’s the newest titles and books yet to be written that will drive competition and commerce for digital books, not out-of-print books held in libraries.

The Evolving Book Industry

The vast majority of books sold in the United States are in print. The \$25 billion retail market skews heavily toward new releases, with out-of-print representing only two to three percent. Even used bookstores sell mostly in-print works. So don’t let anyone fool you that the future of books depends on what happens with the settlement of a lawsuit over out-of-print library books.

What we anticipate will revolutionize the way some people read books is an open cloud-based platform, where users buy and store digital books in online personal libraries accessible from any Internet-connected device. Amazon's Kindle approach links its online bookstore with its hardware device in a proprietary system, where users buy their books and device from a single source – Amazon. We are partnering with bookstores, publishers, and device manufacturers to develop an open platform. In this open platform, readers can find and purchase digital books from any bookstore and read them on any device, including laptops, mobile phones, and e-readers from multiple vendors. Smaller, independent bookstores, such as BookPeople in Austin, will benefit from an open platform that helps them stay relevant as book consumption moves online. Ours and other retail syndication efforts may be critical for consumers to retain a diverse range of options when shopping for books.

Google does not currently sell books. We are a new entrant, starting with zero market share. We're excited that the settlement will let us sell out-of-print books online through an open platform to anyone in the United States. Indeed, we believe it may be the development of this open platform, rather than concern about the marginal economics of out-of-print works, that underlies corporate opposition to this agreement. After all, in a market driven overwhelmingly by new titles, sales from the settlement will be a tiny fraction of overall book sales. We didn't settle the lawsuit thinking it would catapult us to be the next Amazon – rather, opening up access to these books helps fulfill our founders' vision for our digitization efforts.

Google Books – Origin and Product Features

Larry Page and Sergey Brin, Google's founders, have long believed in the power of unlocking information contained in books. Their interest in making digital libraries accessible dates back to 1996 when they worked on the Stanford Digital Library Technology Project as graduate students.

When Larry and Sergey approached me with the bold vision of doing for books what we do for the web – namely, making copies and indexing the text to make it searchable – as the company's lawyer I was a little taken aback. But as I thought about it, it made perfect sense. Today it is understood that the act of copying the web to index it is a fair use under our nation's copyright laws. Fair use is the very reason search engines exist. Well, the same fair use principles apply here – we make copies of books, index them, and only show users a few lines of text if the book is still under copyright protection. If you have used Google Books and seen more than short snippets, then you were looking at a book that was licensed to us or is in the public domain.

Since we started in 2004, we have scanned more than 10 million books. We get the books in two main ways. First, publishers partner with us on a non-exclusive basis to give us licenses to display and preview often their newest and commercially valuable titles. We have more than 30,000 publisher partners, representing more than two million books. For example, we partnered with the University of Michigan Press to make available a 2001 book entitled *Before Motown: A History of Jazz in Detroit 1920-1960*, for which users can browse several pages online. Our "Partner Program" was not the subject of the lawsuit or settlement.

The main way we get out-of-print books is from 42 global library partners, including 30 major institutions in the United States. Libraries have long been entrusted to preserve information spanning the range of human knowledge. Our partners have enriching historic collections, such as the Nettie Lee Benson Collection at the University of Texas comprising rare books that chronicle the history, politics and society of Latin America. Our library agreements are non-exclusive, and several participating libraries partner with other digitization efforts.

Of the 10 million books, we estimate that at least two million are clearly in the public domain and not part of the lawsuit. These include books published before 1923. For these books, when a user enters a relevant query we display the entire text. Users can freely download the book in multiple formats. Making public domain texts discoverable online is already advancing education and scholarly pursuits. Tim Barton of Oxford University Press describes a Columbia University classics class assignment, in which 70 percent of the undergraduates cited a book published in 1900 that was not on the reading list and long overlooked in classics scholarship.

That leaves six million books that are likely still under copyright protection but mostly out-of-print, although not all orphaned. For these books, we currently show users three small snippets of text around the search term, often just a few lines from the book. This snippet view is not particularly useful to our users – they cannot replicate the experience in physical bookstores, where people tend to pick up books and browse through a few pages before buying. Google Books also provides links to show users where to locate the book in a library or buy it from retailers. We drive traffic today for free to Amazon, Barnes & Noble, used book stores, and other booksellers through these links.

Even with our limited uses of library scans and restricted snippet view, in 2005 authors and publishers sued us in separate lawsuits, with the authors filing a class action. The lawsuits essentially claimed copyright violations for scanning, indexing and displaying portions of in-copyright works. We strongly disagreed then, and we still disagree today. Nothing about the settlement changes our firm belief that copying for the purpose of indexing is a fair use that is encouraged by existing copyright law precedents. Fair use is critical to the way web search and book search work, and Google vigorously defends fair use in this and other contexts.

Settlement Expands Access to Locked-Up Information and Benefits Copyright Owners

As the lawsuit progressed, at the authors' request, we sought to find common ground among authors, publishers, libraries and Google to expand distribution channels and make out-of-print books more accessible. In October 2008, we announced a settlement that will:

- Allow anyone, anywhere in the U.S. to preview out-of-print books and purchase an online version, right from their computer;
- Provide every public and university library across the U.S. free viewing of millions of books at a designated computer, plus the ability to purchase an institutional subscription;
- Provide the print disabled and visually impaired unprecedented access to the written literary record;
- Create new opportunities for authors and publishers to sell their books; and

- Enhance innovation and competition in digital books by creating a non-exclusive registry to clear rights, collect revenue and license works efficiently to Google and others.

The Reading Public – Google settled the case mainly so we can provide readers greater access to books. Rather than continue showing only snippets of out-of-print books, the settlement will allow us to display previews of up to 20 percent of the book, sell digital versions and provide access to institutional subscriptions, unless the rightsholder instructs us otherwise. With strong privacy protections, users will be able to browse and buy digital copies of millions of books that otherwise might be left behind in the digital age.

Out-of-print books are not sold through most bookstores and typically are found only in a limited number of research libraries, making access difficult or time consuming for much of the population. Expanded access will broadly benefit readers, researchers, and students, but it will be felt most tangibly by those who historically have had the least access to books, particularly those living in under-funded areas or with a disability that hinders traveling to, or reading from, their local libraries. Regardless of geography, income or physical disabilities, the settlement will greatly expand access to the world of knowledge contained in our nation’s largest libraries. According to Wade Henderson of the Leadership Conference on Civil Rights, “[f]ailure to approve the settlement would be tragic, in that it would impede meaningful access to vital information for many of who have been denied for far too long.”

Libraries and Academic Institutions – The settlement will let Google sell an institutional subscription enabling libraries, universities and other organizations to offer access to millions of books from the world’s leading libraries. Expanded access to these vast collections will serve as an important equalizer. Historically black colleges and community colleges are eager to attract faculty and students and level the playing field with larger institutions. The institutional subscription will be priced to assure a market rate for the rightsholder and broad access by the public. Under the settlement, public libraries and non-profit higher education institutions can obtain free access to the institutional database at one on-site computer.

Scholars and Researchers – Many scholars and librarians support our work as complementary to their efforts to make books accessible in an increasingly digital society. Gregory Crane, who runs the Perseus Digital Library Project to preserve Greco-Roman literature and culture, believes the settlement “is a watershed event and can serve as a catalyst for the reinvention of education, research and intellectual life.” Google also will provide \$5 million to create two research centers for computational research across the corpus.

Disability Access – Millions of print-disabled Americans will receive revolutionary new access to books through the settlement. As CNET reported earlier this month:

“Blind people ... have access to a special library run by the Library of Congress that converts print books into formats readable by the visually impaired, but that library – in existence since 1931 – only has 70,000 texts, said Chris Danielsen, director of public relations for the National Federation of the Blind. If the settlement is approved in October, it will give ‘print-disabled’ people ‘access to more books than we have ever had in human history,’ he said.”

After the settlement, millions of out-of-print texts will be accessible via screen enlargement, screen reader, and refreshable Braille display technologies. The National Federation of the Blind believes this will be pivotal in shifting the current inaccessible e-book archetype to one that assures equal access. For the first time, the print disabled will access our printed heritage to a degree comparable to that enjoyed by other Americans.

Authors and Publishers – The settlement provides a means to locate and compensate authors whose works might otherwise never be distributed online, while preserving rightsholder choice. Under the settlement, the rightsholder is in control, regardless of whether the book is in print or out of print. At any time, the rightsholder can direct Google to turn displays on or off, start or stop selling digital versions, or not scan particular books. Rightsholders will receive 63 percent of revenue earned from purchases, advertising, and subscription sales. For consumer purchases, rightsholders can set their own price (including a price of zero, as some authors simply want to give away their older books), or they can choose to have Google set a competitive price using an algorithm. The registry will provide authors a low-cost mechanism to resolve ambiguity over digital rights and license works to other providers in addition to Google.

Settlement Lowers Barriers for Other Entrants

We are the only company to date that has attempted to digitize the vast in-copyright collections of U.S. libraries. Even so, nothing in the settlement prevents anyone from doing what we have done. The agreement is non-exclusive in every possible respect, and the creation of the registry will make it easier for other companies to enter the market. That is why several leading antitrust scholars have praised the settlement’s pro-competitive benefits. Indeed, e-reader manufacturer Sony Electronics believes the settlement “will foster competition, spur innovation, and create efficiencies that will substantially benefit consumers.”

Search Engines – Any search engine that wants to scan and index in-copyright books can already do so. It is understood that scanning for the purpose of indexing is fair use. The settlement therefore has no affect on the ability of other search engines to compete by scanning and indexing in-copyright books, whether orphaned or not. Microsoft announced its own digitization initiative in 2005 for public domain and partner books. Three years later, after scanning 750,000 books, Microsoft shut down the program for financial reasons, preferring to crawl the repositories created by others instead. After the settlement, just as before, search engines no doubt will continue making their own business decisions about digitization.

Book Retailers – Next is the question of whether the settlement harms competition for book sales. Because the settlement largely deals with out-of-print works, it does little to change the state of competition for new, in-print titles, which comprise 97 percent of the market. Through Google Editions, we will work with publishers to offer digital versions of in-print books through multiple retailers. Our open retail platform will expand distribution in a way that is clearly beneficial for the public.

Competition for out-of-print books is restrained for everyone. Unlike newer titles, as a practical matter it is nearly impossible to clear ownership rights to millions of older, out-of-print books. It’s not simply a matter of locating the author. A tangle of legal uncertainties apply, including

decades-old contracts, different copyright regimes depending on when and where in the world the book was published, whether the book was registered or renewed with the Copyright Office, and whether the inserts, illustrations or images have separate copyright holders. The right to publish the hard copy may or may not include digital rights, an unresolved legal entanglement between authors and publishers. Long ago communications between author and publisher may have left either one with the sole ability to license the work. Facing the threat of statutory damages liability (as much as \$30,000 per work) for making a mistake even if the rightsholder is not harmed, often neither author nor publisher is willing to commit that they can license the work for online use. The cost of ascertaining for certain who has the rights to an out-of-print book likely exceeds the economic potential of any given book. The result is that these books, which collectively represent much of our nation's printed cultural heritage, have remained inaccessible.

Nothing in the settlement makes it any more difficult for others to license these books. Rather, the settlement is structured to make it easier for anyone – including Google's competitors – to clear rights. Google is funding a non-profit registry, controlled by authors and publishers, to resolve ownership disputes. As rightsholders come forward, information about what books were claimed and who claimed them will be publicly available, thereby lowering the costs and risks for other providers. Google's competitors can use this information to avoid scanning books with limited market potential and focus on commercially valuable works. Later entrants also can take advantage of Google's efforts to identify books in the public domain. Moreover, while rightsholders retain licensing of their own works, they also can authorize the registry to license to third parties to the extent allowed by law. Many books that were once difficult for anyone to license will become books that are easy for everyone to license.

If within ten years the registry licenses a significant number of unclaimed works to another distributor on more favorable terms (less favorable for the rightsholder), Google can receive equal treatment. This simply protects against others free riding off the investment of Google in creating the registry, and reflects the fact that, unlike Google whose terms are fixed through the settlement, competitors can negotiate terms based on future market realities. Moreover, the provision does not apply to claimed books, which hold the lion's share of economic value. Importantly, it does nothing to reduce the registry's incentives to license our competitors. If a competitor offers the registry a better deal, the registry has every incentive to take it, and the provision doesn't apply. While this clause has generated much controversy, the structure is relatively commonplace and understood to be pro-competitive in contexts like this.

Settlement Reduces the Problem of Orphan Works for Everyone

Many people have expressed concern about the problem of “orphan works,” a concern we share. We have long supported an effective orphan works legislative solution, and we will continue to do so. This settlement is a strong complement to, and not a substitute for, orphan works legislation.

An “orphaned” book is an abandoned book. Many out-of-print books, however, are not abandoned but instead have two parents whose ownership rights are uncertain. We call these books “neglected” books. Data points indicate that orphaned books are at most about 20 percent of out-of-print books, and likely would be lower with a financial incentive and efficient

mechanism for rightsholders to claim books and clear rights, which the settlement provides. Even among the orphans, a substantial portion may be commercially insignificant or miscellaneous works, such as a transistor handbook from 1966 that we scanned and is now likely abandoned.

Over time, the structure of the settlement will reduce the orphan work problem for everyone. The settlement will create a registry whose job it is to go out and find rightsholders. It also will create a financial incentive for rightsholders to come forward. And it creates a database that identifies these rightsholders, making it easy for other providers to find them and obtain a license for their books. We believe over time a significant number of works will be claimed. Ideally, the registry would eliminate orphan books altogether. But realistically some small portion of rightsholders will still be unable to be found, resulting in a true abandoned book, or orphan.

The settlement will enable Google to make certain uses of abandoned books. So far we are the only company that has sought to digitize in-copyright, potentially orphaned books. We believe anyone who wants to re-use abandoned works should have a fair, legal way to do so. In our view, the settlement helps here too.

To the extent that other providers want a legal framework to re-use orphaned books (without having to defend against a lawsuit like we did), Google would support a legislative solution. The settlement provides a working model – a private sector incentive and mechanism to clear rights – that will reveal the scope of the orphan problem and spur legislation. Indeed, past legislative efforts have contemplated and encouraged private sector initiatives to build rights databases like the one Google will fund, which the Copyright Office called “indispensable” to solving the orphan works problem.

Some scholars have taken a well-intentioned view that it is preferable to pass orphan works legislation before letting Google make abandoned books more accessible. This would mean we all wait for enactment of a broader bill that addresses not only orphan works but also rights clearance challenges for neglected works. In the meantime, instead of having multiple potential providers of neglected books and at least one provider of abandoned books, we will have no providers of any of these books. Moreover, absent the settlement or a government-funded registry, it remains unclear whether the private sector will fund the necessary databases.

For truly orphaned books, why is one provider now better than none? Because one company spending the resources to make orphaned books more accessible greatly enriches our cultural heritage and expands the progress of human knowledge. Every day, older works in libraries are being taken off shelves and sent to storage facilities. Given the opportunity to revive access to these books for the public in a way that harms neither competition nor commerce, nor the chance of enacting future legislation, I would hope the choice is obvious.

The Settlement in Context – Congress Continues its Legislative Role

The settlement represents the resolution of a long and hard-fought litigation among multiple parties with divergent interests. The suggestion that the settlement usurps the role of Congress to set copyright policy because the suit took the form of a class action is flatly wrong. The

settlement does not establish new copyright law; it is not even a determination on the merits of copyright law. All the settlement represents is the means by which the class of rightsholders decided to resolve the lawsuit.

Critics may dislike the use of class actions in copyright, but Congress itself created class actions through Rule 23 of the Federal Rules of Civil Procedure and has not restricted their use in copyright cases. Copyright class actions are not uncommon, and have been settled through similar remedies. The class action process allows rightsholders to object to the settlement or opt out. Indeed, this settlement will let rightsholders control the use of their books even after the settlement takes effect. Moreover, as the means of redress for private litigation in the United States, the settlement is fully consistent with international treaty obligations – a view confirmed by Berne Convention scholar Sam Ricketson.

I've heard many suggestions for improving the settlement, some diametrically opposed. But the Judge's role is to approve or reject. If rejected, the parties likely return to their litigation stances, arguing over snippets and indexing, losing this opportunity to open up online access to information trapped in out-of-print books.

It would be unfortunate if this hearing devolved into hypothetical debates over class action law in the copyright context, postulation of the Platonic ideal of orphan works legislation, or simply a forum for competitors to argue over what is estimated to be less than three percent of the commercial market for books. Something far greater for human knowledge is at stake.

The very purpose of Article I, Section 8, Clause 8, the copyright clause, of the Constitution is to “promote the Progress of Science and useful Arts.” As reading moves online, and new generations of students tap into centuries of learning from their laptops, users will find knowledge they greatly value but did not even know existed. While this may not generate significant commercial value, it will elevate the marketplace of ideas. The settlement represents the progress of science to tackle copyright challenges and help ensure millions of out-of-print books do not fade into oblivion. To oppose this settlement means depriving the public of learning, and punishing the parties to a lawsuit for resolving their private litigation in innovative and groundbreaking ways.