

Private Ordering in the Shadow of Copyright Law: Google Books as a Blueprint

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1. Introduction

The information economy is undergoing a period of fundamental change. These changes concern the ways information goods are owned and traded, and how they are regulated through public and private rules. Thus, they pertain to core institutions of the digital information landscape. Prompted by the juristic discussion on the role and impact of the copyright regime in the information age, this article offers a regulatory perspective on the evolving governance arrangements that shape the market for cultural goods. Without privileging either one, this approach includes public ordering through copyright law and private ordering through license contracts. Furthermore, it discusses proliferating strategies of selling access to information and the impact of those strategies, both on the use of literature and the constitution of cultural works.

Google Books, the unsuccessful but very well documented attempt to reutilize the vast amount of out-of-print works, serves as an example to illuminate the ongoing transformation of information governance. Google Books is the outcome of a settlement agreement of a lawsuit that the Authors Guild of America and five large members of the Association of American Publishers each had filed against Google on the grounds of copyright infringement. While “Google Print”, the subject of the original lawsuit, merely intended to integrate ink and print works into Google’s search service, the objectives of the settlement went a significant step further. Google Books intended to sell access to out-of-print works and thus infuse new value into works deemed worthless in the past. In a sense, this business model blurs the distinction between the services offered by public libraries and the products of commercial bookshops. It planned to offer for a fee what public libraries provide for free: access to works. Such a project requires the scanning and indexing of millions of texts. In other words, it demands mass digitization – a venture neither anticipated nor covered by copyright law.

Google Books made many observers hold their breath. Its business model could have changed the global book economy in profound ways. Samuelson (2010: 1308), for example, has portrayed Google Books as “one of the most significant developments in the history of books, as well perhaps in the history of copyright”. Likewise, von Lohmann (2008) predicted that it is “likely to change forever the way we find and browse for books”. Grimmelmann (2009, p. 1) found it “difficult to overstate the importance of the settlement”, and Google itself referred to the digitization of books as its “moon shot” (Toobin 2007).

A central element of the present transformation affecting the information sphere concerns access to digital works. Starting with the sale of software as a mass commodity in the 1980s, license contracts have begun replacing the traditional sale of information goods. Instead of purchasing an information artefact, users are now more often buying *rights to use*. Carefully circumscribed terms and conditions, the *fine print*, form a crucial element in the commodification of access to information goods and, to a growing extent, substitute the transfer of property.

At first glance, license contracts appear as a mere implementation of copyright law. Yet they have the potential to sidestep or modify copyright law and thereby reshape the rules of the game. Embedded in an evolving mode of industry self-regulation, a whole new set of information assets is emerging that requires close monitoring of users in order to unfold its economic potential. As the case of Google Books shows, this contract-based regime involves a redistribution of the rights that used to structure the information economy (see also Gasser 2004). Although the competent court rejected Google Books in early 2011, it is worth studying this case as a possible blueprint of the future information economy. Its business model indicates how books and other cultural commodities could be traded and how public and private regulation interact to enable such markets.

The next section of this paper outlines a governance perspective on Google Books emphasizing the transformation of both information markets and respective modes of regulation. The third section provides an overview of Google Books, its regulatory framework and business model. The fourth section discusses three aspects of relevance beyond the specific case of Google Books: (1) the intended private reform of copyright, (2) the commercial exploitation of access to information goods and (3) the rise of license contracts as a means of ordering the information economy.

2. Changing bundles of Entitlements: A Governance Perspective on Copyright Reform

Due to its legal, commercial and geographical scope, Google Books has triggered a major international controversy encompassing three class action lawsuits, a proposed and subsequently amended settlement by the litigating parties, more than 400 filings by class-members and “friends of the court” (among the latter the French and German governments), two court hearings, various conferences, innumerable blog entries, articles and a still growing amount of academic publications, all covered by a special online-bibliography¹. The academic debate has focused on the legal dimension of Google Books. The predominantly juridical literature has addressed copyright infringement (Samuelson 2011, 2010), compe-

1 <http://digital-scholarship.org/gbsb/gbsb.htm>

tion concerns (Picker 2009) and procedural matters pertaining to the class action nature of the settlement agreement (Grimmelmann 2010).²

This article approaches Google Books from a governance perspective with an emphasis on its regulatory implications for the book trade and the information economy at large. The analytical value of the governance approach lies in its ability to “decenter” rule-setting authority within a given regime (Bevir and Rhodes 2006). Instead of privileging *ex ante* statutory norms and the legislator, it aims to take all relevant actors and means of regulation into account (Botzem et al. 2009). Notwithstanding the common assumption of the growing importance of copyright law, the governance approach suggests treating the relationship between public and private ordering as one of the research questions. An advantage of such a “low-presupposition” perspective is that it is particularly sensitive to shifts between various forms of regulation and thus well-suited to study the transformation of the copyright regime.

Yet, studying Google Books from a governance perspective is less self-evident than it may appear. Many, if not most, observers have condemned the commercial library project as a case of copyright infringement, pure and simple. In more or less drastic terms, Google Books has been accused of “trampling on property rights” (Nimmer 2009), causing a “copyright meltdown” (Vaidhyanathan 2007, p. 1221; see also Newitz 2010) or turning copyright on its head (Peters 2009, p. 70). In the view of the latter, the then U.S. Register of Copyrights, Google Books “would alter the landscape of copyright law – which is also the role of Congress and not the courts – for millions and millions of rights holders of out-of-print books. The out-of-print default rules would flip copyright on its head by allowing Google to engage in extensive new uses without the consent of the copyright owner, in my view making a mockery of Article 1 of the Constitution that anticipates that authors shall be granted exclusive rights.” In sum, many copyright experts have assessed Google Books against statutory copyright rules, coming to the conclusion that it deviates both from U.S. and European copyright law.

The allegation of copyright infringement raises the question as to how this perspective relates to the governance approach and its effort to decenter rule making authority. According to Elkin-Koren (2004, p. 252), the verdict of copyright infringement can be attributed to one of the two concepts that currently shape the discourse on the Internet and the information regime. The more traditional model of the regulation of information reflects the idea of property rules “created by centralized institutions of the territorial state”. According to this understanding, only the legislator has the authority to alter the norms that constitute intellectual property law, which is why Google Books clearly constitutes a case of copyright violation. Elkin-Koren’s (2004, pp. 252-3) second model refers to the “emerging regime of standard contracts” shaping the markets for copy-

2 Specifically, observers address ramifications relating to (market) power (Grimmelmann 2009), price setting (Band 2009), privacy (Jones and Janes 2010; von Lohmann 2008), privatization (Sag 2010; Darnton 2009) and propertization (Vaidhyanathan 2007, p. 1218). Some of the authors weigh them against the opportunities of an unparalleled access to the vast amount of out-of-print literature (Picker 2009, p. 2).

righted works. Against the backdrop of this latter concept, Google Books appears as a case of private ordering loosely defined as “decentralized processes by which norms are formulated”.

The second model suggests that non-governmental practices, for instance market-based transactions in the form of contracting, may assume a regulatory role to the extent that such transactions prove to contribute to the change of rules and expectations. Instead of confining itself to the question of whether or not Google Books infringes on copyright laws, the private ordering approach may be more interested in the proposed or practiced modifications of existing norms and in their consequences for the information economy. That said, Samuelson (2011, p. 482) recently discussed Google Books as a private act of rewriting copyright. It is “intriguing”, she wrote, to view the settlement as a “mechanism through which to achieve copyright reform that Congress has not yet and may never be willing to do”.

The governance perspective on the information economy does not neglect the role of statutory property rights for information markets, but it adopts a dynamic stance on the property regime by paying close attention to its ongoing reinterpretations and modifications. These changes concern the distribution of rights in the information sphere, but they may also affect the regulatory weight of copyright law relative to other, private, forms of ordering (see Bakardjieva Engelbrekt 2007, p. 72). Referring to Hohlfeld’s conception of property as a changing and relational “bundle of entitlements”³, Bracha (2007, p. 1807) argues that copyright is neither absolute nor invariant. Instead of one ontological form, “property rights involve a multitude of choices among various institutional forms”. While there is broad agreement that intellectual property rights change over time, Carruthers and Ariovich (2004, p. 25) emphasize that they do not always expand. One of the most controversial aspects of Google Books, for example, pertains to a provision that would curtail the control of right owners (see below). Likewise, although the legal system may be the most important source of property rights, the governance perspective casts into doubt if it is indeed the only one. Market transactions, for example, can manifest themselves in the transformation of a property regime. Carruthers and Ariovich (2004, p. 25) describe this development as a decoupling of commercial practices from formal institutions resulting in the emergence of (perhaps temporary) “informal property rights”. License contracts between creators and publishers or between information producers and customers offer numerous examples for the emergence of such informal property rights. An, albeit rather generic, economic explanation for this phenomenon can be found in the inefficiency of a given property regime (Salzberger 2006, p. 48).⁴ In order to exploit new business opportunities such as the re-exploitation of discontinued works, private actors may test the boundaries of a given regulatory framework.

3 See for example Carruthers and Ariovich (2004), Heller (2000) and Stepanians (2005, p. 236) for a more detailed account on this interesting subject.

4 See also Cohen (2011, pp. 153-5), who raises the question if copyright law provides an adequate framework for the “post-industrial resource-coordination problems” that a property regime is expected to handle.

Taken together, the contrary perceptions of copyright infringement versus privately enacted copyright reform differ in terms of the legitimacy they ascribe to Google Books agreement. More generally, they imply different ideas about the type and location of rule making authority in the information economy. The diagnosis of copyright infringement reflects the common view of copyright as a fixed set of property rights granted by statutory law whose scope and boundaries are exclusively to be defined by the legislator. The private ordering perspective, on the other hand, adds and emphasizes the regulatory dimension of copyright law, which allows public and private ordering as concurrent or complementary forms of governance.⁵ Exemplified by Samuelson's work (2011, 2010), the latter approach primarily focuses on the regulatory ramifications of Google Books and assesses them against the benchmark of public ordering – or more precisely: the actual mission attributed to copyright legislation.

If the allocation of entitlements is the exclusive domain of the state, modifications of such entitlements also fall under the exclusive scope of the legislator. Other forms of modification, by definition, must be infringement. By contrast, copyright understood as a regulation of information markets can be the subject of public and private interventions. A redistribution of property rights could thus result from various, more or less formal and coordinated actions and means. The governance approach escapes the narrow debate on whether or not Google Books constitute a copyright infringement and opens up additional analytical avenues for studying the development of such arrangements. Specifically, it allows studying Google Books as one significant instance within the larger interplay of public and private ordering in the emerging information economy.

The next section will describe in more detail the genesis and business model of Google Books.

3. Google Books: Reutilization of Out-of-Print Literature

3.1. The Regulatory Framework

The key element of Google Books is the commodification of access to the vast amount of out-of-print literature. Somewhat similar to digital subscription models for music, Google Books meant to make available present and past works of literature as a commercial service. The reutilization of information goods is not specific to digitization, however. New technologies regularly create secondary markets for cultural goods. Examples are TV broadcasting that “breathed new life” into cinematographic works or video recorders that had the same effect on television series (van Gompel and Hugenholtz 2010, p. 61). Yet, digitization does not only enable new markets for out-of-print works, it also transforms the valuation principles of cultural goods.

According to Anderson's (2004) theory of the “long tail”, we are moving from a world of scarcity governed by limited shelf space, TV channels or screen time

5 I thank Mike Madison, University of Pittsburgh, School of Law, for pointing out these different ideas of copyright to me. See also Liu (2004).

towards a world of abundance. The world of abundance implies that, due to reduced costs of digital storage and online distribution, there is no longer a need for the cultural industries to solely focus on high volume mainstream taste. Instead it becomes economically feasible to offer access to all types of available cultural works.⁶ It is estimated that roughly 5–10 % of all books ever printed are commercially available. The rest are out of print. The “long tail” for books may thus consist of an enormous amount of unavailable works gathering dust on library bookshelves.

Google Print, also called *Google Book Search*, began as a large-scale digitization project aiming to expand Google’s search service into the analogue world of ink and print. The original idea was that books should become searchable just like any other content on the Internet. However, Google Print has been neither the first nor the only project aspiring for a digital library on the Internet. What sets Google Print apart from other digitization efforts such as “Project Gutenberg”⁷ or the “Open Content Alliance”⁸ is its magnitude and audacity (Johnson 2007). While most digitization projects make sure they stay within the boundaries of copyright law, typically by focusing on books or collections whose copyright has expired, Google boldly envisions digitizing each and every book: “Imagine sitting at your computer and, in less than a second, searching the full text of every book ever written. [...] Imagine one giant electronic card catalog that makes all the world’s books discoverable with just a few keystrokes by anyone, anywhere, anytime” (Schmidt 2005). Reaffirming its mission to “organize the world’s information”, Google books seeks to assemble the world’s entire literature in an electronic, full-text searchable database.

In 2004 Google announced, as a first step, its plan to digitize 17 million books within ten years.⁹ By late 2009, half way through, Google had scanned twelve million books¹⁰, in autumn 2010 the number had risen to 15 million (Crawford 2010). The book database is compiled from two sources: a partnership program with publishers and the library project. The partnership program, which accounts for about 15 % of the database, gives Google access to works in print. It includes approximately 30,000 publishers from roughly 100 countries (von Lohmann 2010) who expressly authorize Google to include their publishing program in the database and display portions of it, to an extent they choose, as search results.

6 Anderson (2004) describes the implications for books: “The average Barnes & Noble carries 130,000 titles. Yet more than half of Amazon’s book sales come from outside its top 130,000 titles. Consider the implication: If the Amazon statistics are any guide, the market for books that are not even sold in the average bookstore is larger than the market for those that are”.

7 http://www.gutenberg.org/wiki/Main_Page

8 <http://www.opencontentalliance.org/>

9 It is difficult to assess this figure since there are no reliable statistics about the number of all books ever printed worldwide. In the course of its digitization project, Google has identified roughly 130 million unique books (Taycher 2010). WorldCat, the largest international library catalogue, listed in 2009 roughly 85 million manifestations of works (Lavoie and Dempsey 2009). Experts suspect that these numbers contain many duplicates (Grafton 2007; see also Coyle 2006 on this subject).

10 Of the 12 million books digitized by 2009, at least two million were in the public domain and another two million derived from the partner program with publishers (Dan Clancy, Chief Engineer of Google Books quoted after Samuelson 2010, p. 1310). The remaining number of books is likely to be protected by copyright and thus subject of the lawsuits filed against Google.

Publishers thus enjoy an *opt-in* relationship with Google Books: only works they make available will be searchable through Google Books.

The library project, the contentious part of Google Books, is based on agreements with major university and research libraries mostly in the US and Europe. According to the general arrangement, Google bears the costs of digitizing and indexing the books while the libraries, in exchange for making their collection available, get a copy of the database generated from their individual corpus if they want to.¹¹ In 2010, 42 libraries cooperated with Google.¹² Most libraries have restricted their collaboration to collections in the public domain. There have been a few noticeable exceptions, however. The libraries of the University of Michigan and Stanford University (holding 7.8 and 8 million books respectively) have given Google permission to digitize their complete collection, including works still protected by copyright law.

Depending on the legal status of a queried text, Google's book search service shows, in addition to bibliographical information, snippets of a few lines surrounding the search term for copyrighted works or entire documents in case of works in the public domain. Copyright experts have regarded, and in many cases welcomed, Google Book Search as a test case for the future regulation of information goods. It is still unclear whether or not the scanning and indexing of books and the online display of text snippets, as a response to search queries, is protected by limitations and restrictions of copyright (CRS 2007; Samuelson 2011, p. 490). Google itself has argued that it modeled the library project after its search engine, and if its search service is considered fair use, the new book search service should be as well.¹³ Perhaps unsurprisingly, the rights holders' associations failed to find Google's point of view convincing.

In 2005, the Authors Guild of America and five large members of the Association of American Publishers each filed lawsuits against Google on the grounds of copyright infringement. However, instead of following the lawsuits through and clarifying the rights to indexing the world's literature, the litigating parties sounded out a private settlement. For more than two years, incidentally while legislation on orphan books was pending in the U.S., they negotiated behind closed doors (for details see Samuelson 2011). The resulting agreement between the Authors Guild, the Association of American Publishers and Google did not resolve the contested issue. In fact, it did not even touch on the question as to whether or not an indexing of copyrighted books deserves exemption from copyright.

11 The specific conditions depend on the type of agreements with Google (for details see Band 2008).

12 For details see: <http://www.google.com/googlebooks/partners.html>

13 "We really analogized book search to Web search, and we rely on fair use every day on Web search [...] Web sites that we crawl are copyrighted. People expect their Web sites to be found, and Google searches find them. So, by scanning books, we give books the chance to be found, too" (Drummond 2009).

Apparently driven by the plaintiffs¹⁴, the scope of the settlement agreement grew far beyond the original cause of the lawsuits. Google Books, the outcome of the negotiations, fundamentally differs from the original book search engine, the actual bone of contention for which Google was sued. Whereas Google Book Search intended to display mere text snippets of copyrighted works, the settlement agreement planned to offer access far beyond the 20 words once regarded as a violation of copyright (Lohmann 2008). Instead of awaiting a legislative solution, the litigating parties “thought big” and developed a private regulatory framework for the reutilization of discontinued literature. Announced in autumn 2008, the settlement agreement includes a detailed licensing architecture and business plan for selling access to out-of-print works. The costs for establishing this new exploitation system are borne by Google. Google agreed to bear the costs for the litigation, to compensate the rights holders (not to be confused with the authors) for the indexing of their works and to provide a start-up fund for the new Books Rights Registry (see below). All in all, Google agreed to contribute a total of US\$ 125 million to the settlement.

In return for Google’s investment, the settlement agreement endorses the digitization of books and protects Google – and exclusively Google – against the potentially enormous liability for copyright infringement in the U.S. (Picker 2009, p. 229). On behalf of the affected publishers and authors, oddly enough including missing rights holders, it authorized Google to digitize and index out-of-print in-copyright books published before 5th January 2009, both in and outside the United States. The rights holders’ authorization for a re-exploitation of the millions of works digitized by Google was to be derived from a body that first had to be created: the “Books Rights Registry” (BRR), a new type of collecting agency designed to represent all authors and publishers with a stake in the Google Books database. Initially funded by Google with US\$ 34.5 million, the BRR was supposed to form the institutional core of Google Books. Among other tasks, the BRR would be responsible for locating rights holders, distributing royalty payments earned through Google Books, negotiating prices and creating a voluntary copyright database to provide information on copyright ownership. The BRR was to be set up as an independent nonprofit organization governed by copyright owners, equally divided between publishers and authors. It acts as the clearing house between all copyright owners and Google.

Members of the BRR would transfer their rights in discontinued works to the BRR which would license them to Google, thereby authorizing the company to sell access to these books. Membership in the BRR was designed by default rule. In other words, the settlement stipulates that copyright owners must expressly opt out if they do not wish to participate in Google Books. By assembling all publishers and authors under one umbrella agency, the settlement sought to mitigate the

14 According to Alexander Macgillivray, then Deputy General Counsel for Products and Intellectual Property at Google (see his presentation at the Berkman Center, <http://cyber.law.harvard.edu/events/luncheon/2009/07/macgillivray>, at min 14 and the corresponding blog entry on the talk: “Google usually thinks very big – this, he says, is one of the few times that other parties at the table were thinking bigger than Google was”, <http://www.ethanzuckerman.com/blog/2009/07/21/alex-macgillivray-explains-the-google-books-settlement/>).

fragmentation of rights preventing the reutilization of discontinued cultural goods. As a result of its opt-out mechanism, the costs of clearing rights would significantly decrease. Simultaneously, however, the private settlement would create a powerful new stakeholder group which would act in the name of “an entire industry, more or less” (Grimmelmann 2009, p. 7) – including its absent members.

The sweeping, all copyright owners encompassing scope of this licensing regime was due to the class action nature of the legal dispute.¹⁵ The Authors Guild and the Association of American Publishers claimed to represent and act on behalf of “all persons or entities having a U.S. copyright interest in one or more books as of January 5, 2009” (Samuelson 2010, p. 1316). Importantly, the U.S. copyright interest is not confined to American authors but applies to all authors whose country has signed the Berne convention (Band 2009, p. 263). Hence, the class action law suit had the potential to create a global regime for the re-commodification of out-of-print literature.¹⁶

As a response to the massive criticism of the settlement, particularly the anti-trust concerns brought forth by the U.S. Department of Justice, the litigating parties presented an amended settlement in November 2009 (ASA 2009).¹⁷ The revised settlement was the subject of a fairness hearing held in February 2010.¹⁸ In March 2011, the competent court rejected the settlement on the grounds that it was not “fair, adequate, and reasonable”.¹⁹

3.2. The Business Model

Based on its licensing framework, the settlement outlines a business model aiming to establish a secondary market for digitized out-of-print books. Interestingly, Google Books was to create not only new sources of revenue for existing works, it also gave rise to new categories of information goods. Stripped of their physical container, literary works can be easily modified and merged into new information artifacts or “content” such as a subscription database, a reader for students or a research corpus. Specifically, the settlement outlines three forms of commercial exploitation (the settlement speaks of “revenue models”): (1) a free preview of portions of texts (supplemented by advertisements), (2) purchases of individual works and (3) institutional subscriptions. The rules governing the business model are, as many commentators have pointed out, exceedingly complex – so complex

15 Class actions are law suits specific to U.S. law that allow collective actors to sue on behalf of the class, i.e. all affected people. Band (2009, p. 263) characterizes class actions as “legal fiction [...] where a handful of class representatives bring an action on behalf of all members of a defined class”. On the representativeness of the Authors Guild see also Darnton 2011.

16 The amended settlement from November 2009 considerably narrowed down this broad scope to books registered in the U.S. or published in the U.S., Canada, Australia and United Kingdom (Band 2009).

17 In addition to the downsizing of the class, the amended settlement created a fiduciary to represent the interests of missing rights holders. Also, it offered competitors the possibility to resell access to the Google Books database (ASA 2009).

18 For the transcript, see http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf

19 For the opinion of the judge, see http://thepublicindex.org/docs/amended_settlement/opinion.pdf

indeed that they can only be grasped by way of radical simplification. Most rules vary with the category and status of works and, at times, with the type of users.

In order to achieve this level of differentiation, the settlement introduced a number of classifications such as types of libraries (varying with their level of collaboration with Google)²⁰, digital file collections (varying with their purpose and comprehensiveness)²¹ or market segments for institutional subscriptions (varying with the type of subscriber) (ASA 2009, pp. 53-4). The definition of terms used in, and partly created for, the settlement agreement alone accounts for more than 20 pages. A glance at these definitions shows that the market envisioned by the architects of Google Books did not have much to do with the traditional book trade. Many established terms acquired a new meaning; a meaning negotiated between the lawyers involved. A telling example is the settlement's definition of a book.²² It is nonetheless worthwhile studying this thicket of rules and classifications in some detail because, in one way or another, it is likely to influence the future book economy including practices of accessing and using literary works.

Google Books plans to offer users a free preview of up to 20 % of copyrighted out-of print works. The "standard preview" for non-fiction works implies that American users (more precisely, users with a North American IP address) can access and read, in response to a search query, up to five adjacent pages of a book. The two preceding and following pages will be blocked from view. The net revenues generated through advertising on the preview pages will be divided between Google (30 %) and the rights holders (70 %) (ASA 2009, p. 70). Different rules govern access to other text genres.²³ Such detailed restrictions notwithstanding, public access (in the U.S.) to the world of out-of-print literature would be infinitely greater than the snippets offered under the rules of the original book search project (Lessig 2008; Samuelson 2010, p. 1358).

"Consumer purchase", the second revenue model of Google Books, offers full access to texts. The settlement defined this service in the following way: "consumer purchases mean a service provided by Google that allows a user, for a fee, to *access* and *view* Online the full contents of a Display Book" (ASA 2009, p. 6; highlighted by J.H.). Unlike what the term "purchase" suggests, the customer

20 Fully participating libraries, host sites, cooperating libraries, public domain libraries, other libraries. For details, see Band (2009, p. 275, 284).

21 Digital copies of a book, library digital copies consisting of copies Google created from a given library, display books (electronic books authorized for commercial services), the institutional subscription database and the research corpus (set of all digital copies generated as part of Google's library project) (ASA 2009, pp. 8-21).

22 Since the definition runs over 21 lines, I only quote what is *not* considered a book: "The term 'Book' does not include: (i) Periodicals, (ii) personal papers (e.g. unpublished diaries or bundles of notes or letters), (iii) written or printed works in which more than twenty percent (20 %) of the pages of text (not including tables of contents, indices, blank pages, title pages, copyright pages and verso pages) contain more than twenty percent (20 %) music notation, with or without lyrics interspersed (for purpose of this calculation, 'music notation' means notes on a staff or tablature), (iv) written or printed works in, or as they become in, the public domain under the Copyright Act in the United States, (v) Government Works, or (vi) calendars" (ASA 2009, p. 4).

23 In case of fiction, Google may show up to 20 % of a text but not more than 5 % of adjacent pages, and the final 15 pages or 5 % of a book are blocked. No preview is available for poetry, short stories and anthologies. For dictionaries, encyclopedias etc., no queries but a fixed preview of 10 % are available.

does not buy an electronic copy of a book, s/he buys a specific service. The electronic copy itself won't change hands; it will remain in the "cloud", i.e. on an individualized virtual shelf provided by Google to its customers who are buying a perpetual right to access their books from any computer. Google expects this service to "revolutionize the way some people read books [...] in an open cloud-based platform" (Drummond 2009). The business model of Google Books thus replaces the common exchange of ownership between bookseller and buyer by an end user license that carefully prescribes what the consumer is allowed to do with her acquisitions.²⁴ Preventing users from reassembling books in the form of hard copies or electronic files seems to be one of the common objectives underlying the constraints that characterize the consumer purchase model (Picker 2009, p. 18). Considering all these restrictions, Samuelson (2010, p. 1349) suggests "single-user access license model" as a more adequate description of this revenue approach.

Institutional subscriptions, the third "contemplated rightsholder service", represent a new type of information good consisting of a blanket license to a collection of copyrighted texts (Grimmelmann 2010, p. 114). The settlement refers to this collection as the "Institutional Subscriber Database", redundantly defined as "all Books available for Institutional Subscription" (ASA 2009, p. 54). Institutional subscriptions target organizational users such as universities, public libraries or corporations. "Appropriate individuals" (defined, for example, as students, faculty or library patrons) will have access to all documents included in the subscription database or discipline-specific subsets thereof. Not unlike a subscription service for music or video, access to the database is limited to the duration of the subscription. The rules for copying, pasting and printing text are the same as those for "consumer purchases".

In addition to these revenue models, the settlement agreement also envisioned so-called "non-display uses" of the book database. These uses include research and development-related forms of data mining that could lead to new services and products such as improved search or translation algorithms. Non-commercial researchers may be granted access to the database for "non-consumptive" purposes. As Samuelson (2010, pp. 1324-5) notes, a searchable digital corpus of millions of books would enable novel lines of research: "Linguists could discover the origins of words, concepts, and principles, or learn new things about usage patterns over time. [...] A digital corpus such as GBS thus opens up opportunities to explore knowledge embodied in books in ways that today can only be imagined." Some observers expect that such non-display uses of the database could end up being more important than the sale of access to books (von Lohmann 2008).

The settlement specifies two, in the litigants' view, compatible objectives for the commercial exploitation of the Google Books database: "(1) the realization of

24 "Consumer Purchase will enable purchasers to view, copy/paste and print pages of a Book, and may enable Book Annotations. With respect to copy/paste, the user will not be able to select, copy and paste more than four (4) pages of the content of a Display Book with a single copy/paste command. Printing will be on a page-by-page basis or a page range basis, but the user will not be able to select a page range that is greater than twenty (20) pages with one print command for printing" (ASA 2009, pp. 60-1). More and different rules apply to works of fiction, poetry, anthologies, encyclopedias and dictionaries (ASA 2009, p. 65).

revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education” (ASA 2009, pp. 52-3). Prices for individual books will either be set by the rights holders or a pricing algorithm developed by Google will be used to determine the optimal price of a work “in order to maximize revenue for each rightsholder” (ASA 2009, p. 61).²⁵ Not much is known about the pricing for the institutional subscriptions (Band 2009, pp. 269-72). Assuming that the authors and publishers represented in the BRR are likely to privilege the first of the two official objectives, observers fear that prices could become very high (Band 2009, pp. 299-301; Samuelson 2010, pp. 1333-4).

The business model of Google Books is based on a strikingly dense web of rules defining a range of authorized services, appropriate uses and users. The most detailed section of the settlement, however, concerns precautions to prevent unauthorized users and uses (Samuelson 2011, p. 537; ASA 2009, Attachment D). Like a reverse image of the rules governing access to the book database, the settlement outlined an equally comprehensive web of monitoring techniques to enforce its terms and conditions and, above all, to secure that leakages of files or violations of rules can be traced back to the transgressor. Its control apparatus affects all services, including the free preview of book sections. In order to ensure, for instance, that individual users cannot read free of charge more than five adjacent pages or more than 20 % of a work altogether, all access, browsing and reading activities related to display files of books need to be recorded. In light of the restrictions placed on the sale of access, the actual use of purchased books will also require close and permanent observation.

To that end, the Google Books implies collecting numerous data about its readers and their activities, their hardware and software. The methods concerned have been described as “some unstated combination of cookies, IP addresses, referrer logs”²⁶ (Privacy Authors 2009, p. 8). On the basis of this data, Google can identify “unique access points”, i.e. the computers used for accessing texts, link them to the specific texts and pages and monitor the browsing activities. Furthermore, all digital files available to users will include a trackable “identifying mark”. Watermark technology will collect encrypted session identifying information enabling Google to trace each copy of the text and log the authorized users’ printing activities including their printing devices (ASA 2009, p. 57). In other words, Google will be able to store information about each user in the following form: “Fred von Lohmann entered the store at 19:42:08 and spent 2.2 minutes on page 28 of 0-486-66980-7, 3.1 minutes on page 29, and 2.8 minutes on page 30” (von Lohmann 2008). The tight coupling of the commodification of access with available monitoring technologies will mean the end of online reading as a private activity. On the contrary, the monitoring entity will sooner or later know more

25 The algorithm consists of several pricing bins between US\$ 1.99 and US\$ 29.99. All books will be distributed among these bins whereby 5 % of the books will be offered at US\$ 1.99 and US\$ 29.99. The majority of books will range between US\$ 2.99 and US\$ 9.99 and thus fairly close to commercially available hard copies.

26 “Referrer logs” identify the website from which a user is coming.

about the customers' browsing and reading habits than the individuals themselves.

Libraries that choose to keep a copy of the digital text corpus that Google generated from their collection will also undergo extensive security provisions. They are required to develop a "security implementation plan" that complies with the settlement's "security standard". The settlement's seventeen pages security standard specifies security-critical objects (for instance systems containing "sensitive copyrighted material"), places, processes and people as well as security-ensuring management positions, responsibilities, awareness programs and practices subject to external control through annual audits by third parties (ASA 2009: Attachment D; Band 2009, p. 281). In addition, the library digital copies will have identification marks indicating the hosting library so that potential leakages can be traced to the source. Breaches of the security implementation plan may result in harsh monetary remedies, depending on the extent of the damage.

While the privacy provisions of the settlement can probably be improved and the monitoring of individual customers somewhat scaled down²⁷, the "securitization" of the digital book trade as such is likely to remain an essential part of Google Books. More generally, the non-stop watching of customers and the transformation of reading, browsing or sharing activities into potentially criminal acts appears to be the flip side of a business model intending to commodify access and to prescribe in greatest detail what and what not users are allowed to do with digital works. If the ownership of the digital copy remains in the hands of the rights holders, terms and conditions including various enforcement techniques will govern the individual use.

4. Realigning the Digital Book Trade: Rights, Assets, Conditions

4.1. Private Copyright Reform

Google Books exemplifies the growing supply of online services surrounding digital content. Streaming services for video or music, for instance, involve complicated negotiations with national collecting agencies and rights holders. Licensing agreements are the proverbial eye of the needle that every reutilization effort has to pass through. Due to differing national laws and multiple rights owned by differing actors, clarifying the rights is often a costly process (see also Hargreaves 2011, pp. 28-9). Identifying, locating and contacting all rights holders assembled in a single book can easily total a three- or four-digit amount (Vuopala 2010, p. 36; Band 2009, pp. 228-9). In case of so-called orphan works whose rights holders are unknown, digitization and related forms of reutilization may be entirely out of the question. Estimating that approximately 40 % of all copyrighted works could be orphans, the British Library (2009) characterizes the resulting situation as the "information black hole of the twentieth century" (for different figures see Vuopala 2010, pp. 17-21).

²⁷ Experts have made concrete proposals to that effect; see, for example, Jones and Janes (2010).

Heller and Eisenberg (1998) have dubbed the high costs of clearing rights to cultural works the “tragedy of the anticommons”. Reflecting on Hardin’s (1968) “tragedy of the commons” which denotes an overutilization of scarce resources, the “anticommons” refer to an underutilization of resources due to the fragmentation of property rights. If rights in resources are widely dispersed, coordination may prove to be prohibitively expensive. Out-of-print works whose reutilization is blocked by high costs of clearing copyrights are cases in point. Ironically, a comprehensive reutilization of literary works thus seems to call for a reversing of the rights deemed indispensable for generating markets for literature in the first place. As Hodgkin (2009) concludes, the introduction of new information services would require “something like a new Berne convention on copyright”.

In fact, orphan works have been on the political agenda in Europe and the U.S. for at least a decade (Hugenholtz et al. 2006, p. 163). Commencing in 2003, several attempts have been made in the U.S. to address the issue of increasing rights clearing costs through a reform of copyright law; so far without sufficient political support.²⁸ In Europe, the problem of orphan works has been discussed both on the national and the European level. Yet with the exception of the Nordic countries²⁹, most member states have not taken any concrete measures to address the information black hole (EC 2008, p. 11). Following a recommendation of the European Commission (EC 2006), a High Level Expert Group was established to develop a set of European guidelines. The resulting non-binding Memorandum of Understanding on “Diligent Search Guidelines for Orphan Works” (HLEG 2008) specifies minimum standards for the identification of orphan works. The search guidelines have been criticized for their single work approach that does not take into account, let alone offer a solution for, large-scale digitization projects (EC 2009, p. 6).

While mass digitization of out-of-print literature is technically feasible, generally desirable and perhaps a commercially viable undertaking, a legal framework for such a market has yet to be established. The present “opt-in regime” mandates a clearing of rights for each work involved. On the surface, the issue of opt-in versus opt-out may look like a negligible detail of the overall property regime. In practice, however, the question of rights distribution goes “to the core of the role played by copyright in the digital age” (Bracha 2007, p. 1802) with far-reaching consequences for the accessibility of information goods in general. Lessig (2010) has characterized the opt-in rule as “a digital death sentence” to the majority of library works: “to require permission first is to guarantee invisibility”.

From a library’s as well as a user’s standpoint, the present property regime blocks access to and reutilization of a substantial amount of the cultural heritage. From a commercial information distributor’s point of view, the property regime causes market failure due to high transaction costs. From the perspective of the

28 See http://en.wikipedia.org/wiki/Orphan_works_in_the_United_States

29 The Nordic countries’ extended collective license scheme authorizes collecting societies to sell licenses not only on behalf of their members but also non-member rights holders, thereby significantly reducing transaction costs for clearing rights of cultural works (van Gompel and Hugenholtz 2010; Riis and Schovsbo 2010).

authors of the settlement, however, it may epitomize both market and policy failure. The inactivity of the legislator, according to some observers, may have encouraged the litigants' choice of a private solution (Grimmelmann 2010, p. 112). "The settlement", as Samuelson (2011, p. 482) quotes Dan Clancy, engineering director of the Google Books project at Google, is the "only way to free up access to digital copies of millions of out-of-print books because Congress [is] dysfunctional in dealing with copyright issues."

Samuelson (2011) suggests interpreting Google Books as an attempt to assert copyright reform by means of private ordering. The settlement amounts to "quasi-legislation" (Samuelson 2011, p. 529) because it would have been binding for many millions of copyright owners. What is more, it intended to establish regulatory solutions to problems believed to be in need of copyright legislation with orphan works as the obvious example. The most significant reform of copyright law concerned the licensing system allowing Google to digitize, store and commercially exploit copyrighted books. It involved a modification of copyright law by shifting some of the costs of clearing rights to the copyright owners (Band 2009, p. 236). Specifically, it would have narrowed down the control over works past their exploitation period. However, according to Sag (2010, p. 75), it would have done so in ways "likely to benefit authors, publishers and readers alike". Due to their opt-out-character, these are in effect compulsory licenses that normally require legislation (see Samuelson 2011, p. 519).

Hargreaves (2011, p. 32) makes a similar point by portraying Google Books as an effort to introduce a still lacking digital licensing system "complete with stakeholder governance and dispute procedures". Sooner or later, he argues, a global licensing infrastructure will emerge in order to facilitate the global trade of digital content. The open question is: Who will initiate and govern such a transnational arrangement? Will it be governments or a group of private actors with enough power to set the rules and thereby reorganize the global markets for information goods (Hargreaves 2011, p. 32)? In either case, one may add, a licensing system that enables a global market for cultural works requires a reaggregation of the property rights dispersed by copyright.

While many aspects of Google Books would have indeed advanced the public interest in access to out-of-print works, all in all, the settlement agreement clearly bears the hallmark of industry self regulation. One indication of private ordering is the equal weight the settlement gives to the goals of public access and revenue maximization for rights holders. Even orphan works, whose rights holders by definition cannot benefit from a secondary market, are subjected to the maxim of profit making. However, the most obvious evidence for a private copyright reform can be found in the fact that the settlement agreement primarily serves the negotiating parties instead of seeking a solution for the entire book market. The license for indexing books applies to Google only and would thus have established a monopoly over the indexing of out-of-print literature. Google Books offers a hint of the possible services and uses given a supportive legal framework, but it does not provide that framework itself.

4.2. Replacing Transfer of Ownership with Selling Access

Unlike currently available “print on demand” or “ebook” products which more or less replicate the trade of physical books, Google Books intends to sell services rather than copies of a work. Neither the envisioned “consumer purchase” nor the “institutional subscription” model involves transfers of property between sellers and buyers. As Duguid (2007, p. 8) puts it, Google treats printed literature “as a storehouse of wisdom to be opened up with new tools”. These new tools, in the settlement agreement referred to as “contemplated rightsholder services”, consist of *access* to the digital book database.

Access-based business models for information goods are not entirely new. The movie industry, for example, generates revenues by selling, and controlling, access to films, as Gillespie (2004, p. 241) shows: “By controlling access to the theater rather than reproduction of the work, the movie industry has developed ways to monetize each viewing experience, rather than possession.” Although the commodification of access or experience is not limited to information goods (see Rifkin 2000), digitization has clearly broadened its possibilities. In the 1980s, the software industry paved the way towards novel types of information services with “shrink wrap”, “click” or “browse wrap” licenses for computer programs (Benkler 2006; Lemley 2007; Madison 2003). User licenses for software have since more or less replaced the traditional exchange of property.

As long as texts were linked to physical containers, access to works was a rather unproblematic matter. Given its print and ink legacy, copyright law does not even mention access as a regulatory issue (Picker 2008, pp. 3-5; Heide 2001; Goldstein 1997). Before the advent of electronic publishing, books could not be read without accessing a physical copy, the latter of which would typically take place in regulated spaces such as bookshops, public libraries or someone’s house. Unlike their physical counterparts, digital information goods are no longer self-regulating (Madison 2003, p. 290), and legally significant actions such as accessing, copying or reading works have become difficult to tell apart. In a famous article, Ginsberg (2003) describes the consequences the information industry has drawn from the challenges that digitization poses for the sale of copyrighted works: “from having copies to experiencing works”. Such access-centered distribution arrangements will only succeed, according to Ginsberg (2003), if the state of “experiencing” a copy will not turn into an unauthorized “having” a copy, or, worse yet, an unauthorized “sharing copies”.

Google Books exemplifies in detail how access-based forms of commercial exploitation can be applied to the book trade. The settlement agreement anatomizes potential uses of books into discrete activities such as browsing, sharing, copying, annotating and printing; it translates these practices into single exclusive rights of the copyright owner and thereby ascribes economic value to each of these actions. Additional value is created by qualifying these rights according to various parameters such as the number and type of books, the number and type of users, perhaps the duration of the users’ rights, the geographic region and other criteria (see also Kretschmer et al. 2010, p. 14). In an access-centered regime, the once unregulated, if not altogether undefined, practice of making use of texts becomes

an economically valuable action that can and, in fact, is likely to be measured – for instance in terms of the absolute or adjacent number of pages viewed –, calculated, priced and sold.

The substitution of access for the exchange of information goods affects the relationship between seller and buyer in various ways. To begin with, customers lose some of the rights and liberties linked with taking possession of a book. The practice of selling access sidelines the exhaustion principle inherent to copyright, which stipulates that the exclusive rights over a copy end with its sale. The purchasers of printed works “can lend their books to friends; the latter [purchasers of Google Books, J.H.] cannot. The former can resell their books or give them away; GBS e-book purchasers can do neither. [...] GBS e-book purchasers cannot, in fact, even take possession of their books” (Samuelson 2010, p. 1348). The subject of control in this regime is no longer the duplication of copyrighted works but access to or the “experience” of it. Access-based exploitation models imply a redistribution of property rights and control between rights holders and users at the expense of the latter (Kretschmer et al. 2010, p. 115).

However, selling access instead of tangible copies does affect the constitution or ontology of books themselves. Recalling that texts purchased from Google Books remain on the supplier’s virtual shelf, books cease to be goods in the traditional sense and acquire features usually associated with services. Not unlike the service of a library, Google offers varying forms of access to literature. Furthermore, like a service, access to texts is specifically generated at the request of the buyer and confined to her. The purchased access can neither be sold nor returned. Also, the relationship between the supplier and the customer continues throughout the “experience” of the good. Finally, each version of a purchased text will be individualized and thus, to some extent, be unique – thanks to the watermark technologies appended to each single file in order to identify users and monitor their actions. Hence, digitized books and other information goods may become hybrids that lean towards services rather than ordinary goods, and publishers may turn into “service-delivery enterprises” (Cohen 2011, p. 141). Consequently, as Rifkin (2000) noted, customers would be spending more and owning less. The freedom of use linked to ownership in information goods would be largely lost.

Critical observers therefore fear that the emergence of an access-centered regime would have profound consequences for the future circulation and availability of information goods or, more broadly speaking, the order of the “networked information society” (Cohen 2006). Reflecting on the Google Books settlement, Grimmelmann (2010, p. 121) has predicted that cultural works will be wrapped up “in endless, needless layers of red tape, DRM, and legal restrictions”. Likewise, Lessig (2010, p. 5-6) concludes that Google Books “constructs a world in which control can be exercised at the level of a page, and maybe even a quote. It is a world in which every bit, every published word, could be licensed. It is the opposite of the old slogan about nuclear power: every bit gets metered, because metering is so cheap”.

As the security provisions of the settlement show, the commodification of access also affects the privacy of reading. Cohen (2006, pp. 2-3) observes a disruption and “casual” rearrangement of “the boundaries of personal spaces and of the

intellectual and cultural activities played out within those spaces.” New forms of authorizing access and use assume that customers will come to regard these regime changes as necessary and the involved restrictions “as natural attributes of the information environment”. In this respect, Google Books and the changes in the information economy it represents also implies a dimension of “social ordering” (Cohen 2006, p. 3).

4.3. Governing Information by License Contracts

Google Books is based on a licensing framework. License contracts have become the principle means to control access, to tailor and commodify types of use, in short, to shape markets for end-user information goods. Licenses belong to the world of contract law. Private actors, according to the theory, agree on the terms of a transaction which involves the transfer of some rights or permissions. Crucially, the purchase of a license does not imply a transfer of ownership but rather resembles that of a lease which specifies how a good can be used. In the information economy, licenses represent the legal instrument to “apportion, by granting or withholding, rights given to the transferee to use information or related products” (Nimmer 2007, p. 4). Copyright law and license contracts meet where the authority to license a good is rooted in the ownership of copyright. Whereas copyright creates and defines the entitlement to be leased, the contract specifies its conditions.

License contracts used to regulate the relationship between creators and publishers or among rights holders. In the course of digitization, the domain of licenses has significantly expanded. License contracts now increasingly shape the relationship between rights holders and end-users – and thus the workings of mass markets. Licenses owe their rising regulatory power to no small extent to recent copyright reforms. Following the 1996 WIPO copyright treaty, which prohibits the circumvention of technical protection measures, a new governance arrangement has emerged. This regime exercises control through the “tight coupling of technology and law, each sharing the task of regulation of not only copying, but access, use, and purchase” (Gillespie 2004, pp. 240-1). Without digital protection measures designed to enforce compliance, the fine print in license contracts would arguably lack the clout to effectively govern the behavior of customers.

From the perspective of copyright owners, licensing cultural goods provides clear advantages over the traditional sales model. First, licenses blur crucial distinctions between “the work of authorship protected by copyright law and the tangible artifact in which a work is embodied” (Madison 2003, p. 281) with the effect that statutory limits of the rights holders’ control are undermined and binding restrictions on users can be imposed (Elkin-Koren 2010, p. 9). What is more, licenses imply nearly unlimited flexibility for the design and differentiation of products or services. Identical information objects such as the Google Books database can be exploited in various ways by modifying the terms of use along simple parameters such as the number of users and type of usages. Since the value of information goods no longer lies in physical objects, digitization “amplifies the capability to tailor products by contract” (Nimmer 2007, p. 12). Hence, contracts do

more than stipulate particular forms of use; they increasingly constitute information goods as such: “The license, in effect, defines the product” (Nimmer 2007, p. 11).

Compared to copyright law with its regulatory focus on duplication and dissemination, licenses allow governing and commercially exploiting a much wider array of uses. Put differently, the regulatory impact of end user licenses unfolds where that of copyright law used to end: after the purchase of information goods. Hence, licenses establish new forms of “information propertization” (Radin 2006; Salzberger 2006; Siegrist 2006) able to inject additional value also in abandoned cultural works. While licensing contracts necessarily remain anchored in copyright law, the small print is emancipating itself from the norms and principles of copyright regulation. As Radin (2004, p. 240) observes, mass market contracts create their “own regime of liberties and obligations, in which the constitutional, legislative or judicial rules engendered by the state are superseded by the contractual regime”. Although copyright law is still vital for creating property rights in informational works, its regulatory power beyond this basic function seems to fade. Neither statutory limitations of intellectual property rights nor their underlying concept of balancing commercial and public interests show much regulatory impact on the information sphere.

Commenting on Google Books, Madison (2008) wonders if we are witnessing the demise of copyright as we know it. Copyright, in his view, is increasingly replaced by other governance arrangements that are moving “the statute to a place where it negotiates for attention as a normative landmark.” Paradoxically, the authority of statutory copyright rules seems to shrink at times when the information economy is expanding and the scope of information governance is rising. Google Books, with its intricate rules and restrictions, exemplifies the overall trend towards private ordering of the information economy. Empowered by legal anti-circumvention provisions, private licensing norms and practices are aligning themselves to an evolving governance arrangement in the shadow of copyright law.

Information governance has been the principal domain of legal and, to a lesser degree, economic scholarship. Seen through the lens of copyright law, the advent of end user license arrangements presents itself as an extension of the control that rights holders, empowered by copyright law, are exercising over the information sphere. If in analogue times copyright law used to focus on the commercial use of cultural goods, beginning with the digital age it is regulating nearly all conceivable forms of use. As Lessig (2010) describes this situation, “we are about to make every access to our culture a legally regulated event, rich in its demand for lawyers and licenses, certain to burden even relatively popular work”. In this spirit, legal scholars have analyzed, and explicitly criticized, the rise of license contracts as processes of increasing and continuous propertization, privatization, commodification and judicialization of knowledge and information (for instance Boyle 2008; Lessig 2010; Lucchi 2007).

The image of the hypertrophic copyright regime has framed nearly every critical account of information governance against the backdrop of digitization. Like an octopus, intellectual property rights seem to wrap themselves around more and more information resources and thereby dry up the public domain. Boyle

(2004) even referred to copyright laws as the “legal sinews of the information age”. Despite all its intuitiveness, however, this linear account is not without biases. The narrative of ever expanding propertization and control emphasizes political continuities at the expense of discontinuities. Moreover, it does not distinguish between statutory norms and contract-based norms and therefore underrates the shifts between public and private regulation in information governance.

5. Conclusion: Continuities and Discontinuities in Information Governance

Studying the information economy as governance arrangements facilitates a de-centering of regulatory authority. Instead of privileging copyright law as the central point of reference, the governance perspective also considers other relevant actors, norms and means that order information markets. This essay has looked at Google Books as an, albeit unsuccessful, attempt of private regulation in the face of assumed policy failure. The guiding assumption was that Google Books can be understood as a blueprint that anticipates and drives the transformation of the book trade and possibly the market of other digital consumer goods as well. Even though the competent court rejected the private settlement, some of its features are likely to resurface as part of standard business practices. Three aspects of Google Books seem particularly emblematic in the context of information governance.

The first concerns the modification and re-distribution of property rights inherent to the Google Books settlement. Exclusive rights deemed necessary to enable markets for information goods to begin with are now effectively inhibiting the formation of new markets and, thus, additional ways of exploitation. Expressed in terms of the “tragedy of the anti-commons” (Heller and Eisenberg 1998), copyright causes a fragmentation of property rights which makes coordination difficult if not impossible. The settlement agreement suggested a private solution to this dilemma. While this solution would have greatly enhanced public access to the print heritage, it clearly bears the signature of its authors. Google Books’ licensing framework privileges the founding organizations over other stakeholders. Even if the private rewriting of copyright makes sense per se, its results do not live up to the standards of a common welfare concept; a shortcoming which perhaps can be attributed to the tightly-knit circle of actors involved.

A second aspect, the significance of which exceeds the scope of Google Books, refers to the transformation of the book trade. Following the business model of the software industry, Google intended to sell rights of use instead of titles in actual copies of books. The settlement agreement intended to decompose the use of books into single activities, translating them into rights and thereby ascribing economic value to them. In this new regime, the focus of control is no longer on the duplication of works but on access and therefore would cover all types of usage. To the degree that digital access is becoming subject to commodification, reading may lose some of its private character and turn into a monitored and measured activity regulated by license contracts. What is more, without the transfer of property rights, books are transformed into hybrids between goods and

services, thereby giving rise to a permanent relationship between information providers and customers.

A third aspect pertains to the evolving governance arrangement for information goods. As a response to digitization, license contracts have become a means to tailor products in the form of rights to use. Given that in this scenario the exhaustion of copyright no longer takes place, license contracts control the use of information beyond the time of sale and establish long-term relationships between rights holder and users. The rise of mass licensing as a new distribution model also changes the division of labor between copyright and private contracts. While statutory copyright remains necessary to create exclusive rights in information goods, its regulatory authority beyond this task seems to decline. This is evident from the diminishing importance of its exceptions and limitations. Supported by legal anti-circumvention rules, private contracts are emancipating themselves from statutory principles and are bringing about a new regime. Google Books exemplifies this shift in information governance towards private ordering.

It is true, the commodification of usage rights adds up to a continuous perpetuation of information goods. However, this continuity is closely linked to fundamental discontinuities in the development of information markets. Some examples of such discontinuities are the transformation of books into services, the shift from public to private regulation and the declining authority of copyright law. Hence, information governance is undergoing a profound transformation, and the narratives of the information society should reflect this process.

References

- Anderson, C. 2004. The Long Tail. *Wired*. http://www.wired.com/wired/archive/12.10/tail.html?pg=2&topic=tail&topic_set=.
- ASA [Authors Guild, I., I. Association of American Publishers, Google Inc.]. 2009. *Amended Settlement Agreement*. http://www.googlebooksettlement.com/r/view_settlement_agreement.
- Band, Jonathan. 2008. *A Guide for the Perplexed. Libraries and the Google Library Project Settlement*. Association of Research Libraries, American Library Association.
- Band, Jonathan. 2009. The Long and Winding Road to the Google Books Settlement. *The John Marshall Review of Intellectual Property Law* 9(227): 227–329.
- Bakardjieva Engelbrekt, Antonia. 2007. Copyright from an Institutional Perspective. Actors, Interests and Institutional Design. *Review of Economic Research on Copyright Issues* 4(2): 65–97.
- Benkler, Yochai. 2006. *The Wealth of Networks. How Social Production Transforms Markets and Freedom*. New Haven: Yale University Press.
- Bevir, Mark, and R. A. W. Rhodes. 2006. Interpretive Approaches to British Government and Politics. *British Politics* 1: 84–112.
- Botzem, Sebastian, Jeanette Hofmann, et al. (eds.). 2009. *Governance als Prozess. Koordinationsformen im Wandel*. Schriften zur Governance-Forschung. Baden-Baden: Nomos.
- Boyle, James. 2004. A Manifesto on WIPO and the Future of Intellectual Property. *Duke Law and Technology Review* 9: 1–12.

- Boyle, James. 2008. *The Public Domain. Enclosing the Commons of the Mind*. New Haven/London: Yale University Press. <http://thepublicdomain.org/thepublicdomain1.pdf>.
- Bracha, Oren. 2007. Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property. *Texas Law Review* 85: 1799–1869.
- British Library. 2009. *Copyright in the Knowledge Economy. Response from the British Library to the Green Paper on Copyright in the Knowledge Economy*. London.
- Carruthers, Bruce G., and Laura Ariovich. 2004. The Sociology of Property Rights. *Annual Review of Sociology* 30: 23–46.
- Cohen, Julie E. 2006. Pervasively Distributed Copyright Enforcement. *Georgetown Law Journal* 95(1): 1–48.
- Cohen, Julie E. 2011. Copyright as Property in the Post-Industrial Economy. A Research Agenda. *Wisconsin Law Review* 2011(2): 141–165.
- Coyle, Karen. 2006. Mass Digitization of Books. *The Journal of Academic Librarianship* 32(6): 641–645. <http://www.kcoyle.net/jal-32-6.html>.
- Crawford, James. 2010. *On the Future of Books, October 14, 2010. Inside Google Books*. <http://booksearch.blogspot.com/2010/10/on-future-of-books.html>.
- CRS [Congressional Research Service]. 2007. *The Google Book Search Project. Is Online Indexing a Fair Use under Copyright Law?* CRS Report for Congress, Washington D.C. http://www.ipmall.info/hosted_resources/crs/RS22356-070122.pdf.
- Darnton, Robert. 2009. Google & the Future of Books. *The New York Review of Books* 56(2). <http://www.nybooks.com/articles/22281>.
- Darnton, Robert. 2011. Six Reasons Google Books Failed. *NYR Blog. New York City, New York Times*. <http://www.nybooks.com/blogs/nyrblog/2011/mar/28/six-reasons-google-books-failed/>.
- Drummond, David C. 2009. *Competition and Commerce in Digital Books*. U.S. House of Representatives Judiciary Hearing. Washington D.C. <http://judiciary.house.gov/hearings/pdf/Drummond090910.pdf>.
- Duguid, Paul. 2007. Inheritance and loss? A brief survey of Google Books. *First Monday* 12(8).
- EC [European Commission]. 2006. *Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation*. Brussels.
- EC [European Commission]. 2008. *Copyright in the Knowledge Economy. Green Paper*. Brussels. http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.
- EC [European Commission]. 2009. *Communication from the Commission. Copyright in the Knowledge Economy*. Com (2009) 532. Brussels: Commission of the European Communities.
- Elkin-Koren, Niva. 2004. The Internet and Copyright Policy Discourse. In *Academy and the Internet*, eds. H. Nissenbaum and M. Price, 252–274. New York: Peter Lang.
- Elkin-Koren, Niva. 2010. Governing Access to Users-Generated-Content. The Changing Nature of Private Ordering in Digital Networks. In *Governance, Regulations and Powers on the Internet*, eds. E. Brousseau, M. Marzouki and C. Méadel. Cambridge: Cambridge University Press. SSRN: <http://ssrn.com/abstract=1321164>.

- Gasser, Urs. 2004. *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media*. A Case Study. Berkman Center for Internet & Society at Harvard Law School.
- Gillespie, Tarleton L. 2004. Copyright and Commerce. The DMCA, Trusted Systems, and the Stabilization of Distribution. *The Information Society* 20(4): 239–254.
- Ginsberg, Jane C. 2003. From Having Copies to Experiencing Works. The Development of an Access Right in U.S. Copyright Law. *Journal of the Copyright Society of the USA* 50: 113–130.
- Goldstein, Paul. 1997. *Copyright and Its Substitutes. The Kastenmeier Lecture*. *Wisconsin Law Review* 1997: 865–871.
- Grafton, Anthony. 2007. Future Reading. Digitization and its discontents. *The New Yorker*, November 5, 1997. http://www.newyorker.com/reporting/2007/11/05/071105fa_fact_grafton.
- Grimmelmann, James. 2009. *The Google Book Search Settlement. Ends, Means, and the Future of Books*. American Constitution Society. http://works.bepress.com/cgi/view-content.cgi?article=1024&context=james_grimmelmann.
- Grimmelmann, James. 2010. The Elephantine Google Books Settlement. *Buffalo Intellectual Property Law Journal* forthcoming: 101–122. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1607423.
- Hardin, Garrett. 1968. The Tragedy of the Commons. *Science* 162: 1243–1248.
- Hargreaves, Ian. 2011. *Digital Opportunity. A Review of Intellectual Property and Growth. An independent report*. London. <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.
- Heide, Thomas. 2001. Copyright in the EU and U.S.: What “Access-Right”? *Journal of the Copyright Society of the USA* 48(3): 363.
- Heller, Michael A. 2000. Critical Approaches to Property Institutions. *Oregon Law Review* 79: 417–434.
- Heller, Michael A., and Rebecca S. Eisenberg. 1998. Can Patents Deter Innovation? The Anticommons in Biomedical Research. *Science* 280(5364): 698–701.
- HLEG [High Level Expert Group–Copyright Subgroup]. 2008. *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works*. Brussels: i2010, Digital Libraries. http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf.
- Hodgkin, A. 2009. Google Book Search and the Tragedy of the Anti-Commons. *exacteditions.blogspot.com*. <http://exacteditions.blogspot.com/2009/02/google-book-search-and-tragedy-of-anti.html>.
- Hugenholtz, Bernt, Mireille van Eechoud, et al. 2006. *The Recasting of Copyright & Related Rights for the Knowledge Economy*. Amsterdam: Institute for Information Law, University of Amsterdam. http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.
- Jones, Elisabeth A., and Joseph W. Janes. 2010. Anonymity in a World of Digital Books. Google Books, Privacy, and the Freedom to Read. *Policy & Internet* 2(4): 43–75.
- Johnson, Richard K. 2007. In Google’s Broad Wake. Taking Responsibility for Shaping the Global Digital Library. *ARL [Association of Research Libraries]* 250: 1–15.
- Kretschmer, Martin, Estelle Derclaye, et al. 2010. *The Relationship between Copyright and Contract Law*. Research commissioned by Strategic Advisory Board for Intellectual Property Policy. London. <http://eprints.bournemouth.ac.uk/16091/>.

- Lavoie, Brian, and Lorcan Dempsey. 2009. Beyond 1923. Characteristics of Potentially In-copyright Print Books in Library Collections. *D-Lib Magazine* 15(11/12). <http://www.dlib.org/dlib/november09/lavoie/11lavoie.html>.
- Lemley, Mark A. 2007. Should a Licensing Market Require Licensing? *Law & Contemporary Problems* 70(2): 185–203. <http://www.law.duke.edu/shell/cite.pl?70+Law+%&+Con+temp.+Probs.+185+%28spring+2007%29+pdf>.
- Lessig, Lawrence. 2008. On the Google Book Search agreement. *Lessig Blog*. http://lessig.org/blog/2008/10/on_the_google_book_search_agre.html.
- Lessig, Lawrence. 2010. For the Love of Culture. Google, copyright, and our future. *The New Republic* January 26, 2010.
- Liu, Joseph P. 2004. Regulatory Copyright. *Boston College Law School Public Law and Legal Theory Research Paper Series, No 37*. Boston. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=558681&.
- Lohmann, Fred von. 2008. Google Book Search Settlement. A Reader's Guide. *Deeplinks Blog, Electronic Frontier Foundation*, October 31, 2008. <http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide>.
- Lohmann, Fred von. 2010. Google Book Search Settlement. Updating the Numbers, Part 1. *Deeplinks Blog, Electronic Frontier Foundation*, February 19, 2010. <http://www.eff.org/deeplinks/2010/02/google-book-search-settlement-updating-numbers>.
- Lucchi, Nicola. 2007. The Supremacy of Techno-Governance. Privatization of Digital Content and Consumer Protection in the globalized Information Society. *International Journal of Law and Information Technology* 15(2): 192–225.
- Madison, Michael J. 2008. On Google Book Search. *Madisonian.Net Blog*. <http://madisonian.net/2008/10/29/on-google-book-search/>.
- Madison, Michael J. 2003. Reconstructing the Software License. *Loyola University Chicago Law Journal* 35(275).
- Newitz, Annalee. 2010. *5 Ways The Google Book Settlement Will Change The Future of Reading*. <http://www.libraryjunction.net/blogs/item/5-ways-the-google-book-settlement-will-change-the-future-of-reading>.
- Nimmer, Raymund T. 1998. Breaking barriers. The relation between contract and intellectual property law. *Berkeley Technology Law Journal* 13: 827–889.
- Nimmer, Raymund T. 2007. Licensing Information Assets in the New Economy. A Pro-rights Perspective. *The Indian Journal of Law & Technology* 3: 1–24.
- Nimmer, Raymund T. 2009. Google Book “Settlement” is Bad for Law, Copyright owners and Users. *Ipinfoblog, Contemporary Intellectual Property, Licensing & Information Law*. <http://www.ipinfoblog.com/archives/intellectual-property-google-book-settlement-is-bad-for-law-copyright-owners-and-users.html>.
- Peters, Marybeth. 2009. Competition and Commerce in Digital Books. *Serial No. 111-31*. Committee on the Judiciary House of Representatives. One Hundred Eleventh Congress.
- Picker, Randal C. 2008. Fair Use v. Fair Access. *John M. Olin Law & Economics Working Paper No. 292*. Chicago: Law School, University of Chicago. <http://www.law.uchicago.edu/Lawecon/index.html>.
- Picker, Randal C. 2009. The Google Book Search Settlement: A New Orphan-Works Monopoly? *Olin Law and Economics Program Research Paper Series*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387582#.

- Privacy Authors and Publishers. 2009. Privacy Authors and Publishers' Objection to Proposed Settlement. *Case 1:05-cv-08136-DC Document 281*. https://www.eff.org/files/fieldnode/authorsguild_v_google/File%20Stamped%20Brf.pdf.
- Radin, Margaret Jane. 2004. Regulation by Contract, Regulation by Machine. *Journal of Institutional and Theoretical Economics* 160: 1–15.
- Radin, Margaret Jane. 2006. A comment on Information Propertization and its Legal Milieu. *Cleveland State Law Review* 54(1): 23–39.
- Rifkin, Jeremy. 2000. *The Age of Access. How the Shift from Ownership to Access is Transforming Modern Life*. London: Penguin.
- Riis, Thomas, and Jens Schovsbo. 2010. Extended Collective Licenses and the Nordic Experience – It's a Hybrid but is it a VOLVO or a Lemon? Forthcoming in *Columbia Journal of Law and the Arts* 33(4). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230.
- Sag, Matthew. 2010. The Google Book Settlement and the Fair Use Counterfactual. *New York Law School Law Review* 55: 19–75. http://www.nyls.edu/user_files/1/3/4/17/49/1080/55-1%20Final%20Sag%2011.17.10.pdf.
- Salzberger, Eli M. 2006. Economic Analysis of the Public Domain. *The Future of the Public Domain. Identifying the Commons in Information Law*, eds. L. Guibault and B. Hugenholtz, 27–58. Alphen an den Rijn: Kluwer.
- Samuelson, Pamela. 2010. Google Book Search and the Future of Books in Cyberspace. *Minnesota Law Review* 94(5): 1308–1374. <http://ssrn.com/abstract=1535067>.
- Samuelson, Pamela. 2011. The Google Book Settlement as Copyright Reform. *Wisconsin Law Review* 2011(2): 479–562 (quoted as in: <http://ssrn.com/abstract=1683589>).
- Siegrist, Hannes. 2006. Die Propertisierung von Gesellschaft und Kultur. Konstruktion und Institutionalisierung des Eigentums in der Moderne. *Comparativ. Leipziger Beiträge zur Universalgeschichte und vergleichenden Gesellschaftsforschung* 16(5/6): 9–52.
- Schmidt, Eric. 2005. Books of Revelation. *The Wall Street Journal*. New York City: A18.
- Stepanians, Markus. 2005. Die angelsächsische Diskussion. Eigentum zwischen ‚Ding‘ und ‚Bündel‘. *Was ist Eigentum? Philosophische Positionen von Platon bis Habermas*, eds. A. Eckl and B. Ludwig, 232–245. Munich: Beck.
- Taycher, L. 2010. Books of the world, stand up and be counted! All 129,864,880 of you. *Google Books*. August 5, 2010. <http://booksearch.blogspot.com/2010/08/books-of-world-stand-up-and-be-counted.html>.
- Toobin, J. 2007. Google's Moon Shot. The quest for the universal library. *The New Yorker*. http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin.
- Vaidyanathan, Siva. 2007. The Googlization of Everything and the Future of Copyright. *University of California Davis Law Review* 40: 1207–1231.
- van Gompel, Stef, and Bernt Hugenholtz. 2010. The Orphan Works Problem. The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It. *Popular Communication* 8(1): 61–71.
- Vuopala, Anna. 2010. *Assessment of the Orphan works issue and Costs for Rights Clearance*. Brussels: European Commission, DG Information Society and Media. http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.