

# The Google Books Search: The Changing Frontiers of Copyright Law

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## I. INTRODUCTION

The ability to digitize proprietary but non-functional forms of intellectual property, such as music, movies, and now books, and the ability to distribute these widely through the Internet, have revolutionized intellectual property law. *YouTube*, *Wikipedia*, *Scribd*, *BitTorrent*, and *LimeWire*,<sup>1</sup> among others, are all channels for the distribution of proprietary non-functional goods that were formerly available only through purchase. In a sense, therefore, Google Books does not do anything new. But, the scope of the coverage sought by Google Books, where Google will become in the words of Google's CEO Eric Schmidt on Google Print, "one giant electronic card catalog that makes *all the world's books* discoverable with just a few keystrokes by anyone, anywhere, anytime,"<sup>2</sup> has attracted debate, criticism, and litigation that is global in scope.

Without any doubt, the implications of the Google Books Search and the settlement involve Philippine authors and other copyright holders. Extensive previews of the English translations of the novels of Jose Rizal,<sup>3</sup>

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1. See *YouTube: Broadcast Yourself*, available at <http://www.youtube.com> (last accessed Feb. 7, 2010); *Wikipedia: The Free Encyclopedia*, available at [http://en.wikipedia.org/wiki/Main\\_Page](http://en.wikipedia.org/wiki/Main_Page) (last accessed Feb. 9, 2010); *Scribd*, available at <http://www.scribd.com> (last accessed Feb. 9, 2010); *BitTorrent*, available at <http://www.bittorrent.com> (last accessed Feb. 9, 2010); and *LimeWire*, available at <http://www.limewire.com> (last accessed Feb. 9, 2010).
  2. Eric Schmidt, *Books of Revelation*, *The Wall Street Journal*, Oct. 18, 2005, available at <http://googleblog.blogspot.com/2005/10/point-of-google-print.html> (last accessed Feb. 9, 2010) (emphasis supplied).
  3. See JOSE RIZAL, *NOLI ME TANGERE* (Maria Soledad Lacson-Locsin & Raul L. Locsin, trans., 1997), available at [http://books.google.com/books?id=ueKpRngzXccC&printsec=frontcover&source=gbs\\_v2\\_summary\\_r&cad=0#v=onepage&q=&f=false](http://books.google.com/books?id=ueKpRngzXccC&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q=&f=false); see also JOSE RIZAL, *EL FILIBUSTERISMO* (Maria Soledad Lacson-Locsin & Raul L. Locsin, trans., 2007), available at [http://books.google.com/books?id=cGXJ0\\_osinYC&printsec=frontcover&source=gbs\\_v2\\_summary\\_r&cad=0#v=onepage&q=&f=false](http://books.google.com/books?id=cGXJ0_osinYC&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q=&f=false) (last accessed Feb. 9, 2010).

limited views and snippets of the books of Nick Joaquin,<sup>4</sup> N.V.M. Gonzalez,<sup>5</sup> Paz Marquez Benitez,<sup>6</sup> the thesis that Fr. Joaquin Bernas submitted to the New York University<sup>7</sup> and his books,<sup>8</sup> the books of Dean Cesar Villanueva,<sup>9</sup> as well as the LL.M. thesis<sup>10</sup> and books<sup>11</sup> of Dean Sedfrey Candelaria, are searchable on Google Books.

*A. Brief History of the Google Books Program*

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4. See Google Books Search, available at [http://books.google.com/books?q=+inauthor:%22Nick+Joaquin%22&source=gbs\\_authrefine\\_t](http://books.google.com/books?q=+inauthor:%22Nick+Joaquin%22&source=gbs_authrefine_t) (last accessed Feb. 9, 2010).
  5. See Google Books Search, available at [http://books.google.com/books?q=+inauthor:%22N.+V.+M.+Gonz%C3%A1lez%22&source=gbs\\_authrefine\\_t](http://books.google.com/books?q=+inauthor:%22N.+V.+M.+Gonz%C3%A1lez%22&source=gbs_authrefine_t) (last accessed Feb. 9, 2010).
  6. See Google Books Search, available at <http://books.google.com/books?q=paz+marquez+benitez&btnG=Search+Books> (last accessed Feb. 9, 2010).
  7. JOAQUIN G. BERNAS, S.J., A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS (1971), snippet view, available at <http://books.google.com/books?id=8NwGAAAAMAAJ&q=joaquin+bernas&dq=joaquin+bernas&lr=&cd=1> (last accessed Feb. 9, 2010).
  8. Among those books searchable on Google Books with a snippet view available are: JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: THE TROUBLED ARROYO PRESIDENCY (2007); JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: THE ABBREVIATED ESTRADA PRESIDENCY (2003); JOAQUIN G. BERNAS, S.J., A LIVING CONSTITUTION: THE RAMOS PRESIDENCY (1999); JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (1996 ed.); JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW (1995).
  9. CESAR L. VILLANUEVA, THE LAW AND PRACTICE ON PHILIPPINE CORPORATE GOVERNANCE (2009); CESAR L. VILLANUEVA, COMMERCIAL LAW REVIEW (2004 ed.); CESAR L. VILLANUEVA, LAW ON SALES (2004 ed.); CESAR L. VILLANUEVA, PHILIPPINE CORPORATE LAW (1998 ed.); CESAR L. VILLANUEVA, PHILIPPINE COMMERCIAL LAW (1998 ed.); CESAR L. VILLANUEVA, PHILIPPINE LAW ON SALES (1998 ed.).
  10. SEDFREY M. CANDELARIA, STATE RESPONSIBILITY AND INTERNATIONAL FINANCIAL OBLIGATIONS: A CASE STUDY (1989) available at <http://books.google.com/books?id=1E5KPwAACAAJ&dq=sedfrey+candelaria&lr=&cd=4> (last accessed Feb. 9, 2010).
  11. SEDFREY M. CANDELARIA, SITUATION ANALYSIS ON CHILDREN IN CONFLICT WITH THE LAW AND THE JUVENILE JUSTICE SYSTEM (1998); SEDFREY M. CANDELARIA, THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE PHILIPPINE LEGAL SYSTEM (1997).

Google Print was unveiled at the Frankfurt Book Fair in Germany in 2004.<sup>12</sup> Google sought to achieve this lofty goal by scanning millions of books from libraries around the world.<sup>13</sup> The scanned copies are made available to the public in the form of a searchable database. Early on, Google found support from library partners like Harvard University, the University of Michigan, the New York Public Library, University of Oxford, and Stanford University.<sup>14</sup> The project was renamed as Google Books in 2005.<sup>15</sup> Since August 2006, users have been able to download complete digital copies (in .pdf format) of books which are in the public domain from Google Books.<sup>16</sup>

### *B. Features of Google Books*

While dubbed as a search engine for books, Google Books has a variety of features which merit different treatments and analyses under law.

The first feature has already been mentioned, that of full view and download ability. Public domain books may be downloaded in .pdf format.<sup>17</sup> If allowed by the publisher or copyright owner, users can preview selected portions of books. All previews contain basic bibliographic data like the title, author, publication date, length, and subject.<sup>18</sup> For some books, additional information like key terms and phrases, references to the book from scholarly publications or other books, chapter titles, and a list of related books is displayed.<sup>19</sup> For every book, there are also links to bookstores where users can purchase the book and libraries where they may be borrowed.<sup>20</sup> Under the limited preview feature, users can see a limited number of pages from the

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12. Google Books, History of Google Books, *available at* <http://books.google.com/googlebooks/history.html> (last accessed Feb. 9, 2010).

13. *Id.*

14. *Id.*

15. *Id.*

16. Adam Mathes, Download the Classics, The Official Google Blog, *available at* <http://googleblog.blogspot.com/2006/08/download-classics.html> (last accessed Feb. 9, 2010).

17. About Google Books, *available at* <http://books.google.com/intl/en/googlebooks/about.html> (last accessed Feb. 9, 2010)

18. Screen Shots from Google Books, *available at* <http://books.google.com/intl/en/googlebooks/screenshots.html#bookinfo> (last accessed Feb. 9, 2010).

19. *Id.*

20. *Id.*

book.<sup>21</sup> Under the snippet view, Google will show information about the book, similar to the conventional library card catalog information, along with some sentences to “display the search term in context.”<sup>22</sup>

Users will discover that there are three kinds of books that are covered by the Google Books project. First, it includes works that belong to the public domain.<sup>23</sup> Second, it also includes copyright protected works that are commercially available in tangible print form or any other form that enables buyers to print the work.<sup>24</sup> Finally, it also includes copyright protected books that are not commercially available.<sup>25</sup>

Google sources its books in two ways. First, under the partner program, authors, publishers or copyright holders can agree with Google to match their books with user searches, and allow a limited preview of their books.<sup>26</sup> Second, through the library project, Google has partnered with several libraries to include the participating library’s books into the Google Books collection, to show the basic information about the book and if allowed, limited previews and snippet views.<sup>27</sup>

### *C. The Potential Benefits of the Google Books Search*

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21. Screen Shot of Limited Preview of Google Books, *available at* <http://books.google.com/intl/en/googlebooks/screenshots.html#limitedpreview> (last accessed Feb. 9, 2010).
  22. Screen Shot of Snippet View of Google Books, *available at* <http://books.google.com/intl/en/googlebooks/screenshots.html#snippetview> (last accessed Feb. 9, 2010).
  23. Google Books, How do you determine if a book is in the public domain and therefore out of copyright? *available at* <http://books.google.com/support/bin/answer.py?hl=en&answer=43737> (last accessed Feb. 9, 2010).
  24. Google Books, Where do these books come from? *available at* <http://books.google.com/support/bin/answer.py?hl=en&answer=43726> (last accessed Feb. 9, 2010).
  25. Google Books, What types of books are available? *available at* <http://books.google.com/support/bin/answer.py?hl=en&answer=43725> (last accessed Feb. 9, 2010).
  26. *See* Partner Program, *available at* <https://books.google.com/partner/>; *see also* Promote Your Books on Google For Free, *available at* [http://books.google.com/googlebooks/book\\_search\\_tour/index.html](http://books.google.com/googlebooks/book_search_tour/index.html) (last accessed Feb. 9, 2010).
  27. Google Books Library Project — An Enhanced Card Catalog of the World's Books, *available at* <http://books.google.com/googlebooks/library.html> (last accessed Feb. 9, 2010).

Sergey M. Brin, co-founder and President of Technology at Google, explains that its mission in the Google Books venture is, “to organize the world’s information and make it universally accessible and useful ... The real victors are all the readers. The tremendous wealth of knowledge that lies within the books of the world will now be at their fingertips.”<sup>28</sup>

Various parties have filed briefs in support of the approval of the settlement that Google and the plaintiffs in the Google Books case.<sup>29</sup> The letter filed by Dean Paul N. Courant of the University of Michigan in support of the settlement provides a good summary of the benefits that would accrue to researchers, universities, and libraries the world over:

- (1) It provides for preservation. The print collection of the world’s libraries are literally turning to dust, as hundreds of millions of books printed on acidic paper age and become brittle in library stacks around the globe. The partnership with Google will enable the university to preserve approximately 8 million works in less than a decade.
- (2) It provides for better access. It enables people to identify works of interest from among the most distinguished libraries in the world and to locate and buy or borrow them. This ability to search and to access the world’s great library collections is of extraordinary value.
- (3) It provides access for people who have print disabilities. Migrating the written record to a digital format will make it possible for people with a variety of types of disability to get what most people already have — access to the knowledge within the books that interest them.
- (4) It is for research. Google Book Search has broad appeal because it enables the public to search across millions of books to find pieces of text of interest to them. The settlement will enable the public to find and purchase books that have not been for sale for decades, many of which have only been available to users of a handful of libraries.
- (5) It is for better curation. With the vast bulk of our collections in digital form, the university can take much better care of its print collections, because the digital copies can become the principal copies of use.
- (6) It provides continued digitization. Due to the immense opportunities in preservation, access, accessibility, research, and curation made possible by digital technology, it has been the objective of the

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28. Google Books Settlement Agreement, the Google Books Rights Registry, *available at* <http://books.google.com/googlebooks/agreement/#4> (last accessed Feb. 9, 2010).

29. Google, Increasing Access to Books: The Google Books Settlement, *available at* <https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/home> (last accessed Feb. 9, 2010).

university to make the best use of this technology to the extent lawfully possible.<sup>30</sup>

Tim Wu, a professor of Copyright Law in Columbia Law School, argues that Google Books is also beneficial for authors.<sup>31</sup> Wu quotes Nick Taylor, President of the Author's Guild, the plaintiff in the Google Books case: "It's not up to Google or anyone other than the authors, the rightful owners of these copyrights, to decide whether and how their works will be copied,"<sup>32</sup> saying that Google Books has deprived authors of their control — their right to decide whether to be in a book search in the first place.<sup>33</sup> Wu argues that this argument is erroneous as it is wrong to think that there is no tradeoff between authorial control and exposure.<sup>34</sup> Individually, more control may seem appealing, but collectively, it can be a disaster.

Using an analogy, Wu claims that map-makers need the permission of landowners before they can put the property on the map.<sup>35</sup> It would clearly be exploitation on the part of the map-owners if they publish an atlas for profit without the permission of the property owner. As an individual property owner, one might want more control over how one's property appears on a map or whether it appears at all, as well as the right to demand payment. The law, however, would be stupid to give property owners that right. It would result in terrible maps as map-makers would have to negotiate with every landowner to publish the Rand McNally Road Atlas. Property owners might think that they would individually benefit, but collectively, they would lose out. The critical point therefore is this: Just as maps do not compete with or replace property, neither do book searches

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30. Letter to Judge Denny Chin, U.S. District Judge, from Paul N. Courant, University Librarian and Dean of Libraries, University of Michigan, (Sep. 4, 2009), *available at* <https://sites.google.com/a/pressatgoogle.com/googlebooks/settlement/university-of-michigan-letter-of-support/michigan.pdf?attredirects=0> (last accessed Feb. 9, 2010).

31. Tim Wu, Leggo My Ego: Google Print and the Other Culture War, *available at* <http://www.slate.com/id/2128094/> (last accessed Feb. 9, 2010).

32. Paul Aiken, Authors Guild Sues Google, Citing "Massive Copyright Infringement," *available at* <http://www.authorsguild.org/advocacy/articles/authorsguildsuesgooglecitingmassivecopyrightinfringement.html> (last accessed Feb. 9, 2010).

33. Wu, *supra* note 31.

34. *Id.*

35. *Id.*

replace books. Both are just tools for finding what is otherwise hard to find.<sup>36</sup>

Google Books has the potential of increasing access to knowledge and to education. While it is currently a search tool limited to providing snippets of most books, certain authors have entered into partnerships with Google Books to sell full access to their works through Google Books.<sup>37</sup> Access through Google Books would be cheaper than traditional access, since a user would be able to print copies of books purchased through Google Books, thus doing away with costs of production and shipping costs of books. As more books become available through Google Books, universities the world over will be able to update their material taught in classes with less cost. And with knowledge so freely available, it becomes almost criminal to restrict the access to knowledge to those who are able to pay a king's ransom.

#### *D. A Summary of the Google Books Litigation and Pending Settlement*

Despite these potential benefits, the Google Books project affects property rights of copyright holders. As expected, the Google Books project spurred public debates among individuals with different interests and opinions. Two class suits of authors claiming that Google infringed their copyright were filed in the Southern District of New York: *Authors Guild, Inc. v. Google, Inc.*<sup>38</sup> and *McGraw Hill Cos., Inc. v. Google, Inc.*<sup>39</sup> The authors sought damages and injunctive relief.<sup>40</sup> McGraw Hill and four other publishers, namely Pearson, Penguin, Simon & Schuster, and John Wiley and Sons, sought injunctive relief.<sup>41</sup> These two cases were later on consolidated in one action.<sup>42</sup>

As of this writing, Google, Inc., the Authors Guild, and the Association of American Publishers have entered into an Amended Settlement Agreement (the Agreement), which was preliminarily approved by the

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36. *Id.*

37. Motoko Rich, Preparing to Sell E-Books, Google Takes on Amazon, *available at* [http://www.nytimes.com/2009/06/01/technology/internet/01google.html?\\_r=1](http://www.nytimes.com/2009/06/01/technology/internet/01google.html?_r=1) (last accessed Feb. 9, 2010).

38. *Authors Guild, Inc. v. Google, Inc.*, 2005 WL 2463899 (S.D.N.Y.).

39. *McGraw Hill Cos., Inc. v. Google, Inc.*, 2005 WL 2778878 (S.D.N.Y.).

40. *Authors Guild, Inc.*, 2005 WL 2463899 (S.D.N.Y.).

41. *McGraw Hill Cos., Inc.*, 2005 WL 2778878 (S.D.N.Y.).

42. Case Management Order Regarding Coordination and Scheduling, *Authors Guild, Inc. v. Google, Inc.*, 05 CV 8136 (D.C.) (S.D.N.Y. May 22, 2006).



United States District Court of the Southern District of New York on 19 November 2009.<sup>43</sup>

Under this Agreement, Google maintains its conduct was lawful at all times and in all respects and does not admit any of the allegations of copyright infringement in the complaints filed in the cases.<sup>44</sup> On the one hand, the Agreement authorizes Google to sell subscriptions to a subscription database, to sell individual books, place advertisements on online book pages, and make other commercial uses of books as described under the Agreement.<sup>45</sup> On the other hand, Google is required to pay the registry of rights holders 70% of all revenues earned through uses of the books in Google products and services in the United States authorized under the Agreement, less certain operating expenses.<sup>46</sup> The registry will distribute the revenues to rights holders pursuant to the provisions of the plan of allocation as defined in the Agreement.<sup>47</sup>

It is important to note that even as Google Books will include the works of authors worldwide, the Agreement covers only persons who, as of 5 January 2009, own a United States (U.S.) copyright interest.<sup>48</sup> Google will pay a minimum of \$45 million to compensate rights holders whose works Google has scanned without permission as of 5 May 2009, forming part of a total of \$125 million to be paid under the Agreement.<sup>49</sup> Rights holders of works Google has scanned without permission as of 5 May 2009 are eligible for cash payments, which will be at least \$60 per Principal Work, \$15 per Entire Insert, and \$5 per Partial Insert.<sup>50</sup> A “Principal Work” is the main work in a Book (that is, the part of the Book that does not include forewords, afterwards, footnotes and other material).<sup>51</sup>

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43. Amended Settlement Agreement, *Authors Guild, Inc.*, Case No. 05 CV 8136 (S.D.N.Y. Oct. 28, 2005) available at <http://www.googlebooksettlement.com/intl/en/Amended-Settlement-Agreement.zip> (last accessed Feb. 9, 2010) [hereinafter Agreement].

44. *Id.*, whereas clauses.

45. *Id.* art. II, 2.1 (a).

46. *Id.*

47. *Id.*

48. *Id.* art. I, 1.41.

49. Agreement, art. II, 2.1 (b)

50. *Id.*

51. *Id.* art. V, 5.1 (a).

In order for an author holding a U.S. copyright to claim a cash payment, a claim has to be filed by completing a claim form on or before 31 March 2011, from Google's settlement administration website in <http://www.googlebooksettlement.com>.<sup>52</sup> Authors may also opt out of the settlement, file objections to the Agreement, and file a notice of intent to appear in the final settlement/fairness hearing which will be held on 18 February 2010,<sup>53</sup> in the U.S. District Court or the Southern District of New York, where the court will determine, among others, whether the terms and conditions of the Amended Settlement Agreement are fair, reasonable, and adequate.

From this Introduction, it is apparent that the matter of Google Books presents various intellectual property law issues, some of which will be resolved in the final fairness hearing in 2010. This collection of Essays presents thoughts on certain issues relating to Google Books. It is the hope of the authors, whose Essays are collected here, that these preliminary thoughts on select issues on this matter will spur discussion and reaction in the Philippine legal community.

### *Essays*

The Google Books Search — The Changing Frontiers of Copyright Law

*Anna Maria Karla B. Ng and Allan Verman Y. Ong*

The Fair Use Defense in Response to Copyright Infringement Challenges to the Google Books Settlement

*Anna Maria Karla B. Ng*

Google Books and the Threat to Privacy from Aggregation of Search

*Allan Verman Y. Ong*

Comparative Perspectives: Google Books Settlement with Copyright Holders in Japan

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52. See Paper Claim Form, available at <http://www.googlebooksettlement.com/intl/en/claim-forms.zip> (last accessed Feb. 3, 2010). The website now carries a simplified procedure for rights holders to claim their books and inserts; see also Simplified Procedure for Claiming Your Books and Inserts, available at <http://www.googlebooksettlement.com/help/bin/answer.py?answer=171811&hl=en> (last accessed Feb. 9, 2010).

53. See Important Dates, available at <http://www.googlebooksettlement.com> (last accessed Feb. 9, 2010).

*Carrie Bee C. Hao*

Philippine Perspective on the Google Books Settlement

*Patricia Ann O. Escalona*