



March 6, 2013

Office of Policy and International Affairs  
United States Copyright Office  
101 Independence Ave. S.E.  
Washington DC 20559

Re: Notice of Inquiry: Orphan Works and Mass Digitization, Docket 2012-12

Google Inc. respectfully submits these reply comments in connection with the above-referenced Notice of Inquiry [NOI]. Several of the initial comments display a misunderstanding of the Google Books Library Project and the litigation related to it. In these comments we will try to shed some light on those issues, and provide some additional ideas for an improvement of the statutory damages system that would, among other things, address most orphan works problems.

### **The Google Books Library Project**

As we explained in our initial comments,<sup>1</sup> the Google Books Library Project digitizes hard-copy library books for the purpose of indexing them, and displays only short snippets of the books that are in copyright (including orphan books). Books in the Library Project, including orphan works, are not displayed in full to the user. Instead, three short snippets are displayed to the user in response to a user query, and Google employs security measures to ensure that users cannot recover the entire text of a snippet-view book or even one complete page. Moreover, works whose text is organized in short “chunks”—for example, dictionaries, cookbooks, and books of haiku—are excluded from snippet view altogether. Books in the Library Project are not sold, and no advertisements have ever appeared on any About the Book page<sup>2</sup> for any book that is part of the Library Project.

For many searches conducted in Google Books, the results page will include links to About The Book pages that do *not* display three snippets: instead, the user sees a much larger portion of the book.<sup>3</sup> Those books are *not* part of the Library Project: if the user is seeing more than three snippets on the About the Book page, the user is not looking at a Library Project book. The user is looking at a book that Google has licensed from a publisher partner. For most of these books,

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<sup>1</sup> [http://www.copyright.gov/orphan/comments/noi\\_10222012/Google-Inc.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Google-Inc.pdf).

<sup>2</sup> An “About the Book page” is a page on which snippets are displayed in Google Books, if the book is a snippet-view book.

<sup>3</sup> There are other display modes as well: for example, a mode where only metadata about the book, and no text at all, is shown.



the user can view 20% or more of the text of the book—far more than the three snippets shown for a query of a Library Project book. Over 45,000 publishers have included books in our partner program, including major publishers like HarperCollins, Penguin, Simon & Schuster and Macmillan. Indeed, with so many licensed previews, it can sometimes be hard to find an About the Book page that shows snippets (as opposed to 20% previews), depending on the user's query. It is important to understand that Google's display of licensed partner books is not, and never was, at issue in the Authors Guild litigation, nor was it ever at issue in the publisher litigation.<sup>4</sup> Those litigations relate only to the snippet display of Library Project books, not 20% preview displays of partner program books.<sup>5</sup>

### **Further Thoughts on a General Solution**

In our opening comments, we proposed a simple change to the way statutory damages work: require a copyright owner who wants to be entitled to statutory damages to keep her contact information current in the registration records of the Copyright Office. That change would ameliorate some of the commercial concerns with using orphan works, namely the threat of punishing damage awards. We here provide some further detail on how that proposal might work.

Since a copyright owner is entitled to ignore requests from users to license her works, it might be difficult for a potential user to know if contact information in the Copyright Office's database is indeed current. This problem would arise in the following scenario: a user queries the Office database; the database returns the information that yes, the work in question was registered, and also returns contact information for the owner; the user attempts to contact the owner; but the user never hears back from the owner. In that case, the user doesn't know if the owner is exercising her right to ignore requests, or whether the owner has gone missing and the work became orphaned at some point after the contact information was last updated. If the user becomes convinced that the work is orphaned and uses the work, the owner could still resurface and sue for statutory damages. The proposed registration requirement would thus only be useful to users if owners responded to requests, which owners are not required to do. This problem could be avoided by a requirement that the owner renew (or confirm) her contact information at certain intervals.<sup>6</sup> The requirement could be, for example, that the owner certify

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<sup>4</sup> The ASMP suit, filed in 2010, does include some claims related to the Books partner program.

<sup>5</sup> As the Office discusses in the NOI, the proposed settlement in the litigations between the Authors Guild, purported class plaintiffs, and certain U.S. publishers, on the one side, and Google on the other was rejected by the court in March, 2011. See NOI at 64,557. The Court rejected the ASA but made no holding on the question of whether the Library Project violates copyright law: that issue is still being litigated with the Authors Guild and the purported class plaintiffs (as well as in a separate case filed by the ASMP). Any effect the proposed settlement might have had on orphan books was of course also nullified when the settlement was rejected. The rejected settlement thus has little relevance to the discussion of orphan works generally or to Google's current plans.

<sup>6</sup> We proposed this in our 2005 comments. See *Google's Response to Notice of Inquiry Regarding Orphan*



her contact information every five years. That way if a user sees that the contact information in the Office's database is more than five years old, the user has a safe harbor with respect to statutory damages. To reduce the burden on owners, the Office's website should be set up so that an owner can have one account tied to all of the owner's registered works—and then update just that single account once every five years. The update process should be free for the owner, especially because it involves only logging into an account and updating some information. Logging into a website and updating one's contact information, for free, once every five years is not much to ask in exchange for the right to receive extraordinary damages for trespass to one's property—damages that are not available for trespass to other sorts of property that often are of greater economic or emotional significance.

Another concern with our proposed general change to statutory damages might be that some categories of registered works are difficult to search, so a potential user's query of the Office's database would not produce meaningful results. The most obvious example is pictorial works, for example photographs. As the Office's *Report on Orphan Works* discussed,<sup>7</sup> photographs often do not include the name of the author within the work, and they are often untitled. Searching a database of authors and titles will therefore be pointless for many pictorial works. However, as we noted in our opening comments, search-by-image technology has matured greatly, and Google now offers it for free. Therefore, if the Office's database made thumbnail versions of the deposit images available to search engines, users could conduct image searches among the thumbnails. That would avoid the problems of search-by-title or search-by-author. In this system, the Office does not need to provide the search-by-image technology: it instead needs to digitize its records and deposited images. The law could perhaps be structured so that the owner is protected if her records on the Office's site were current at the time of the infringement, regardless of which search technology the user chose to employ: the risk of a bad search would thus fall on the user. In that system, the user could decide to rely on Google results, or perhaps a new search provider would come along that specializes in querying the Office website and provides an indemnity to the user for failed searches (probably for a fee).

More generally, the amendment to the statutory damages provision could be structured so that the contact information requirement would come into force for a particular category of work (such as pictorial works) only when the Office certifies that its records for that category of work are searchable on the Office's site. The category of literary works, for example, might be certified when the title and author information is searchable, but the category of pictorial works might be certified only when the images are all scanned and thumbnails are publicly available so they can be searched by image.

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*Works* (Mar. 25, 2005) at 6 (available at <http://www.copyright.gov/orphan/comments/OW0681-Google.pdf>).

<sup>7</sup> U.S. Copyright Office, *Report on Orphan Works* (2006) at 24-25.



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As we noted in our initial comments, the problem of orphan works is broad enough that many solutions are possible. We look forward to continuing to discuss these issues.

Respectfully submitted,

/s/

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