

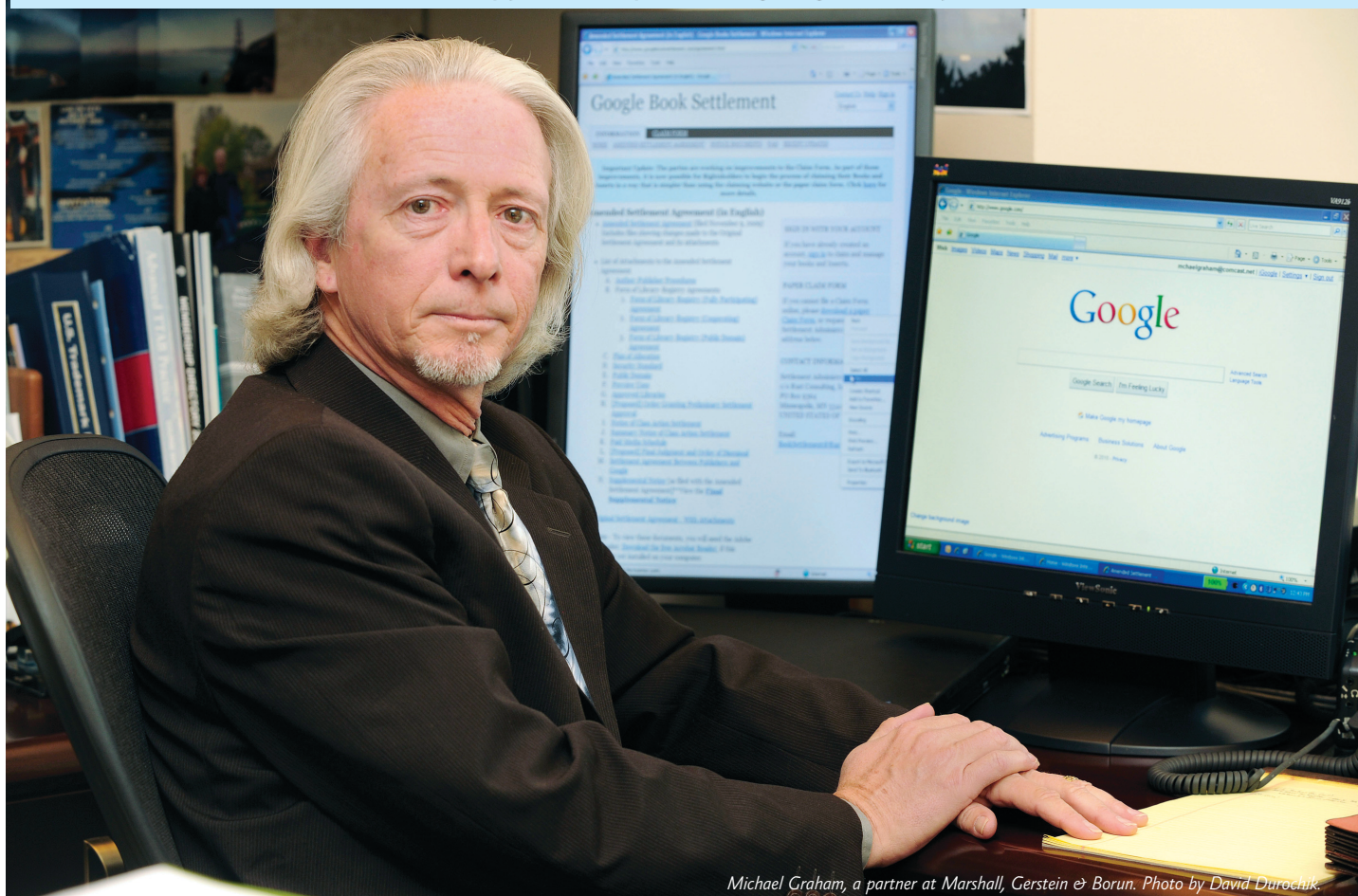
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Michael Graham, a partner at Marshall, Gerstein & Borun. Photo by David Durochik.

## Google propels books into a whole new digital world

By Amanda Robert

**F**or many, life outside of the digital world may seem unimaginable.

Technology entwines with everything, transforming the way people learn, communicate and entertain themselves. As tech-savvy consumers crave better and faster access to information, companies create cutting-edge inventions to meet their demands.

Today's young learners choose laptops and interactive, touch-screen whiteboards over

weathered, dog-eared textbooks. College students read online databases of periodicals and scholarly journals instead of heavy, hardbound research volumes. Fast-paced professionals solicit instant news through applications on smartphones rather than through the inky, crinkly pages of newspapers.

Many people spend their free time connecting with friends on Facebook, watching new movies from Netflix and reading the latest best-

sellers on Kindles or iPads. They no longer feel satisfied with sitting still, choosing instead to constantly consume the world around them.

In 2004, Google continued to feed this hunger for accessible information when it introduced Google Book Search, an innovative project that sought to mass-digitize millions of books from around the world and make them available online for readers.

The search-engine giant announced that it

would partner with publishers and authors to scan their books and provide “snippets,” or previews, of their pages online. If readers searched for their books, or for subjects related to their books, they would see these snippets. They would also find details on where to purchase or borrow the books.

Google said it would also scan and digitize books from the collections of libraries around the world. In addition to searching for and previewing snippets of in-copyright books, readers could download the full text of out-of-copyright books.

“I believe this is the way books are ultimately going to be read,” said Richard Stockton, a patent lawyer and partner at Banner & Witcoff. “Some people will never surrender their paper copies, but it seems that technology keeps getting better and better, and people are getting more comfortable with digital books. Eventually, online PDFs or other equivalents will become the preferred way of reading.”

Google Book Search promised to help readers reach the world’s books and offered a new source of revenue to their creators, but the project hit a snag when the Authors Guild, the Association of American Publishers and other groups of authors and publishers filed a class-action lawsuit against Google in the U.S. District Court for the Southern District of New York in 2005.

The plaintiffs claimed that Google’s scanning and sharing of entire books infringed on their copyrights. After negotiating for several years, they reached a settlement agreement with the company in 2008 that would allow Google Book Search to move forward.

### Finding common ground

The Google Books Settlement Agreement was submitted to the court in October 2008 and amended in November 2009. It awaits the approval of Judge Denny Chin, who President Obama appointed to the 2nd U.S. Circuit Court of Appeals in April 2010.

The Google Books Settlement represents a broad class of publishers and authors, including authors of books that are in-copyright, but out-of-print, in the United States, United Kingdom, Australia and Canada. Most of the world’s books are in-copyright, but out-of-print, since the current copyright term covers books that have been published since 1923. These books

are commonly called “orphan works,” since it’s often difficult to identify their copyright owners.

If approved, the settlement would allow readers to preview up to 20 percent of these out-of-print books, as well as buy online access to them or browse them for free at partner libraries and universities. Readers can continue to view and download out-of-copyright books in their entirety.

The Google Books Settlement allows Google to include in-copyright, out-of-print books in its online book search unless their copyright owners choose to remove them. Google Book Search also includes in-copyright books that are still published, but readers can only see snippets of these books if their copyright owners agree to participate.

The settlement additionally creates a book rights registry to identify the copyright owners of orphan works and to collect and distribute money earned from book sales and advertisement revenues. Google plans to pay \$125 million to establish the registry and to resolve previous copyright claims by authors and publishers.

Stockton and other lawyers in the Chicago area and in the rest of the country commend Google for taking trailblazing steps to promote the union of digital technology, research and literacy.

As Google Book Search allows people to be anywhere in the world, reading any book that they want, it also gives authors and publishers a new opportunity to share their books with untapped audiences.

“They’ll be able to utilize Google’s obvious talent with the online realm to move their books through channels that were previously never envisioned,” Stockton said. “Google has a reputation of being a leader in propelling online content to its users, and this is going to make it very easy for them to do so.”

Lawyers also say that even though Google, the Authors Guild and the Association of American Publishers support the Google Books Settlement, it still includes legal issues that could affect the rights of authors and publishers. If left unresolved, these issues could stall the settlement and the progress it seeks to achieve.

Neither Google nor its legal advisers responded to calls or e-mails seeking comment for this story.

### A changing world

“I don’t want to compare it to the printing press — that may be overdoing it — but this is really going to be an amazing thing,” Stockton said. “Just think — everyone in the world would have access to books.”

Google Book Search continues a trend that began with the invention of the Internet, Stockton said. Libraries will evolve from warehouses of information into portals of information, where readers can access hundreds of millions of books through the digital database.

Michael Graham, a partner at Marshall, Gerstein & Borun, agreed that Google Book Search benefits not just Google, authors and publishers, but also libraries and their patrons.

As a student of literature and as someone who worked in trade publishing in New York for seven years, Graham developed an early interest in the idea of a searchable information database.

“The Google settlement would give us a real useful tool,” he said. “The database would be incredible, and to be able to do that with all of the books — it has the potential of creating an electronic library of Alexandria.”

With the approval of the Google Books Settlement, and with the evolution of the publishing industry, readers could visit any library and find every book ever written.

“The key is that this is really ground-breaking,” Stockton said. “It will change everything. Whether it’s good or not is going to depend on whether this is favorable to consumers and libraries and users.”

That’s why Stockton started following the project and the settlement between Google and authors and publishers. He saw how the mass-digitization of books could impact the next generation of readers.

“Brick-and-mortar” bookstores will stay open, but their opportunities will be limited going forward, Stockton said. Companies that handle the distribution of books could be forced to give more of their business to Google.

### Learning from Napster

Stockton compared possible changes in the publishing industry to changes in the recording industry, especially in the late 1990s after the rise of Napster and the “rampant piracy of music” on college campuses. The exchange of music online dramatically altered royalty models and the distribution of albums, and led

to changes in the law that protect Internet service providers from liability.

"The first reaction was to fight it and maintain the status quo," Stockton said. "But over time, the recording industry realized that this was the way things were going to be, and they better work with this system as opposed to maintaining the status quo."

As with Napster, lawyers see how the Google Books Settlement could pose a danger to copyright law.

Graham pointed out that one provision in the settlement allows Google to scan and share in-copyright, out-of-print books without the permission of their copyright owners. Under

something worthwhile."

## Reading between the lines

As a scholar, James Grimmelmenn said he would be thrilled to consult the text of every book ever published. He could compare books, see a spread of new words and ideas, and conduct comprehensive research in ways that were never possible.

Despite his enthusiasm for Google Book Search, the associate professor at New York Law School admitted that the Google Books Settlement exhibits too many characteristics of legislation.

"It affects a lot of people in complicated

one. The company faces a large number of copyright owners who have a larger number of books, enormous costs related to clearing the rights to those books, and divergent economic and political interests.

"The normal way of getting to a solution would be reaching agreements, but you can't reach agreements with everyone involved because there are too many people and the transaction costs are too costly," Band said. "The other alternative, a legislative solution to cut through these obstacles, is too difficult because you have too many different interests and Congress is too dysfunctional."

Band pointed out that the Google Books

*"Some people will never surrender their paper copies, but it seems that technology keeps getting better and better, and people are getting more comfortable with digital books. Eventually, online PDFs or other equivalents will become the preferred way of reading."*

copyright law, copyright owners retain the right to control whether or not others display, copy, transform or distribute their works.

The settlement instead creates an "opt out" structure, which means that Google gets the right to copy any in-copyright, out-of-print book that it decides to include in Google Book Search.

"We're going to take your federally granted copyright rights, and as a business proposition, we're going to change those," Graham said. "That's basically what they have done."

Even though authors and publishers who are class members approve the opt-out provision, Graham questioned whether they should make the decision for copyright owners who are not present. He said he understands why Google wants to include hard-to-find orphan works, but disagrees with giving a company the power to change the law to make it happen.

"It's not sexy, but it is extremely important from the point of view of the protection of our culture and the information economy that we are growing," he said. "We can't allow [copyright] to be determined by private litigation and private settlements, even when those private settlements are going to give us

ways, which sounds like a standard democratic job of the legislature," Grimmelmenn said. "The class-action wasn't really designed with that broad-scale social change in mind. You can see uncomfortable corners where the settlement has been crammed to fit the contours of what class-action allows."

The lawsuit started with copyright concerns over the scanning and sharing of books, but the class-action settlement leads to other concerns as it creates a new structure for an industry traditionally regulated by copyright, Grimmelmenn said.

"For most class actions, we tend to think of the paradigm of resolving some past action," he said. "It might be a tort that seeks compensation for victims, or it might be employment discrimination that challenges the legality of particular practice.

"Class-action has consequences going into the future, but stems from things that have already happened. This is a class-action that is going to shape to a remarkable extent what copyright owners and Google do in the future."

Jonathan Band, an adjunct professor at the Georgetown University Law Center, argued that it's not easy for Google to satisfy every-

Settlement, while more sweeping and wide-reaching than the initial subject matter of the lawsuit, became the only viable option for implementing the Google Book Search.

"I'm a very pragmatic, results-oriented person, so I see that there is a very desirable objective, which is this comprehensive database of books," he said. "I think that a class-action settlement is just as legitimate a solution as legislation would be."

William McGrath, a partner at Davis McGrath and the associate director of the Center for Intellectual Property Law at The John Marshall Law School, said the settlement shares a massive body of knowledge with readers in a way that also supports authors and publishers. They can promote their books in a digital space that has never been open to them and profit from receiving the attention of readers all over the world.

"These are books that commercially don't warrant being continued in print anymore," McGrath said. "They might be 50 years old, but they're still covered by copyright. The settlement opens up new avenues of revenue for publishers and authors of these old, out-of-print works."



Despite criticism that Google usurped the rights of authors and publishers, the settlement allows any copyright owner to contact the company and remove their books from Google Book Search, McGrath said. The settlement also charges the book rights registry with locating and providing payment to copyright owners who don't know their books have been included in the online book search.

"There is enough flexibility built into this, so authors or publishers who don't want their works in can get them out," McGrath said. "Authors and publishers who don't care enough to contact Google will still be able to get some of the benefits from the revenue streams, and the public gets access to books that they might not otherwise have any access to, certainly not digitally."

#### A historic settlement

Allan Adler, the vice president for legal and governmental affairs for the Association of American Publishers, spoke to the importance of the settlement and to concerns over potential copyright violations and class-action misuse.

"The settlement gives us nothing less than a historic opportunity to achieve a resurrection in knowledge, contained in published books that have generally disappeared from public availability," Adler said. "That's my personal

interest in the case — participating in something that I think could have a broad beneficial impact on millions of people."

After Google, the Authors Guild and the Association of American Publishers announced their settlement agreement, they launched the largest notice program of any class-action in history, Adler said. Members spent a year e-mailing, calling and meeting with authors and publishers from all over the world, informing them about the nature of the litigation and how it impacted their rights.

Most objections came from authors and publishers outside of the United States, who raised questions over a class-action lawsuit representing the interests of those who were not American citizens and not parties to the lawsuit, Adler said. Since most countries don't employ the equivalent of a class-action lawsuit, settlement parties explained to them that they could opt out of the class, remain a class member and remove their books, or remain a class member and receive payment for their books.

The settlement parties also disagreed with other authors and publishers in the U.S. who said they felt Google, the Authors Guild and the Association of American Publishers exceeded the bounds of an appropriate class-action settlement, Adler said.

"If the person that engaged in unauthorized use of a copyrighted work subsequently agrees to get the permission of the author after the fact, and to pay an appropriate licensing fee for that permission, that is a very efficient and economical way of resolving infringement disputes," Adler said. "We believe that what we did under the class-action settlement mechanism was very much like that."

He also called concerns over orphan works "overblown," since every class-action litigation involves class members who choose not to come forward to file claims. He added that the Google Books Settlement provides incentive for copyright owners to come forward by paying them for their participation in the online book search.

Adler encouraged people to remember that Google Book Search and the Google Books Settlement, which resolves a legal dispute among parties with commercial interests, started with a progressive plan to provide the world's books to anyone with access to a computer.

"There were a number of things that we tried to accomplish in here, aside from resolving the legal dispute and seeing if we could all advance our interests in publishing works for the benefit of the public," Adler said. "There were things that were achieved that are matters of pure public interest." ■