



TRANSCRIPT

THE BATTLE OVER BOOKS: AUTHORS AND PUBLISHERS TAKE ON THE
GOOGLE PRINT LIBRARY PROJECT

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Celeste Bartos Forum
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A sell-out audience filled New York Public Library's Celeste Bartos Forum the evening of November 17, 2005, for a discussion of Google's library digitization program. The discussion was jointly sponsored by *WIRED* magazine and the NYPL as part of its "Live from the NYPL" fall series. The panelists were **Allan Adler**, vice president for Legal and Governmental Affairs at the Association of American Publishers (AAP), **David Drummond**, vice president and general counsel of Google, **Lawrence Lessig**, a professor at Stanford Law School, and the founder and chairman of Creative Commons, and **Nick Taylor**, president of the Authors Guild 2002–2006. **Chris Anderson**, editor-in-chief of *WIRED*, acted as moderator. **Paul LeClerc**, president and chief executive officer, and **David Ferriero**, Andrew W. Mellon Director and Chief Executive of the Research Libraries, at the New York Public Library welcomed the audience.

CHRIS ANDERSON: Tonight we have the challenge to deliver to you a "biblical moment." It just so happens the Bible's a book. It so happens we're in a library. And it so happens we're going to be talking about books. So, done.

There are about thirty-two million books out there. About three million of those are in print, maybe another three million of those are out of copyright, which means that they're generally older than 1922. The rest of them are in a strange, gray area, which is to say they're still in copyright but they're typically out of print. That means that there are very few ways to get them. Libraries are one way to get some of them, used bookstores a way to get some of them, but a huge amount of human knowledge is locked up in books that are largely inaccessible. We are now in the Google Age, where a generation is growing up believing that if something isn't on Google it really doesn't exist. And books are not playing as much of a role as publishers might like in that universe.

The effort to bring books into the electronic age, the Internet age, started in 1971 with the Gutenberg Project, which was actually volunteers keying in books that were in the

public domain and redistributing them as e-books. In the last five years, an organization called the Internet Archives started doing some scanning of public domain books. Amazon started its own scanning process, which led to Search Inside the Book, I believe in 2003. Then in 2004, Google launched Google Prints. Google Prints was an effort to scan books that were out of copyright, in the public domain, and also books that were provided by the publishers, and make them available on Google. The text was searchable, it was readable, but you could also buy the book. In December of 2004, Google took the next step and announced the Google Print Library Project in cooperation with five libraries: Stanford, Harvard, Oxford, the University of Michigan, and the New York Public Library. This included not just books that were out of copyright, but also books that were in copyright, but which publishers had agreed to include, and, in the case of some of the libraries, books in copyright that the publishers had not explicitly agreed to include. This was called public domain opt-in and opt-out.

Google presented each of these kinds of books—public domain, publisher permission, and publisher permission not explicitly granted—in three different ways. But the most important one, the one around which the lawsuit formed, was where the book is in copyright and the publisher has not explicitly given permission for it to be scanned and displayed by Google. What Google displays in this instance is a snippet, a very small amount of the text, often just a fragment of a sentence. That takes us to this year. In August, the complaints had started to come in from publishers and authors, and in September the first lawsuit came in. The Authors Guild filed suit claiming massive copyright violation. In October the publishers also filed a complaint. Google paused their scanning process for a while to discuss this. This month they restarted the scanning process, continuing mainly with the older books and those in the public domain. Subsequently, other companies have come in. Yahoo and Microsoft, along with Internet Archives and Larry Lessig's Creative Commons, have started something called The Open Content Alliance, which is scanning and making available public domain books and those where the publishers have opted in. Today, to complicate things entirely, the Google Print Library Project has been renamed Google Book Search, not to be confused with Microsoft Book Search. So that's where we stand. There are three classes of books, Google is presenting the three in three different ways, and one of those ways has caused enough offense to trigger two lawsuits.

With us tonight to discuss all this are Allan Adler from the Association of American Publishers, Nick Taylor from the Authors Guild, David Drummond from Google, and Larry Lessig from Stanford Law School and Creative Commons. I'll start by asking Nick, who filed the first suit: What exactly offended you all the most?

NICK TAYLOR: What do we object to? We object to the appropriation of work that authors own without asking our permission. This is work that's owned. It's valuable. Works that are out of print are not necessarily going to be out of print forever. And it's just basically a rogue version of eminent domain, only without the compensation that government routinely gives when they take over private property for public use.

ANDERSON: What do you mean by appropriate?

TAYLOR: They have not asked authors who own the copyrights if they want their works to be included in Google Library or Google Book Search, as it's now called.

ANDERSON: So you are equating inclusion in this project as stealing the work?

TAYLOR: Exactly.

ANDERSON: All right. The words are on the table.

DAVID DRUMMOND: Might I respond, too? Remember what we're doing here. This is a program in which you will not be able to read in-copyright books through Google Book

Search. The purpose of this program is to help you find them, to help you discover books. That's a very different thing than saying that this is a substitute for actually buying the books and reading them. In fact, we are looking to direct you, once you've discovered that book, to the place you can find it. It's very important to understand that distinction. The only thing you'd be able to see are some short snippets, very much like the snippets that you see with Google Web Search. So we believe very strongly that this is a fair use under copyright. When you have fair use, you're not required to ask permission because the purpose of copyright law is all about trying to increase the amount of creative action that's going on in the society. And part of that is the incentive that it gives to authors to create those works. But equally important is the right for all of us to refer to those works, to comment upon them, to do reviews of them as in book reviews, etcetera, and to come up with services that help people locate and discover things.

So really this is all about discovery. And when you think about the power of this, it's really amazing. This is the power for anyone in the world to discover that a book exists on some particular topic that may not be in their local library, or might not otherwise be accessible to that person. It's the power to discover books that otherwise would not be discovered. There might be a case where the only copy of a book exists in a library somewhere, and perhaps the only way to prevent that book from falling completely into obscurity is to put it into a program like this. So the public benefit of this, we believe, is immense and very important. What this is not is Napster. Information does not want to be free. That's very clear as to Google. But it does want to be found.

TAYLOR: This is all very fine and all very admirable. And it will, as you say, make information available to that fraction of the population of the world that has access to a computer and an Internet hookup. But it will also enormously increase the value of Google's franchise. Google is in the search business. It wants to provide access to all the world's information. What we fail to understand as authors is why that value does not obtain to us in any way. Why is it simply being taken?

LAWRENCE LESSIG: This is an extremely important point. On this stage you've got three lawyers, one real creator, and then an editor. But one real creator. And it's extraordinarily compelling for the creator to say "This value is being created and why shouldn't we share in it?" Because of course ultimately it is the author who writes the work that is useful to find through things like Google Search. I think that both sides need to confront that directly. Because I think that this is the heart of the question. And it is what makes this debate so important, because this is the fundamental question going on in copyright law right now. Should there be any uses of copyrighted works that are free? Free. Originally, until the Internet, and digital technology, there were all sorts of uses that were free. Free in the sense of not triggering copyright law. For example, read a book, or collect a library, or set up a used bookstore, or write a review of a book: None of those uses of creative work triggered copyright law because none of them produced a copy. Some uses were right at the core of copyright law, like publishing a book, obviously, or distributing books in ways that compete directly with original rights that the copyright owner has: These are properly regulated within the scope of copyright law. And then our tradition had a thin sliver of exceptions called fair uses—uses which were technically triggering the rights of copyright but which the law said ought to remain free.

In the digital age, under the arguments that you all have advanced, there is no free use. In the digital age, every single use of creative work produces a copy. And your question is, well, every single use produces a copy, why shouldn't we then be able to exercise our power to get some money over all of these copies which are now technically within the scope of copyright law? And I think the answer is both, because historically copyright law has always recognized that there were uses that have to remain free. The Supreme Court said in *Sony*, copyright law "has never accorded the copyright owner complete control of all possible uses of his work," so used bookstores, libraries, all these people built on the value of copyrighted works but they didn't have to pay the copyright owner.

In my view, the most important reason for leaving some uses free is not so much because of the sort of cushy, liberal, Oh yeah, it's good to subsidize the poor—that's important, but that's a kind of Berkeley idea and I'm from Stanford. The real reason to worry about leaving some uses free is that if there aren't these free uses, then innovators cannot build upon the extraordinary work that's gone before in ways that radically change the world. If you think of the history of the Internet, it is just filled with outsiders discovering the next great innovation and building it. It wasn't AT&T that built the Internet, it was a student at Stanford with his supervisor that began to build the protocols to do it. It wasn't even AT&T that built the worldwide web or Microsoft, it was a Swiss researcher. It wasn't Swiss researchers who built the ability to do search, it was Stanford students again. The point is, it's always been outsiders. And if you give total control in the way that your theory entails, then we have a kind of capitalism by Soviet, where it's the big organizations that decide what the future of innovation looks like, rather than the competitive process, the competitive market, which has built so much of the great value that the Internet has delivered so far.

ALLAN ADLER: That's all very alarming, but it has nothing to do with Google. The fact of the matter is that we're talking about a pretty straightforward copyright scenario. Google is essentially a one-trick pony. It's a hell of a trick, but it is just a search engine. Google sells advertising in connection with the operation of its search engine. In order to keep that fresh appeal to advertisers, to continue to sell advertising in that context, Google has to constantly come up with new things to search for. Hence, Google is able to say that if they get satellite images, they can allow people to search their neighborhoods. If they can get hold of old television programs, they can allow people to search through the video stream of those programs. I mean, hell, if they could get access to your children's room they could search the socks drawer, if they wanted to. But the point is that, in this context, in order to conduct the searches they want to conduct, they are making full copies in their entirety of all of these books and compiling for themselves internally the world's largest digital library of books in the public domain and books in copyright. For the latter, they're doing so without the permission of the copyright owner, to the extent that they have gone beyond the initial agreement they had with the publishing community, which was what the original Google Print for Publishers Program was about.

ANDERSON: Could I interject for a second so we can get some understanding of exactly where the harm is. This is what we're talking about here. These are the books for which the publishers have not given permission. There's no advertising on this page and the content is too short to be useful. So I'd like to know where you're losing money in this scenario?

ADLER: Well, first of all, one of the most important things, which you keep glossing over, is they are making copies of all of these books in their entirety, and they are saving them to a database that they will consider to be Google's proprietary database. They are loading them on Google's servers, where Google will be able to use this material for whatever business purpose it chooses. At the moment, as far as we know, it chooses only to use them for the purpose of showing these so-called snippets of information in response to queries that users of their search engine make. But that may not be all that they're doing. Even as they do that, however, what they are chiefly doing is directly promoting their search engine. They are a for-profit company, which makes 99 percent of their revenue from selling advertising in connection with the operation of that search engine. If they are going to directly promote it through the use of valuable content, intellectual property created by others, those others at least should have the right to have permission asked, if not also to share in a bit of the revenue.

LESSIG: Do they also have to pay for used bookstores? Should used bookstores have to pay authors when they sell their works?

ADLER: Used bookstores fall under the first sale doctrine. That's the battle that I'm sure many authors regret was lost, but it was lost nearly one hundred years ago in a Supreme Court decision.

LESSIG: Right, because the principle there was not that every time value is created it must be shared. The principle was that there are limits to what the scope of copyright law grants in a monopoly to the original author.

ADLER: No, actually the principle there was that when you are talking about a physical copy that embodies the literary work that is the copyrighted property, the law of property encourages physical transfer because part of the value of physical property is in being able to transfer possession and ownership from one party to another. That's part of what gives it value. So what the Court said about the first sale doctrine was, once a literary work has been embodied in a physical copy and that copy has been lawfully disposed of, the copyright owner has nothing to say about what happens to that particular copy. That doesn't mean, however, that somebody is allowed to take that copy, copy it in its entirety and use that copy to further its business interest.

DRUMMOND: It seems to me there are a number of myths being promulgated here about what copyright law says and what fair use says. I think if you hear some of these arguments, you believe that there's no such thing as a fair use, which is kind of what Larry was getting at here. A cursory reading of some cases shows that there are situations where it's OK to make a full copy of something. What do you think allows you to tape a TV show to watch it later on your VCR? You're making a full copy of something. There's this notion that you can't be a commercial use and a fair use. Wrong again. The Supreme Court's been fairly clear about that. I think it was the *Campbell v. Acuff Rose* case that talked about this. And there was a 2 Live Crew song where the use was held to be fair use.

ADLER: Because it was a parody of the original copyrighted work.

DRUMMOND: But clearly it was a commercial use. There's this notion that, well, what they're doing now is perfectly fine, but someday they're going to do something really bad. To us that suggests not that much faith in the copyright law. We have a program, we've designed the service to be a fair use one, to be a service that promotes a significant public good that spurs creativity in the society and in the world, and one that does not harm publishers or authors. So it seems to us that the moment anyone, Google or anyone else, starts to do things that have an actual harm, then copyright law is very well designed to deal with that. It's very hard to understand what exactly is the harm being created here. If anything, this program might help.

ADLER: Let me explain the harm to you, David, because we do have faith in copyright law. That's why we went to court. The court is going to apply copyright law, and we believe the court will find that what Google is doing is not fair use. But you ask this question: What's the harm? The harm is that Google, which is a for-profit company, is doing this to directly promote its for-profit operation, taking away the opportunity from the people who generated this valuable content to exploit that content for the very same reasons and to have some benefits accrue to themselves. Why couldn't publishers license this use to Google? Clearly, the companies that are participating in OCA [Open Content Alliance] are willing to license copyrighted material. Clearly, Microsoft, in its announcement of its book search service, is willing to license copyrighted material.

DRUMMOND: With a service that will allow you to read the book, which we have as well.

ADLER: You started with that process but you took a left turn with the library project. And what you haven't been able to do to this day is explain to your publisher partners what the significance of that publisher partnership agreement is, in light of what you're doing in the library project.

DRUMMOND: Well, it's just a misrepresentation to suggest that we somehow created a program that we were going to stick with forever. As you know, we leave it to the publisher to decide how much of the content to show. What we're talking about in the library portion of Google Book Search is something entirely different. It is a location tool. It is an electronic card catalog. No one would have suggested that it is illegal to create a library card catalog in the analog world. To do it well and to do it in the digital world, as Larry was saying, requires a copy. The ultimate use of it is indistinguishable from a library card catalog. It helps people find things. But it just seems like it would be a tragedy if you wanted to come into a library and look up a book and in order to find it you have to pay a toll to somebody.

TAYLOR: If you want to create a library card catalog, why don't you just scan the card catalogs of the libraries rather than their entire content?

DRUMMOND: Because, through lots of creativity and the fact that we have a flexible copyright law in this country, software programs have been able to come up with really interesting ways in which you can create a much better card catalog, because people can actually find things through key words.

LESSIG: In the RIAA [Recording Industry Association of America] lawsuits and the Grokster case and the Napster case, at least the copyright owners were asserting a right that they believed they needed to assert in order to defend their business against losses. What you've said is you think you should assert this right because what you want to do is to be able to get a kind of revenue that right now you don't get at all. So it's about taking part of the value of something that's creative here, not about protecting yourself against losses produced by this new technology. That's—

ADLER: Of course it's about that, Larry. What you're essentially saying is that authors and publishers should be penalized for being slow to come to the idea that Google, with all of its technology people, not surprisingly found more quickly: That there is a tremendous value in the content of published books, particularly if you unbundle that content.

LESSIG: Right. But if we give you the total right over how innovation happens, you will always be slow. That's the point. It's because they have the right that this was built. The second thing is, I think it is right, as David says, that you're promulgating all sorts of misconceptions about copyright law here. The president of your organization, Pat Schroeder, published in the Washington Times the following: "Our laws say if you want to copy someone's work you must get their permission." Now, you're a lawyer. Isn't that wrong? Isn't that absolutely false as a statement of copyright law? Because section 107 of the Copyright Act says if it is a fair use it is not an infringement to copy a particular work? Isn't that what the law says?

ADLER: It's a broad rhetorical flourish, for which the former congresswoman is famous.

LESSIG: It's false, right? False.

ADLER: I'm not going to respond to that.

LESSIG: I know in Washington, you call false statements "rhetoric," but it's just false, isn't it?

ADLER: You want to talk about false statements, though, Larry. You keep putting forward this notion that as long as works are under copyright and the people who hold the rights to those works try to exploit them as the law allows them to do, that somehow creativity is at a dead end, it's stifled.

LESSIG: Where did I say that?

ADLER: You say that whenever you talk about the information commons. You said before that control by the copyright owners of their works is stifling creativity by the people who want to create and build on top of what they created.

LESSIG: Actually, that's not what I said.

ADLER: The fact of the matter is copyright does not apply to ideas; it doesn't apply to facts. People should consider all the copyrighted work that's out there as part of that pool of material, along with works in the public domain, that they can build on. You want to take the position that the only way they can build upon it is if it's absolutely free of any control by the people who hold the rights.

LESSIG: This is the Washington view of the world, that it's only one or the other. Binary thinking. My view has never been that we have to eliminate copyright protection. My only claim tonight was that if you controlled everything, which is what your principle entails—that every single use produces a copy, so every single use ought to be subject to your control—then we will get less innovation and development. Then we lose what copyright law has always established, which has been a balance between control and free access. I totally believe that there are copyrights that ought to be protected. I don't support people's right to pirate. I stood here last year with Jeff Tweedy and said it was wrong for people to use peer-to-peer services to take other people's music. I totally believe that copyright needs to be protected. It just should not become an extreme, which it has never been in our tradition. And that's what your theory entails.

ADLER: You set up a straw man by saying that's what publishers and authors believe. Publishers and authors rely on fair use in the same way as other users of third-party copyrighted works do. Publishers and authors have never called for the elimination of fair use, and publishers and authors have always acknowledged that fair use applies in the digital environment as it did in the analog environment. What we have also said, however, is that fair use may have a different calculus in that environment, because as Congress has acknowledged, as the Supreme Court has acknowledged, in a digitally networked world, the risk of unauthorized reproduction and distribution can instantly destroy the market for a work, a possibility that could never occur before in the history of copyright.

LESSIG: We totally agree about that. Fair use needs a new calculation in the digital age; it needs to take into account that risk precisely. But it also needs to take into account the fact that in the analog age there are all sorts of uses free from the control of the copyright owner. Yet in the digital age, under the theory you're advancing, there are no free uses. All that's being argued about here is, What should the scope of fair use be? Should it include a system that enables people to search to identify and discover works that the world is oblivious to?

ANDERSON: Can we explore what the differences are between the publishers' interests and the authors' interests? We described the potential harm as being the opportunity costs of revenue that Google gets but authors and publishers don't, and the potential costs of something scary Google might do in the future. I presume the notion of this entire project is to bring more readers to authors, to get a broader readership overall. Where do you see the problem in that?

TAYLOR: Once again, the problem is very simple. It's the appropriation of material they don't own for a commercial purpose. None of us wants to be invisible on the Internet. We recognize how suicidal that would be. We all want to be exposed to Internet searches. The point of this is not the value of what Google is doing and it's not the exposure it's bringing to authors, we think that's a wonderful thing. The principle here is, we want to control our material. Of course we do, we created it, we own it. And under the copyright law, that's the way it is. Why should Google control it? Why should Google just take it over—and then begin to make even more money by attracting the eyeballs that allow it to sell the advertisements that have made it a hundred billion dollar business?

ANDERSON: One of the things I'm trying to understand is the difference between the publishers, who are in the business of publishing books, and the authors, some of whom are in it for the money, and others who are in it for the readership or for other incentives. It seems to me your interests and their interests are not entirely alike.

TAYLOR: Authors and publishers have a long history of not always agreeing on everything. But in this case we certainly do. Once again, the exposure is certainly valuable. The ability to search and find a book that one might need for reference is certainly valuable. The issue here is control. It's the appropriation of material that they don't own for a purpose that is, however altruistic and lofty and wonderful, nevertheless a commercial enterprise.

ADLER: There's a great irony in this discussion, particularly when Larry talks about our desire for control. It's like you say that publishers and authors were always being labeled somehow as Luddites because we still continue to make a product that is largely the same as what we've been making for the past four hundred years, ink on paper bound. But guess what? That's not because we're slow on technology, it's because we talk with consumers. We've tried to move the book into the digital environment, and we've found that for a variety of reasons many consumers still want to see books printed in the traditional way. The irony, though, is when you talk about control, you seem to want to limit authors and publishers to only being able to sell the book outright. That's the way they can exploit what they've created. Only sell the book outright. But if Google wants to unbundle the book, if Google wants to be able to use the database, and market the database in a variety of different ways in which database materials can be marketed, that's all right. But why shouldn't the authors get the benefit of doing that too? It's a new market created by technology. Is it only the people who create the technology who get the benefit of that market? Especially when the value in that market is not the technology alone but the content that the technology manipulates?

DRUMMOND: I've never seen any argument as to how the Google Book Search takes away any opportunities from authors or publishers to license their content to anybody.

ADLER: OK. It's really not all that complicated. You copied all of these works in their entirety and then came to the rights holders and said, Look, if you really don't want your work in our database you can opt out. You can pull it out. And that's the default rule that you think copyright laws should operate under in the digital age. Think of what that means. This doesn't just apply to books: It would apply to motion pictures, to software, to music, to quilt patterns, to anything that could be copyrighted. If that were the default, it means that the people who hold the rights, the people who created the work or purchased the rights from the creators, would have to go around the world stopping everybody from using their works by telling them explicitly, "We don't want you to use it." The default position that you've outlined would be, "Anyone should be able to use it until the rights holder tells them they can't."

ANDERSON: But what Google has said is that so long as their use is fair use, then they are granting an opt-out provision. That's very different from saying that Google is saying—

ADLER: But we disagree that it's fair use.

LESSIG: I understand that, but let me clarify what you're suggesting Google is saying, which is that companies like Google should have the right to go out and commit copyright infringement until somebody tells them to stop. That's not Google's position. Their position is, if it's fair use, then they should be allowed to do it without permission. They've given an extra option to the authors that says even though under fair use they have this right, they'll remove something from the index if the author doesn't want it.

ADLER: I'm suggesting that they're not quite that generous, that if they really believed it's fair use they wouldn't need to offer an opt-out.

DRUMMOND: What you're missing is that we operate the world's largest search engine.

ADLER: Oh, I'm not missing that at all.

DRUMMOND: What we're doing with Google Book Search is the exact same thing that we do with Google Web Search. If a webmaster doesn't want to be crawled, then they can call us up, or there's a piece of code they can put on their website and we'll respect that. We're doing the same thing here. We're not doing this because we have some vision of "opt out" of copyright law. We don't believe we are legally required to offer this opt-out. But we're doing it so as to be consistent with our web search.

ADLER: That's very important, because that's exactly the point. You're talking about taking one model—which exists online for web searches precisely because that is automated technology talking to automated technology—and applying it to very different circumstances. The situation that you have with web searching is, it's not fair use, but rather implied consent. When somebody puts a website up on the web, they want traffic, they want people to come there. That's the only reason they put a website there.

DRUMMOND: Do you think that content that's put up on the Internet is entitled to less copyright protection than analog content?

ADLER: No, it's a different form.

DRUMMOND: What you're saying is that it's an implied license.

ADLER: It's a different form, an implied license, with the ability of the website owner to protect information that it doesn't want collected by your web crawlers, either by putting it behind the firewall or by using robot text so that your web crawlers will see a sign that says, "You are not authorized to collect it, so leave it alone." What you're saying, however, is that you should be able to take anything that was not already put into a digital format and placed online by the rights holder and go ahead and digitize it and put it online yourself, and apply the online rules to it.

DRUMMOND: No, we have robot TXT in the form of "send us a list of things you don't want copied." It's precisely the same thing. And if afterwards you see something, let us know about that. It's precisely the same thing.

ADLER: You're saying it's precisely the same thing.

DRUMMOND: Yes.

ADLER: What I'm saying to you is it shouldn't be. There is nothing that says that the rules that have grown up around search engines in order to make them grow and prosper, to make their particular functions—

DRUMMOND: Right. Which is great, because if your way of looking at this prevails there will be no more search engines.

ADLER: On the contrary.

DRUMMOND: Because those will be copyright violations as well.

ADLER: I think the courts will be perfectly capable of distinguishing why a set of rules that apply to automated searching online of websites should not necessarily apply to copyrighted works that previously were not online and were put online without the permission of the rights holder.

LESSIG: What I'm not understanding is your premise for this argument about a distinction. People put things on the web because they want people to get access to them.

ADLER: Do you disagree with that?

LESSIG: No, I don't disagree with that. What I disagree with is the negative implication that people publish books because they don't want people to get access to them.

ADLER: On the contrary, all I'm saying is people publish books and make a decision to use that format. After all, Larry, as much of a champion of the web as you are, I noticed in the past five years you published books. You didn't put all of your wisdom and ideas into blogs. You realized there was another format to reach the audience you want to reach. And you published books. And guess who you published them with? You published them with mainstream publishers. And if those publishers did not acquire the rights, or rather I should say, if those publishers did acquire electronic rights from you with respect to those books, it should be their decision whether those books go online, not Google's decision.

LESSIG: I would agree with you with respect to what should be conceived to be a copyright infringement. But when somebody published a book in 1910 or 1930, they wanted people to read that book, to get access to that book. I don't know of any author who ever wrote to libraries and said, Don't put this book in your card catalog or, You're violating my rights if you let people get access to this book. Nobody ever conceived of it like that because everybody understood historically there's a limited set of controls.

TAYLOR: But the library bought the book.

LESSIG: Absolutely the library bought the book. So here too, every one of these libraries bought these books, and there's an index that they have. It's just making an index for the 21st century, that's all this debate is about.

ANDERSON: Maybe there's a little twist on this. It's my understanding that the library sends the book to Google, which scans the book and sends the digital file back to the library. Google has assured us that it will respect copyright and it won't put advertising on that sort of thing. But what about the library? What might the library do with that digital file? Could it, for instance, buy a single copy of the book for its entire network of libraries? What are the restrictions on its use?

LESSIG: Well, I would be on their side in this debate if Stanford library were saying it was going to take the scan that Google did and basically make it available for everybody to read books online. That would be wrong. That would be a copyright violation, absolutely no doubt about it. And so the question isn't whether we're replacing physical books with digital work. The question is whether we're using digital works to get access to these kinds of books. Now, the big attention to this project is that, as Pat Schroeder said in an article in Salon, they're rich. They're rich. Look at him [points to David Drummond]: He's rich. [Laughter] This company is rich. So we ought to run out there and grab all the money from them that we can.

This is the thing I'm most worried about. I'm most worried that you guys will settle with this rich company, you'll settle. And what that will mean is that people who are not rich, libraries or universities or other people who want to engage in the same kind of freedom to copy and to build indexes in exactly this way can't, because you've imposed a tax on this particular kind of use. And you've made it harder for the next Google to come along and to displace Google. So I understand why it's attractive. I understand why "Here's the money, let's find a way to get the money." But the point to think about is how this stifles opportunities for others in other places.

TAYLOR: You always talk about creativity, Larry, as if creativity would come to a halt if Internet searches or Google searches were somehow not available. Fair use allows me, as an author, to find however I can, all material that might go into a book and—to use Google's term—use snippets in assembling another sort of work, a transformative work. As you know, authors are doing that all over the country. And some of them are using Internet searches and some of them are searching libraries and some of them are interviewing people; they're doing all kinds of things. And yet creativity is not stopped at all. The

number of books keeps increasing. A hundred fifty thousand books were published last year, more than anybody can possibly read. The fact of the matter is that creativity is not halted, and it's not going to be halted. I just don't think that argument holds water.

LESSIG: That's right, Nick, as far as it goes. But I think you're missing one step in the process. If you're coming up with that history or whatever it is you're assembling as part of your creativity, one of the things that is very important on the front end is discovery. What this project is allowing people to do is enhance the ability to create new works, because you're going to find things you otherwise couldn't have found. That's why this is so important. It would be a tragedy if you said, well, you can't use these tools we've devised to do it, to build this better catalog, this better discovery device.

TAYLOR: None of us disagrees with that. I don't know an author who doesn't have Google on his or her desktop if he or she uses a computer. That's not in dispute. What is in dispute is the appropriation of material.

ADLER: And what is in dispute in respect to that is Google's presumption in telling an author or a publisher what's good for them. People are entitled in the marketplace to do their own thing for themselves. It may be bull-headed, it may be shortsighted, but that's part of what being a property owner is about, the freedom to use the property. And for Google to come along and simply preach, Well, it's good for you, we're telling you this is going to benefit you—if it benefits people they will know well enough to opt in. If they choose not to opt in, obviously they have a different view.

LESSIG: If The Wall Street Journal were here I think they'd accuse you of copyright infringement because what you've just done is directly copy what they just said in their, I think, outrageous editorial criticizing Google Print. This is their argument. It's property, and you know you should ask permission before you take the property. Now of course we've already agreed, I think, that the question in this case is not about the "property," it's about whether this is fair use. But the point The Wall Street Journal misses is that copyright is the most inefficient property system ever invented by man, because there is no way to know who to ask permission to clear these rights, because we have no system of registration, we have no system of recording, we have no list of copyright owners. The Wall Street Journal says it might be difficult to go out and ask for permission. It's not difficult; it's impossible. So if you set up a regime that says you've got to ask permission before you index these books, then there simply won't be an index.

As a teacher, let me tell you the consequence of that. I asked a student to collect for me all the speeches of Congressman Kastenmeier, one of the architects of the 1976 Copyright Act. He served in Congress from 1959 until about 1991. The student came back to me and said that, surprisingly, Congressman Kastenmeier surprisingly never gave a speech in Congress before 1985.

If there is not this index, then there is an extraordinary amount of human knowledge that's lost. Because the way we think about knowledge today is to access it digitally. You can sit here and you can say, "All we're doing is asking for a little piece of the pie." But if you ask for a little piece of the pie in this context, what that will do is make it extraordinarily difficult for this kind of access to be produced. And if you don't produce this access, there's an extraordinary amount of knowledge that you will be shutting off. You'll be shutting off access to it in a way that doesn't advance the interest of your publishers and certainly doesn't advance the interests of authors.

ADLER: First of all, we agree with you that there is this vast body of material, largely published between 1923 and, say, prior to 1970 before the ISBN system came into effect, much of which people now can't necessarily identify with the rights holders. There's a proceeding at the U.S. Copyright Office underway to engage in rule making and to ultimately legislate a recommendation to address that issue. What we object to is for Google to simply decide on its own, "We can't wait until that issue gets resolved. So what we're

going to do is simply treat that material as if it's out there available to us to exploit the value of, regardless of whether we can contact the copyright owner or not. " When you say, Larry, that it's impossible to contact the copyright owner, isn't that what the Google Print for Publishers program was exactly about? And isn't it the fact that Microsoft has said its book search program will contact copyright owners? Amazon.com, for Search Inside the Book and for the two new programs that they've announced for next year, have said they will contact the copyright owners. Clearly technology allows that, it's not impossible to do.

LESSIG: I didn't say it was impossible to contact all copyright owners. I'm one, they can contact me right here. That's not the claim. The claim is there's an extraordinary number they can't contact. Now you say, you're right, the Copyright Office is thinking about the orphan works problem and Congress might get around to thinking about the orphan works problem, but we don't have 'til the 22nd century to solve this problem. The point is that this knowledge is going to be lost, especially in the context of work that is literally on a form of media that will disappear by the time they work out these particular kinds of problems, for example films or recordings. That is the harm.

ADLER: Well, we don't have 'til the 22nd century, but we certainly have more time than having to do it by Google's next quarterly filing.

ANDERSON: In the minutes we have remaining, I want to include the audience in this as well, so let me start taking questions.

Q: It seems that a lot of questions center on the fact that Google is creating private property out of those books. What if Google were to join something like the Open Content Alliance and in exchange make sure that they would apply a creative common license to work created by their membership?

ADLER: The AAP spent much of this year chasing Google to initiate a conversation about trying to reach a mutual accommodation in this area. Part of that involved trying to recognize the scale of the project that Google has taken on and to see if there are ways in which we could help them with the shortcuts that they wanted, to scan a large volume of books while at the same time preserving the legitimate rights of publishers and authors. If Google were to join the Online Content Alliance and follow the six rules that the OCA has set up, we would probably applaud them in the same way we did Yahoo in the creation of the alliance itself.

Q: I have two questions. The first one is, has Google begun to track any of the sales through used bookstores or other ads that come up when people search for a book? My second question is, you've talked about American fair use copyright law. Is international law similar?

DRUMMOND: On the first question, it's very early in the program, and in any event we send users to go buy the book somewhere else. So we wouldn't necessarily have that data. On the second question, about international copyright law, I probably should defer to Larry since he teaches it.

ADLER: The answer to the question is that UK law and the copyright law that governs the members of the European Union do not have a fair use doctrine like the United States does. As a result, I think Google has acknowledged that with respect to operations of this kind in Europe, it is going to have to deal differently with works that are still in copyright.

DRUMMOND: Let me also say, on the question about the increase in sales that is likely to result from this: It's true that Amazon.com has recorded that as a result of its Search Inside the Book programs there have been increased sales of certain books. But remember, Amazon.com is a bookseller. Google is not a bookseller and it's just as likely, frankly, that when people make inquiries using Google's search engine and they come up with

references to books, they are just as likely to come to this fine institution to look up those references in books in the library as they are to buy them.

LESSIG: This is a den of piracy right here—a library. [Laughter]

DRUMMOND: Both of those questions went to the issue of whether or not this is likely to increase sales, and I believe the implication was, to the benefit of the publishers and the authors of the book. All I'm suggesting to you is if you're going to look it up in the library, as good as that is, it does not necessarily provide any additional funds.

ADLER: It's not as good as it could be for the publisher.

Q: There's been all this rhetoric about information that is being lost, but I would like to remind you that the Library of Congress and the Bodleian Library both have key word and category searches for all the information, and that can be found free without the help of Google. Google never needed to do this in the first place, because THOMAS, which is the Library of Congress's professional search service, has often found me all the books that I have needed. I have used it to buy used copies of books or gone to the New York Public Library and borrowed books. At the National Archives, they also store film, and they're in the process of restoring films. So the idea that Google needs to be saving the world's manuscripts and saving the world's motion pictures is just disgusting. Google does not need to be saving the world from anything.

LESSIG: It is true that category searches are usually pretty good. But we should recognize that categories themselves might be the sort of thing that people want to be researching over time. So at the Stanford Law School we started our own thing, like the Dewey Decimal System, in the 1950s to talk about law. The category "homosexual" is under criminal pathology.

Q: It's also under several other categories.

LESSIG: Not in the Stanford system.

Q: Not under the Stanford system, but when you go under THOMAS, the Library of Congress system, it is.

LESSIG: But the point is—

Q: And anyone who files a copyright will know that because it is filed under THOMAS.

LESSIG: Right. And it's a great site. But what I'm saying is if you want to be able to see how the view of categories has changed, how our understanding of various subjects have changed, I think categories is a bad way—

Q: It's completely unnecessary.

LESSIG: Really?

Q: Yes.

LESSIG: I understand people have a view of what good research is and what bad research is. I do too, but I don't think we ought to be imposing that through law, through a copyright system.

Q: I'm concerned about the future of libraries with regard to all this. I'm not talking about large, institutional libraries that tend to be relatively well funded, but if Google becomes such a powerful search engine, what's in it for smaller libraries in the long run if nobody else wants to use anything else besides Google?

DRUMMOND: I love my local library. I would continue to go there regardless. For one thing, I want to actually look at books, I want to check them out. I want to buy them in bookstores. So I don't think what we're doing has any real impact on libraries. Local

libraries serve a purpose entirely independent of what we're talking about here and it's a great purpose and they do it very well.

ANDERSON: I think on one of your services you actually do link to the public library on the search.

DRUMMOND: That's right.

Q: I'm a wildly unheralded writer. [Applause] And when I sit here and listen to Google say this and an attorney say that and the Publishers Association say the other, I have a feeling that I'm watching a clash among rhinoceri and I'm a chipmunk caught in that sandwich. What is at issue here is not abstractions, which we've heard a good deal about, but some nasty stuff that's actually going on in the real world. I went online recently and found that one of the most celebrated companies, in league with one of the planet's biggest publishers, has put online about twenty pieces that I've written, and it says at the bottom, "reprinted by permission," which is bull, because I'm the copyright owner and I registered every one of those copyrights. My point is that when I hear Google's assurances of this or all these abstractions, I don't trust you, because I don't want to be a chipmunk caught in a rhino sandwich. That's what I think is happening and that's why I think the man from the Authors Guild is concerned about the future. In the real world, writers' works are being stolen now.

TAYLOR: There's nothing to disagree with there. [Laughter] Just applaud. [Applause].

Q: My first question is addressed to the publishers and authors. You keep alluding to "if they ask for permission," but which is more important, permission or compensation? Because by your tone it seems like if they ask your permission, you would give it to them for free and then we wouldn't have this problem.

ADLER: Speaking for the members of the AAP, I can't answer that question because that's up to each individual publisher to decide. But I would suspect that given the recognition that there often are deals involving licenses that don't necessarily require fees, the importance of recognizing the need for permission and acknowledging that through a license is probably paramount to both publishers and authors regardless of whether or not they decide they want to charge a fee.

TAYLOR: We've seen individual musicians seek new revenue streams within the paradigms created by the digital world, whether it's the ability to advertise their work by way of a website or something like that. So compensation is also important.

Q: My second question goes to that point. The transaction costs of Google being able to do what they seek to do are immense, and all that they're asking from the publishers and authors is that you simply contact them and tell them that you would prefer that your work were not included in this project. So the only cost to the authors, to the publishers, is the cost of opting out. How can you argue that the cost of making a phone call is too much? You're well aware of what you've published or what you've written, you don't have any discovery costs, you only have the cost of making a phone call to Google and saying I don't want these works included and they won't be included and there's no infringement. So how do you justify the immense cost for a great public benefit versus a very small cost for a very small amount of compensation?

ADLER: Because as I said earlier, the framework for copyright's exercise of rights, and indeed for exercising rights in a patent, which are very important to Google because their business is built on their patents, is not built on an opt-out, it's built on an opt-in. If every publisher and every author has to go to Google to say "Don't use my work" in order to prevent them from copying the work in its entirety and putting it into the database, then eventually they will have to do the same thing with Microsoft and Yahoo and any other entity and any other user of the works around the world who says, "If Google can have that default then why can't we?"

Q: Right. But again the cost is six phone calls or an unlimited amount of discovery.

ADLER: Six phone calls? What if every search engine at every university in every country around the world said, "If Google can operate in reliance on that default, so can we."

Q: But that's not what they're asking. If it's a fair use—

ADLER: But it isn't fair use. They believe it is. We believe it isn't.

Q: I'm Steven Johnson. I'm actually an Authors Guild member who has not up until this point supported the Authors Guild claims against Google. But something that Allan was saying struck a chord in me that made me think about it from a different angle. I'd be curious in particular to hear what Larry has to say about it, which is, it seems to me that up to now we have our definition of fair use optimized around the idea of reading as a primary kind of value that you're getting. So we all agree that if Google sat there and enabled us to read entire works of copyrighted material, that that would be an abuse of fair use and we wouldn't accept that. But when you're searching, as opposed to reading, I think that the unit is not necessarily the snippet that you get at the end of the process, but the unit in which the value is the knowledge that you are searching the entire work. If you were simply searching snippets, then I would think that you would be able to say OK, clearly that's fair use. But because Google has the entirety of the document behind the scene somewhere, and because you know as a searcher that you're getting the entirety of that as something you're exploring—even if you only see snippets at the end of that process—doesn't that seem closer to the abuse case than when we just focus on what you see at the end of the process?

LESSIG: I don't see it that way. Let me start with where I think we begin to get off track. Again, I don't think that the right to read is a fair use; it's a free use. The right to read your latest book, *How Everything Bad Is Good for You*, is a free use not a fair use. What's happened is, because everything digital involves making a copy, now every time we engage in any use we have to try to justify it under the fair use rubric, which was not designed—as Allan acknowledges and I think we would acknowledge—to deal with this radically different world. I would agree with you that what in fact is happening is that there's a very complicated search going on, scanning a whole bunch of words that have been extracted and index points maintained. The facts about those extracted words aren't the underlying work anymore, that's just an abstraction from the work, and the thing that's produced doesn't interfere with the underlying interest that I think the copyright was granted to secure, namely to buy and produce and to make money from books and movies and whatever derivative works you want to make out of it. There is no substitution with that underlying work, and that's the core of the analysis that turns it into fair use, not use that says I'm allowed to violate somebody's copyright so long as I'm not told to stop but a fair use. If it is a fair use then I think Google should be allowed to do this, libraries should be allowed to do it, anybody should be allowed to.

ADLER: Larry, when you invoke the freedom to read in the new technology your argument proves too much, because when you have services that go online—for example, *The Wall Street Journal Online*—you are not free to read unless you subscribe. You are not free to read *Salon* unless you subscribe. Are you denying those creators, those publishers, the opportunity to exploit that business model simply because you're saying reading is unaffected by copyright?

LESSIG: No.

ADLER: In the online world, reading is based on the public display of the work, and people pay to license that right. When you think about database research services like *LexisNexis*, they wouldn't exist under your view that the freedom to read, simply reading, is unaffected by copyright.

LESSIG: All I'm saying is that before the digital technologies there was a wide range of free uses. After digital technologies, for exactly the reasons you've said, there are no free uses. There are only fair uses and licensed uses. Now, we haven't got a clear robust sense of what you think fair uses are, and my concern is, I think, in the end, if the theory is, "If there's value then we have a right to it," then there's no fair use. My only point is you constructed a permission system where in order to get access you seem to need some kind of permission through some kind of license. And the infrastructure that you have to build to support that system of permission that's watching every single use and every single context and taxing wherever there's use in a way that is consistent with this regime changes dramatically the balance that existed before.

ADLER: The problem is, you say, "You don't understand what I think is fair use." What I don't understand is what you think are legitimate licensed uses. You seem to think some licensing is OK but other licensing is not OK. And undoubtedly there is some licensing that is abusive, and that's the type of licensing that should be rejected not as a matter of law but in the marketplace.

LESSIG: Can we both agree that some licenses are good and some licenses are bad? But I think some uses should be free.

ADLER: And some uses are free.

LESSIG: Oh yeah. Which?

ADLER: Well, we obviously disagree with respect to this one particular issue.

Q: This is a question either for Mr. Lessig or Mr. Drummond. The whole discussion tonight on the legal issue has been about making the indexes and whether copying for that purpose is or is not a fair use. But there's another aspect of the library project and the digitization of copyrighted material in the library project that is of significant concern to publishers, and that is the distribution of that digital copy back to the library, and I'd appreciate either Mr. Drummond or Mr. Lessig to comment on the legal authority for that distribution.

DRUMMOND: I don't want to get into this in detail, but I think that basically the overall use of this is a fair use. In our arrangements with the libraries, they've assured us that they will use it in a way that's consistent with fair use. I think it's too bad we don't have someone from one of the libraries here, but I think preservation, for instance, is a very important thing for them. But this is overall a fair use, whether it's using Google or it's with the libraries, in our view.

ADLER: It is fair to say, though, that you have some concern about the possibility that libraries may use this material in ways that are inconsistent with copyright laws, because in your contract agreement with the University of Michigan you have an indemnification provision that specifically excludes indemnifying the university if they are sued in connection with the use of the digital copy that you will be giving them.

DRUMMOND: Well, we would think that you would actually like the fact that people were thinking about the potential for misuse.

ADLER: We'd like it even better if you didn't just give them the digital copies.

DRUMMOND: I understand that you'd like that. I understand that you don't want fair use to exist anymore. But I think that the idea here is that we obviously thought about this issue and we think that it is proper to work with our library partners in this way.

ANDERSON: Would any of the gentlemen like to speak to that? [Addressed to several NYPL representatives offstage.]

DAVID FERRIERO: If you go to the University of Michigan university site you will find a copy of the Google agreement and it's pretty specific about what the library can and can't do with that content. In terms of sharing it, or re-use of it, any kind of value added, any kind

of activities are pretty well controlled. So concerns about sharing this content in a way that's going to let small college libraries especially—as has been described to me by some of the publishers—

being able to eliminate the library and depend on the copy of the file from one of the partners compensating for the library, it's not going to happen based on the agreement that we have with Google.

Q: I've got a question for the authors and publishers representatives here which is, I hear copy and misappropriation or appropriation over and over again, and yet it seems that the notion of copyright gets to expand with the technology so that the author's right to control copying gets larger and larger as technology changes, yet I don't hear the corresponding expansion in the public's right to access or fair use in all of the possibilities that the new technology should give to the public at the same time to preserve the balance. How is it that copyright has so perfectly struck the notion of copy in its 100-year history and yet the notion of fair use doesn't get those same expansions?

ADLER: Well, I would respond to that by saying there's a difference between what's called ephemeral or temporary copies that are created, for example, when you send an e-mail—things that occur automatically, mechanically if you will as part of the process—and what Google is doing. There has been some grappling with the law in the Digital Millennium Copyright Act that was enacted in 1998 about how to deal with those kinds of copies. But what we're talking about here are not copies that are created automatically and inherently because we're dealing with digital technology. Google could be very well standing there at a photocopying machine doing what it's doing, copying these works in its entirety. It's deliberate copying, it is not the inevitable result of a technological operation, it is simply part of a business plan.

Q: What they're showing us is just the snippets, like the fair use quotations that authors rely upon in their work.

ADLER: But in order to get there they have to create their own private digital library of all of these works.

Q: I think we heard that the copyright law will serve to go after them if they start to misuse that. If we found that Google employees were using that to substitute for their own purchases of books I would be the first one to join you in a lawsuit against them.

ADLER: Copyright law talks about the reproduction right as a right of the copyright owner that is exclusive of distribution and display. In other words, the reproduction right isn't only violated in instances where the copy that is made without authorization under the law is also distributed. Making the copy itself is what is illegal. And if you're going to have an organization like Google—

LESSIG: There you go with that word again.

ADLER: What, illegal?

LESSIG: Making a copy itself is “illegal.” No. If it's a fair use, it's not illegal.

ADLER: Right. But we've already posited that we're arguing that it's not a fair use. So the argument again is that they are copying these works in their entirety, creating a database, in essence a digital library of their own and basically what people who are sympathetic to Google are saying is, “Well, it's OK as long as they don't use it for this purpose and that purpose. What's the harm in them creating that digital library as their proprietary database?” The answer is, they don't have the right to do that. And if they do it, and they are seen as having the right to do it, anyone else can do it too.

LESSIG: For most of the history of the copyright law in the United States, copyright did not protect an exclusive right to copy. That was not brought into the law until 1909. When it

was brought into the law, nobody was thinking about copying snippets on pieces of paper; they were thinking about publishers. They were thinking about printing presses. They were thinking about entities that would have commercial access to machines that made copies. And all of the problems we're talking about here are because that commercial activity has become democratized. We all have machines that make copies. Copies are as natural as breathing in the digital world. One very sensible way to begin to think about how to re-strike the balance is to ask the question whether we should go back to the way copyright law was for most of the history of copyright law, which is not to grant an exclusive right to copy. As Ernie Miller and Joan Feigenbaum have written, there's a way of protecting the interest of what copyright owners properly need protected without this kind of accidental fact that because digital machines copy in order to breathe, every single breath has to be regulated by the law of copyright. And so we could imagine this federally protected right to distribute, right to engage in commercial activities around the creative work, right to engage in commercial derivatives of the work—those rights are the core of what a copyright regime needs to protect. It would be at the core of what I think copyright law ought to be protecting without making it that we have to worry about whether every cache violates a copyright law or whether every computer, every time it's turned on, has to call up somebody to get permission or a license.

ADLER: But again, in this instance we're not talking about the copying that digital technology does to breathe. We're talking about copying that could be done with other copying media. The only difference here is that Google happens to be a search engine operation that naturally does its copying in the most expedient and efficient way, which is through digital copying.

LESSIG: You might not be as extreme as the copyright extremists are here, even though I think you're more extreme than you should be. But let's be clear. The EU, for example, has explicitly stated that it is defending the absolute right to control every single copy in all these places you say they shouldn't control. That's what they believe the copyright law grants copyright control over. Every single instance—every breath in the digital age—must be licensed. That's their view and that's the extreme view that I'm happy to see you don't adopt, but there are few on that side of the table who don't adopt that sort of extremism.

ANDERSON: Please join me in thanking our panel. Good night.