Google Books: Page by Page, Click by Click, Users Are Reading Away Privacy Rights

ABSTRACT

Google Books will likely become the world’s most extensive book and magazine search and browsing resource, library, and bookstore—combined. However, as users necessarily reveal personal identifying information through their book searches and reading habits, this service poses a significant threat to personal privacy.

Because the Google Books Amended Settlement Agreement neglects to meaningfully address user privacy, the only available privacy protections are the limited rights bestowed by the Google Books Privacy Policy and the Google Privacy Policy. Unfortunately, these Privacy Policies protect the interests of Google at the expense of users.

The enactment of federal privacy statutes, which include provisions for electronic privacy, underscores the importance of protecting certain types of personal information. Moreover, just as the Constitution has historically protected reading habits and freedom of thought from governmental intrusion, Congress should extend privacy protections for such innately personal data to corporations as well. Additionally, safeguards long-recognized by traditional libraries should be maintained by Internet content providers like Google Books as they provide a functionally similar service.

This Note proposes a solution to the privacy concerns raised by services like Google Books: the enactment of a comprehensive federal statute that protects the privacy of personal electronic information. Specifically, such a statute would require: (1) transparency to make consumers aware of what data companies collect and store and what consumers implicitly authorize those companies to do with that data merely by using online products; (2) boundaries on what user information can be tracked and limits on the timeframe in which it can be retained; (3) user access to personal information; and (4) protection against release of acquired information to other parties.
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Upon the resolution of a pending settlement, Google Books will likely become an unprecedented worldwide resource—and a significant threat to personal privacy rights. The Google Books Amended Settlement Agreement (the Settlement) was negotiated in response to a lawsuit filed by several authors and publishers against Google. The suit stemmed from legal issues tied to the development and expansion of Google Books, a service that makes millions of digitized books available to users. The U.S. Department of Justice has not yet endorsed the Settlement, but upon its likely approval, Google Books will function as a one-of-a-kind digital resource. It will become “the world’s largest search and browsing tool, library, bookstore, and book service combined.”

The Settlement would create innumerable opportunities for expanded access—but not without problems. Although the mass digitization of books will unquestionably enhance the availability of books, this benefit to society comes at the price of consumers’ privacy. Like other Google services—Gmail, Google Calendar, Google Maps, Google Searches, etc.—the Google Book system collects and stores personal information. However, the data acquired through Google Books raises additional privacy concerns because privacy laws and library policies have traditionally shielded reading habits from monitoring. Moreover, access to an individual’s search history “eerily resembles a metaphorical X-ray photo of one’s thoughts, beliefs, fears, and hopes. It is ripe with information that is financial, professional, political, sexual, and medical in nature.”

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and stores vast quantities of consumer information, the potential safeguards for users’ privacy remain inadequate. The current protections are problematic because the data acquired by Google can be accessible to anyone with a valid subpoena.\textsuperscript{8}

This Note addresses the privacy concerns raised by Google Books and proposes a solution to the problem. Part I explores the Google Books service, the terms of the Settlement, its failure to protect consumer privacy, as well as the Google and Google Books Privacy Policies and the limits of both. Part II first examines the existing federal statutes that inadequately secure privacy protections. It then considers case law illustrating the importance of personal privacy and submits that such protections should extend beyond governmental actors. Moreover, Google Books’ policies are a pronounced change from the library culture, which highly values patron privacy. Lastly, it explores negative consequences of inadequate privacy safeguards. Part III presents a solution: the enactment of a federal statute to protect personal data collected by services like Google Books.

I. THE GOOGLE BOOKS AMENDED SETTLEMENT AGREEMENT AND APPLICABLE PRIVACY POLICIES

A. Overview and History of the “Google Book Search” Project

Sergey Brin and Larry Page, the co-founders of Google, originally imagined Google Books in 1996 while working on a research project.\textsuperscript{9} They conceptualized a “web crawler” that could index the contents of books in digitized form and note the connections between each source to determine the relevance of any given book to a search query.\textsuperscript{10} The creation of such a crawler inspired Google’s core search technology—its algorithms.\textsuperscript{11} Years later, in 2002, Google officially began the book project.\textsuperscript{12} It started by talking to experts about how long it would take to copy “every book in the world.”\textsuperscript{13} Google introduced the project under its original name, “Google Print,” in 2004 at the Frankfurt Book Fair in Germany.\textsuperscript{14} The project began as an

\begin{itemize}
  \item[8.] Privacy Policy, supra note 5.
  \item[10.] Id.
  \item[11.] Id.
  \item[12.] Id.
  \item[14.] Id.
\end{itemize}
online research tool and database to access the scanned texts or portions of texts of millions of books.\footnote{Id.; EPIC, supra note 4.}

Although the Google Books service has one face on the Internet,\footnote{The current domain name for Google Books is http://books.google.com. See GOOGLE BOOKS, http://books.google.com (last visited Sept. 21, 2010).} it actually consists of two distinct projects: the Google Library Project, and the Google Partner Program.\footnote{Gervais, supra note 13, at 5; see About Google Books, infra note 27.} The Google Library Project collaborates with libraries to include their collections in Google Books and then displays information about the works to Google Books users.\footnote{Google Books Library Project, GOOGLE BOOKS, http://books.google.com/googlebooks/library.html (last visited Oct. 19, 2010).} The Google Books Partner Program is a marketing program that enables publishers and authors to promote their books through Google Books; their works become discoverable to Google Books users by submitting a digital or physical copy of their books to be displayed online.\footnote{Google Books Partner Program Overview, GOOGLE BOOKS, http://books.google.com/support/partner/bin/answer.py?answer=106167 (last visited Oct. 19, 2010).}

Only the Library Project is the subject of the lawsuit.\footnote{FAQs, supra note 1.} Google developed the project in partnership with various libraries and universities and created custom infrared scanners that facilitated automatic book digitization en masse.\footnote{History of Google Books, supra note 9.} The initial five partners were Harvard University, the University of Michigan, the New York Public Library, Stanford University, and the University of Oxford.\footnote{Id.} Dozens of other institutions have joined since then.\footnote{Library Partners, GOOGLE BOOKS, http://books.google.com/googlebooks/partners.html (last visited Oct. 6, 2010).} Google built its repository of digitized books by scanning the books in its partners’ libraries; in exchange, Google supplied the libraries with scanned versions of the books in their collection.\footnote{Pamela Samuelson, Richard M. Sherman ’74 Distinguished Professor of Law & Info. at the Univ. of Cal. at Berkeley, 2009 Kilgour Lecture at the University of North Carolina Chapel Hill: Reflections on the Google Booksearch Settlement (Apr. 14, 2009), available at http://www.youtube.com/watch?v=P-9MjgAheHg.} At a cost of ten to twenty dollars to digitize each book, Google’s expenditure is approximately $300 to $800 million to date.\footnote{Gervais, supra note 13, at 8; see Declaration of Daniel Clancey In Support Of Motion For Final Approval Of Amended Settlement Agreement, The Author’s Guild v. Google, Inc., No. 1:05 CV 8136 (DC) (S.D.N.Y. Feb. 11, 2010), available at http://www.libraryjournal.com/article/CA6718929.html.} As a result of the Library Project, Google Books now includes over twelve million books.\footnote{Declaration of Daniel Clancey, supra note 25.} Users can
search for a particular book, browse books online, find relevant information from reference pages, and buy or borrow books or magazines.27

The level of access to works on Google Books depends on two factors: the copyright status of the work and the willingness of the publisher or author to participate in the Partner Program. If the book belongs to the public domain, then the entire work will be available for display.28 Google Books refers to this as “Full View.”29 If the book is still under copyright, however, the user may only access a small portion of it.30 The available materials will be shown through either the “Snippet View,” with information about the book plus a few relevant sentences, or “Limited Preview,” with a select few pages available and links to purchase the book.31

Previews are different for fiction and non-fiction books, and bibliographies only show the title, copyright page, table of contents, and index.32 To protect the rights of copyright holders, users cannot print or copy-and-paste any of the preview displays.33 Substantial portions, or at least more than a few snippets, of a copyrighted work are viewable only if the author or publisher has joined the Partner Program and given permission.34 Depending on the wishes of the publishers and authors, users will either see a limited preview (of a few pages from the book), or will have access to the book in its entirety. As of October 2008, the Partner Program comprised nearly twenty thousand publishers.35 Of the millions of books that Google has scanned, about 1.5 million are available in full text.36

31. Id.
33. SUPER SIMPLE SUMMARY, supra note 32; FAQs, supra note 1.
34. SUPER SIMPLE SUMMARY, supra note 32; FAQs, supra note 1.
B. The Terms of the Google Books Settlement Agreement

Two lawsuits, consolidated in 2005, challenged the legality of Google Books. The Authors Guild and certain individual authors brought a class-action lawsuit, and five large publishing firms filed a distinct, but related, lawsuit. The plaintiffs claimed copyright infringement for unauthorized scanning and displaying the works in a systematic way. Google justified its actions by referencing the “fair use” doctrine because it was scanning the books in order to create an index and to provide snippets. However, the parties eventually agreed to settle the matter without testing the merits of this defense.

On October 28, 2008, after nearly two years of negotiations, the parties proposed an initial settlement agreement. That agreement allocated rights to the copyrighted materials at issue, provided royalty payments to known copyright owners in exchange for permission to publish the materials online, and created a separate entity called the Books Rights Registry to manage and distribute royalty payments. But the settlement provoked numerous objections from authors, academics, librarians, public interest groups, and the Justice Department. Those groups voiced a variety of concerns—including privacy, competition, abuse of class-action process, and violation of copyright. In an attempt to address these issues, the parties filed an amended settlement agreement on November 13, 2009.


38. Samuelson, supra note 24; EPIC, supra note 4.

39. EPIC, supra note 4.

40. FAQs, supra note 1.


42. See Authors Guild v. Google Inc., 74 Fed. R. Serv. 3d 1488, at *1 (S.D.N.Y. 2009).

43. Rich, supra note 3.

The Settlement defines the plaintiffs as “all Persons that, as of January 5, 2009, have a Copyright Interest in one or more Books or Inserts.” It authorizes Google to digitize books and inserts, sell subscriptions of its database to institutions, sell online access to individual books, sell advertising on pages from books, and make other commercial uses of books. In exchange, Google must pay rightsholders 63% of all revenues from the commercial uses of the books and $34.5 million to establish and maintain a Book Rights Registry. The Registry will collect payments, hold them for copyright owners, and serve as the interface between copyright owners and Google. Google will also pay a minimum of $45 million to compensate rightsholders whose works Google had scanned without permission as of May 5, 2009. These rightsholders are eligible for cash payments of at least sixty dollars per principal work, fifteen dollars per entire insert, and five dollars per partial insert. A “principal work” is the main work in a book (the part that does not include forewords, afterwords, or footnotes), an “entire insert” is “an [i]nsert that is an entire work, including forewords, afterwords, introductions, . . . entire poems, short stories, song lyrics or essays;” and a “partial insert” is an insert other than an entire insert. Such economic terms are thoroughly delineated to account for the interests of both sides.

The Settlement also establishes that Google Books will provide search and access capabilities for the full text of books through three different mechanisms: (1) Institutional Subscription, (2) Consumer Purchase, and (3) Public Access Service. Google will permit libraries, companies, colleges, and other schools the option of purchasing an institutional subscription. It will sell the available books for purchase electronically to consumers. Finally, Google

hearing on February 18, 2010, as of October 2010 he has yet to announce a ruling. Rich, supra note 3.

45. Amended Settlement Agreement, supra note 44 at §1.13.
46. Id. §§ 2.1(a), 3.1(a).
47. Id.
48. Id. § 2.1(c).
49. Id. § 6.2(b).
50. Id. § 2.1(b).
51. Id.
52. Id. § 1.113.
53. Id. § 1.54.
54. Id. § 1.102.
55. Id. §§ 4.1, 4.2, 4.8.
56. Id. § 4.1
57. Id. §§ 1.35, 4.2.
may—at its discretion—provide public access service to not-for-profit higher education institutions and public libraries.\textsuperscript{58}

Privacy concerns arise because the Settlement requires individuals to open an account with Google in order to purchase books.\textsuperscript{59} Google account registration requires the user to provide personal information, including name, email address, and account password.\textsuperscript{60} Institutional subscription users must supply the account login or the user’s or the institution’s IP address.\textsuperscript{61} Users of public access service terminals need not register; instead, Google will receive the IP address and cookies to identify Internet connection or browser.\textsuperscript{62} Additionally, the Settlement allows Google to monitor user information through watermarks.\textsuperscript{63} Google will add a visible watermark to printed material for institutional users and consumers that “displays encrypted session identifying information, and which could be used to identify the authorized user that printed the material or the access point from which the material was printed.”\textsuperscript{64} Thus, even if an individual prints materials to avoid Google’s tracking of online reading activity, evidence remains of who printed which materials and where the printing took place.\textsuperscript{65}

\textit{C. The Google Books Settlement Fails to Sufficiently Address User Privacy}

The Settlement noticeably fails to address privacy concerns, and the “massive potential reach of Google’s service makes the company’s relative silence on privacy all the more problematic.”\textsuperscript{66} This lack of attention to privacy is remarkable considering the high level of detail in most of the Settlement’s terms and the intimate information that would be collected.\textsuperscript{67} Google Books can link a user to every book that she has searched, browsed, purchased, or read, as well as track

\begin{footnotesize}
\begin{itemize}
\item[58.] Id. § 4.8(a)(i).
\item[61.] \textit{Google Books Privacy Policy}, supra note 59.
\item[62.] Id.
\item[63.] \textit{See Amended Settlement Agreement}, supra note 44, §§ 4.1(ix)(3)(d), 4.2(a).
\item[64.] Id. § 4.2(a).
\item[65.] \textit{See EPIC}, supra note 4.
\item[67.] Id.
\end{itemize}
\end{footnotesize}
the specific pages the user has read, and even for how long.\textsuperscript{68} Recently, Dan Clancy, the engineering director for Google Books, confessed that he "was monitoring search queries recently when one . . . caught his attention."\textsuperscript{69} He could easily identify the obscure 1910 book, and he knew that the user spent four hours reading 350 pages of it.\textsuperscript{70} Google has the ability to accumulate tremendous amounts of intimate data on every user and link each user to her reading history. Yet, the Settlement mentions privacy only twice in its 173 pages.\textsuperscript{71}

The Settlement first references privacy when it states that all of the data provided to Google by members of the settlement class "shall be subject to a Registry Privacy Policy."\textsuperscript{72} But, this section does not delineate the details of the policy.\textsuperscript{73} Notably, this passage only addresses the privacy of rightsholders but not the privacy of consumers or library patrons.\textsuperscript{74} Furthermore, "[w]hile the contemplated privacy policy could potentially provide privacy protections to authors' and publishers' personally identifiable information, these protections are by no means guaranteed. The mere existence of a Privacy Policy does not guarantee privacy protections."\textsuperscript{75}

The Settlement addresses privacy a second time when it states that the Registry will make the identity of the registered rightsholders publically available "unless the Registered Rightsholder requests that such information not be made public for reasonable privacy concerns, as determined by the Registry."\textsuperscript{76} Yet again, the privacy protections apply only to rightsholders, and not to the majority of users.\textsuperscript{77} Even rightsholders have very limited privacy rights—the protection of their information hinges on whether Google Books finds their privacy concerns "reasonable."\textsuperscript{78} Therefore, while the Settlement addresses and expects widespread consumer use, it includes no privacy protections for the millions of Google Books users, and even its protections for rightsholders are extremely limited and uncertain.\textsuperscript{79}

\textsuperscript{68} Objection, supra note 4, at 2.
\textsuperscript{70} Id.
\textsuperscript{71} See Amended Settlement Agreement, supra note 44, §§ 6.6(a)(vi), 6.6(d).
\textsuperscript{72} Id. § 6.6(a)(vi); see EPIC, supra note 4.
\textsuperscript{73} EPIC, supra note 4; see Amended Settlement Agreement, supra note 44, § 6.6(a)(vi).
\textsuperscript{74} EPIC, supra note 4; see Amended Settlement Agreement, supra note 44, § 6.6(a)(vi).
\textsuperscript{75} EPIC, supra note 4.
\textsuperscript{76} Amended Settlement Agreement, supra note 44, § 6.6(d).
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
The Settlement places no limits on the collection of personal information associated with accounts, as long as Google authenticates users via “commercially reasonable efforts.” Numerous provisions address monitoring or reporting information about users, but none create boundaries as to what data may or may not be amassed. Google Books has access to all kinds of information associated with reading activity—books searched, browsed, purchased, and read—yet offers no privacy protections in return. Everything a user does can be observed and accumulated.

Also of concern, the Settlement includes no restrictions on how long Google may retain the data it collects. The potential lengthy possession of data troubles critics because Google maintains it in a form that can identify users and their habits. Determining an individual’s identity requires surprisingly few characteristics—even generic information may suffice. Additionally, Google generates revenue through advertising sales on pages where previews of scanned books appear, thus creating an incentive not only to collect as much user data as possible, but also to keep it for a long period of time. This business model is incredibly effective, and largely accounts for Google’s boom. Google’s fourth-quarter revenue for 2009 approached 5 billion dollars, which was up 17% from 2008 and exceeded analyst expectations. Because its revenues increase with the accumulation and storage of data, Google will presumably capitalize on the lack of statutory protection and retain user information for as long as possible. Unfortunately, maintaining data that links individuals to

80. EPIC, supra note 4; Objection, supra note 4, at 2.
82. Objection, supra note 4, at 2.
83. Id.
84. Id. at 2, 8.
85. Id. at 8.
87. Rich, supra note 69; Corporate Information, GOOGLE, http://www.google.com/intl/en/corporate/index.html (last visited Sept. 27, 2010) (“As a business, Google generates the majority of its revenue by offering advertisers measurable, cost-effective and highly relevant advertising, so that the ads are useful to the people who see them as well as to the advertisers who run them.”).
89. Id.
their reading selections for an extended length of time increases its susceptibility to exposure.

Negligible safeguards limit the disclosure of information to third parties or to the government pursuant to valid subpoenas.\textsuperscript{90} While libraries maintain a very high standard before revealing book records, the threshold for Google to disclose that same information is much lower.\textsuperscript{91} Regarding privacy protection for users, the company states only that “Google is not \textit{required} to disclose confidential or personally identifiable information other than as required by law or valid legal process.”\textsuperscript{92} While the Settlement addresses when Google \textit{must} reveal private data, it fails to mention when Google \textit{can} reveal such information to the government or third parties.\textsuperscript{93} Without any standards set forth in the Settlement, only Google’s Privacy Policies—as interpreted by Google—limits the unveiling of user data.\textsuperscript{94} Google treats users’ information and data collected from its other services in nearly the same manner, so the concerns raised by Google Books and Google searches are comparable.\textsuperscript{95}

Finally, the Settlement lacks any requirement that Google Books report the number of disclosure requests it fields or how many user-records it reveals to either a third-party, such as a private litigant, or the government.\textsuperscript{96} As such, only Google will be privy to the knowledge of the frequency, justifications, or timing of Google Books’ disclosure of users’ personal information.\textsuperscript{97} Consumers will be blind to the potential attacks on their private information, what information is revealed, and to whom.

\textit{D. The Google Books and Google Privacy Policies Provide Uncertain Protection}

Google’s Privacy Policy, the main privacy protection for Google Books’ users outside of the Settlement, has been recognized as the

\begin{itemize}
  \item \textsuperscript{90} Objection, \textit{supra} note 4, at 2, 9.
  \item \textsuperscript{91} Objection, \textit{supra} note 4, at 9.
  \item \textsuperscript{92} \textit{Amended Settlement Agreement, supra} note 44, § 7.3(b) (emphasis added).
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} Objection, \textit{supra} note 4, at 9–10; \textit{see infra} notes 117–19, 142–53 and accompanying text.
  \item \textsuperscript{95} \textit{Privacy Policy, supra} note 5 (the Google Privacy Policy applies to “all of the products, services and websites offered by Google Inc. or its subsidiaries or affiliated companies except Postini”); \textit{Google Books Privacy Policy, supra} note 59 (“The main Google Privacy Policy describes how we treat personal information when you use Google’s products and services, including Google Books.”).
  \item \textsuperscript{96} Objection, \textit{supra} note 4, at 10; \textit{see generally Amended Settlement Agreement, supra} note 44.
  \item \textsuperscript{97} \textit{Id.}
\end{itemize}
worst in a group of more than twenty leading Internet service companies. In fact, in June 2007, Privacy International rated Google as “hostile” to privacy in a report ranking web firms by how well they handle personal data. Google landed at the bottom of its ranking because of the sheer volume of data that it gathers about users, its “incomplete” protections, and its “poor record” of handling complaints.

Acknowledging this and similar criticism, Google released a supplemental privacy policy for Google Books on the day before objections to the original settlement agreement were due. Google intended this policy to work in tandem with its general privacy policy: “[T]he main Google Privacy Policy describes how [Google] treat[s] personal information when [individuals] use Google’s products and services, including Google Books.”

The Google Books Privacy Policy highlights key provisions of the Google Privacy Policy, describes privacy practices specific to the Google Books service, and outlines planned privacy practices. The Google Books Privacy Policy acknowledges that “Google Books operates a lot like Web Search and other basic Google web services, so there are relatively few privacy practices that are unique to the Google Books product.” One distinct aspect of Google Books is that it includes the “My Library” feature, which allows users to maintain a public online list of favorite books and personal reviews of those books. Users may review and delete these lists. Also, Google Books exploits log information, including IP addresses and cookies from the user’s browser, to enforce security limits such as the number of pages users can view from a particular book.

The Google Books Privacy Policy identifies the various forms of information that it collects:

When you use Google Books, we receive log information similar to what we receive in a Web Search. This includes: the query term or page request (which may include specific

100. Id.; PRIVACY INT’L, supra note 98.
101. Objection, supra note 4, at 7.
103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
Furthermore, the Google Books Privacy Policy recognizes that some jurisdictions have special “book laws” that subject information sharing to a heightened standard.\textsuperscript{109} Only where these book laws exist and apply to Google Books will Google address them.\textsuperscript{110} Thus, with the limited exception of states with book laws, the Google Books Privacy Policy does little more than the main Google Privacy Policy to govern Google Books users.

Google Books monitors user activity and acquires user information through both Google accounts and electronic footprints.\textsuperscript{111} Although users may search and read books without a Google account, they cannot take advantage of the advanced features of Google Books without one.\textsuperscript{112} Users reveal personal information to Google, however, even if they do not possess an account. The Google Privacy Policy allows Google to track a user’s past and present online actions and locations through an amalgamation of cookies, IP addresses, referrer logs, and unique hardware and software characteristics.\textsuperscript{113} Through such technologies, Google can monitor the books for which users search, the books and magazines they purchase, the pages they read, and even the notes they write in the “margins.”\textsuperscript{114} Essentially, Google can create dossiers that expose users’ lives in great detail—what individuals read reveals personal characteristics—and those dossiers have the potential to be shared across Google services, to civil litigants, and to law enforcement without straightforward standards for disclosure.\textsuperscript{115} Google’s Privacy Policy makes plain the wide range of information that Google receives and tracks:

\begin{itemize}
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Ryan Singel, \textit{Critics: Google Book Deal a Monopoly, Privacy Debacle}, EPICENTER (June 2, 2009, 4:02 PM), http://www.wired.com/epicenter/2009/06/google_books; see also Travis Bonnett, \textit{A Good or Raw Deal for Libraries?}, AM. LIBR. ASS’N (Feb. 2010), http://www.ala.org/ala/mgrpsrts/nmrt/news/footnotes/february2010/ALA_print_layout_1_575901_575901.cfm (“If someone finds a book that they would like to buy, it would add electronic bookmarks to their personal library and they would also have to create a Google account; creating and signing into a Google account is required to complete this task. This is problematic because this will mean that Google will have personal information, such as full names, email addresses, and zip codes, of everyone who completes this task.”).
  \item \textsuperscript{113} Privacy Policy, supra note 5.
  \item \textsuperscript{114} Hugh D’Andrade, \textit{Don’t Let Google Close the Book on Reader Privacy!}, DEEPLINKS BLOG (July 23, 2009), https://www.eff.org/deeplinks/2009/07/take-action-dont-let-google.
  \item \textsuperscript{115} \textit{Google Book Search Settlement and Reader Privacy}, ELECTRONIC FRONTIER FOUND., http://www.eff.org/issues/privacy/google-book-search-settlement (last updated July 2009).
\end{itemize}
When you access Google services, our servers automatically record information that your browser sends whenever you visit a website. These server logs may include information such as your web request, your interaction with a service, Internet Protocol address, browser type, browser language, the date and time of your request and one or more cookies that may uniquely identify your browser or your account. When you send email or other communications to Google, we may retain those communications. When you send and receive SMS messages, we may collect and maintain information associated with those messages, such as the phone number, the wireless carrier associated with the phone number, the content of the message, and the date and time of the transaction. Google offers location-enabled services. If you use those services, Google may receive information about your actual location (such as GPS signals sent by a mobile device) or information that can be used to approximate a location (such as a cell ID).

Regarding information sharing, Google’s Privacy Policy states that Google reveals the personal information it has collected when:

[w]e have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request, (b) enforce applicable Terms of Service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against harm to the rights, property or safety of Google, its users or the public as required or permitted by law.

Such a subjective standard for when Google may share users’ data with third parties or the government invites many opportunities to divulge personal data. This policy leaves users vulnerable to disclosure pursuant to a subpoena rather than requiring a court order or a full search warrant supported by an affidavit showing probable cause. The Google Books Privacy Policy does not alter this standard. Moreover, although Google claims in its Privacy Center FAQ to erase records of IP addresses after nine months and to delete cookies from the search engine logs after eighteen months, neither Google nor Google Books Privacy Policy codifies such a procedure.

According to Google’s Privacy Policy, users enjoy only limited access to their own personal information. While users may correct inaccurate data, they are only permitted to delete data if is allowed by law or not retained for “legitimate business purposes.”

116. Privacy Policy, supra note 5 (emphasis added). Users may reset browsers to refuse cookies or to indicate when a cookie is being sent, but some Google features and services may not function properly is this is done.
117. Id. (emphasis added). Google also shares personal information when “[w]e have your consent. We require opt-in consent for the sharing of any sensitive personal information.” However, Google does not specify what they consider “sensitive personal information”.
118. See Tene, supra note 7, at 1453; see infra notes 145–48 and accompanying text.
121. Privacy Policy, supra note 5.
122. Id.
Google collects such information for advertising reasons, presumably a legitimate business purpose, the data users may effectively delete remains unclear. Additionally, Google reserves the right to “decline to process requests that are unreasonably repetitive or systematic, require disproportionate technical effort, jeopardize the privacy of others, or would be extremely impractical (for instance, requests concerning information residing on backup tapes), or for which access is not otherwise required.” As such, while Google amasses personal information on a consistent and widespread basis, users may only delete their data a limited number of times. Bearing in mind the quantity of information retained for each user, the “access” granted by Google’s Privacy Policy is minimal.

E. Google’s Applicable Privacy Policies Lack Sufficient Privacy Protections

Even in tandem, the Google Books and Google Privacy Policies are unsatisfactory for at least three reasons. First, they protect the interests of Google over those of users. Second, they permit the extensive accumulation of desirable information increasingly targeted by third-party subpoenas. Third, they contain ambiguous language that, coupled with the low threshold for the issuance of a subpoena, leaves the information vulnerable to third parties.

1. The Privacy Policies Are Self-Serving by Shielding Google from Liability Rather Than Protecting User Information

Traditionally, privacy policies are drafted primarily to protect the provider from liability, and they are based on user consent that is neither informed nor freely given. Most users of Google Books do not realize the extent to which they are being tracked—if they even realize it at all. Google’s discreetly placed privacy policies do little to enlighten users. To locate the Google Books Privacy Policy, one must scroll past the images of front covers of books and magazines from all genres before reaching the small font of the privacy policy hyperlink at the bottom of the homepage. This link takes the user
to the Google Privacy Center. Next, one needs to select “Books” from among the listed services and products for the Google Books Privacy Policy to appear. Google’s main Privacy Policy is available by clicking on the tiny, nearly unreadable font of the hyperlink on Google’s homepage. This link also directs the user to the Google Privacy Center where one must choose “Google’s Privacy Policy” to access the full text of the policy. Neither privacy policy is easy to find, even if the user is actively looking for it.

While privacy policies are grounded in user consent, consent must be informed and voluntary to be meaningful. Most users are unaware that Google monitors their reading queries and selections; thus, their consent is tenuous at best. Additionally, because Google Books is a unique service and currently has no competitors, users have no real alternative. A decision between using Google Books under the current policies and foregoing use altogether to protect privacy is not much of a choice.

2. As Google Collects More Data, Requests from Government and Third Parties to Access the Information Proliferate

In such a highly computerized era, Google is capitalizing on widespread online activity. Over 230 million Americans access the Internet. In the United States alone, 63 million people are mobile web users, and 35% of them go online daily via their handset. When using the Internet, these millions of individuals leave digital footprints revealing interests, hobbies, and agendas. Considering such ubiquitous Internet usage, and with Google as the undisputed leader among search engines, Google is amassing millions of dossiers containing personal information. This sizeable amount of user data is highly attractive to government and third parties.
information is now being supplemented with personal reading choices gained through book and magazine search queries, purchases, and comments when using Google Books.\footnote{WLNР 10637378 (stating that, as of May 2010, Google is estimated to account for 64.4% of all Internet search queries in the United States, followed by Yahoo with 17.7% and Bing with 11.8%).} Because Google possesses such a wealth of information, its data piques the interest of the government and third parties, including private litigants.\footnote{Google Books Privacy Policy, supra note 59; Objection, supra note 4, at 2.} For instance, the details of users’ activities are probably helpful in criminal investigations. Rather than searching for scattered bits of information, law enforcement can expedite its investigations by requesting information from private companies like Google.\footnote{See, e.g., Gonzales, 234 F.R.D. 674; see infra note 149–53 and accompanying text.} Consequently, third-party subpoenas are proliferating.\footnote{Foley, supra note 136, at 451.} As Google attains more personal information, the need for comprehensive privacy safeguards grows more pressing.

3. The Subjective Nature of the Current Google Privacy Policies Offers Only Thin Privacy Protection to Users

Google’s Privacy Policy admits that Google will share user data with “subsidiaries, affiliated companies or other trusted businesses or persons for the purpose of processing personal information.”\footnote{Id.} Google also retains the right to share data with third parties if Google becomes involved in a “merger, acquisition, or any form of sale of some or all of its assets.”\footnote{Privacy Policy, supra note 5.} While these issues are troublesome, the disclosure of copious amounts of private information to an indefinite number of third parties is the most problematic. The vague language of the policies coupled with the vulnerability of the data to a subpoena gives rise to grave privacy concerns.

Not only do Google and Google Books empower themselves to share users’ information with the government and third parties when they have the “good faith belief” that it would be “reasonably necessary” to do so, but the privacy policies even allow for their own amendment without user notification.\footnote{Id.} Accordingly, the ambiguous language that allegedly protects the rights of users hardly limits the information that Google is legally allowed to share. These feeble “restrictions” on Google leave Google Books users potentially
vulnerable to nearly every request made. Because the current privacy policies do not establish strict criteria for when the data can be conveyed to others, Google has great control over the private information of its millions of users.

Whatever protections the Google Privacy Policy does afford to Google users are trumped by a mere subpoena. While a full search warrant, in addition to an affidavit supporting probable cause, would clearly enable law enforcement officers to access the data compiled by Google Books, much less than a full warrant suffices in most instances.\textsuperscript{145} “In terms of information privacy, subpoenas afford weak protection; they are normally issued without prior judicial approval and are enforced on a mere showing of relevance.”\textsuperscript{146} Third parties may access Google Books’ gold mine of data with a minimal showing that the information sought is “reasonably calculated to lead to the discovery of admissible evidence.”\textsuperscript{147} “Relevance” is a low threshold that is defined broadly and does not require the subpoenaed materials to be admissible at trial; such a lenient test leaves user information susceptible to exposure.\textsuperscript{148}

The competing values of privacy rights and government access to personal information held by third parties came to a head in 2006 with \textit{Gonzales v. Google}.\textsuperscript{149} In \textit{Gonzales}, U.S. Attorney General Alberto Gonzales subpoenaed Google to obtain thousands of search queries entered by its users and thousands of URLs produced by Google searches.\textsuperscript{150} The government claimed it needed the data to test filtering software for online pornography.\textsuperscript{151} The government, however, failed to provide any detail of what it intended to do with the URLs, and it gave no explanation of “how an aggregate study of Internet trends would be reasonably calculated to lead to admissible evidence in the underlying suit.”\textsuperscript{152} Yet, the District Court compelled Google to provide a sample of 50,000 URLs.\textsuperscript{153} \textit{Gonzales} exemplifies the complicated relationship between privacy concerns, third-party controllers of data, and government access. Unfortunately, while the court addressed privacy issues sua sponte, it failed to make a

\begin{itemize}
\item[145.] Tene, \textit{supra} note 7, at 1453.
\item[146.] Foley, \textit{supra} note 136, at 452.
\item[147.] \textit{Fed. R. Civ. P.} 26(b).
\item[148.] Foley, \textit{supra} note 136, at 452; Gonzales v. Google, Inc., 234 F.R.D. 674, 680 (N.D. Cal. 2006).
\item[149.] \textit{Gonzales}, 234 F.R.D. at 677–78.
\item[150.] \textit{Id}.
\item[151.] \textit{Id.} at 681.
\item[152.] \textit{Id.} at 682.
\item[153.] \textit{Id.} at 686.
\end{itemize}
determination as to what degree, if any, Internet searches are “private.”

II. THE CENTRAL IMPORTANCE OF PRIVACY AND THE FLAWS IN CURRENT FEDERAL PRIVACY PROTECTIONS

Federal action has illustrated the importance of guarding personal data.\(^\text{154}\) Congress has enacted statutes to protect various types of intimate information and to account for the rapidly changing technologies that make such information more readily available.\(^\text{155}\) The Constitution protects the privacy of individuals against unwarranted governmental intrusion;\(^\text{156}\) by extension, safeguards should defend such privacy from private actors as well. However, Google Books continues to lack appropriate privacy protections that libraries have historically afforded patrons. The perpetuation of insufficient privacy protection will lead to numerous undesirable consequences.

A. The Enactment of Federal Privacy Statutes Indicates the Importance of Protecting Personal Information

Congressional action to protect personal information underscores the importance of privacy considerations. Because governments and other organizations accumulate vast amounts of data about individuals, Congress enacted statutes to address the types of information that may be collected and how it may be used.\(^\text{157}\)

Congress buttressed the right to privacy in the Privacy Act of 1974, which regulates the collection, maintenance, use, and dissemination of personally identifiable information maintained by federal agencies.\(^\text{158}\) Concerned about how systems of records might negatively impact privacy rights, Congress sought to prevent governmental privacy violations that occur through the collection of personal information.\(^\text{159}\) The Act establishes tangible privacy safeguards in at least four ways. First, it requires agencies to grant

\(^{154}\) See infra notes 157–194 and accompanying text.


\(^{156}\) See, e.g., Griswold v. Connecticut, 381 U.S. 479, 484 (1965); see infra notes 195–224 and accompanying text.

\(^{157}\) See infra notes 158–94 and accompanying text.


\(^{159}\) Id. § 2(b).
individuals access to any records acquired and maintained on them.\textsuperscript{160} Second, it requires agencies to follow certain fairness practices when gathering and handling personal data.\textsuperscript{161} Third, it restricts how agencies can share an individual’s data with third parties and prohibits disclosure without written consent.\textsuperscript{162} Fourth, it gives individuals the right to sue the government for violating the Act.\textsuperscript{163}

Through this statute, Congress emphasized the significance of privacy, especially as technology advances. The Act’s Congressional Findings and Statement of Purpose recognize that “the right to privacy is a personal and fundamental right protected by the Constitution of the United States.”\textsuperscript{164} It also addresses the ever-relevant concern that “the increasing use of computers and sophisticated information technology . . . has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information.”\textsuperscript{165} Although inapplicable to Google Books, which is not a federal agency, its privacy standards should guide the development of future privacy protections.

Other federal privacy statutes protect personally identifiable information in a variety of contexts—such as health information, financial data, and credit reports. The Health Insurance Portability and Accountability Act (HIPAA) provides federal protections to ensure the confidentiality and security of personal healthcare information; it guarantees patients an array of rights with respect to that data.\textsuperscript{166} HIPAA shields information transmitted or maintained in any form or medium, and it affects the daily business operations of all organizations that handle personal health records.\textsuperscript{167} Congress also passed the Gramm-Leach-Bliley Act to protect consumers’ personal financial information held by financial institutions.\textsuperscript{168} That statute has three principal parts: the Financial Privacy Rule, the Safeguards

\begin{footnotes}
\footnotetext{160}{5 U.S.C. § 552a(d).}
\footnotetext{161}{Id. § 552a(e).}
\footnotetext{162}{Id. § 552a(b).}
\footnotetext{163}{Id. § 552a(g).}
\footnotetext{164}{Id. § 2(a)(4).}
\footnotetext{165}{Id. § 2(a)(2).}
\footnotetext{168}{15 U.S.C. §§ 6801–6809 (2006). This statute is also commonly known as the Financial Modernization Act of 1999.}
\end{footnotes}
Rule, and pretexting provisions. The Financial Privacy Rule controls the collection and disclosure of customers’ personal financial information by financial institutions; the Safeguards Rule requires all financial institutions to create, apply, and uphold protections for customer information; and the pretexting provisions protect consumers from individuals and companies that acquire their private financial data under false pretenses. Finally, the Fair Credit Reporting Act governs the collection and use of personal data by credit reporting agencies, advances accuracy in consumer reports, and safeguards the privacy of the information contained within them. As medical, financial, and credit information have all warranted federal privacy protection, inherently personal information of book selections and reading habits also deserves federal protection.

Created to safeguard individuals, the Federal Trade Commission (FTC) is the United States’ consumer protection agency. Specifically, the FTC’s Bureau of Consumer Protection (Bureau) protects consumers against fraud, deception, and unfair business practices by enforcing companies’ privacy policies regarding the collection, use, and securing of consumers’ data.

The FTC’s consumer protection mission includes a focus on privacy. The Division of Privacy and Identity Protection, the newest Bureau division, oversees consumer privacy, credit reporting, identity theft, and information security issues. In particular, the Division has jurisdiction to enforce § 5 of the Federal Trade Commission Act. That statute prohibits unfair or deceptive acts or practices such as misleading statements and unjust policies involving consumers’ personal information. It also executes the Fair Credit Reporting Act

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170. Id.
173. Id.
176. Id.
and the Gramm-Leach-Bliley Act. The FTC has recognized that as personal information becomes more accessible, government must take precautions to protect individuals from the misuse of their personal information.

B. Federal Statutes Enacted to Protect Electronic Privacy

As technology has advanced, the law has lagged behind. Enacted as an amendment to the federal wiretap statute, the Electronic Communications Privacy Act of 1986 (ECPA) sets out the provisions for access, use, disclosure, interception, and privacy protections of electronic communications. While critics consider the ECPA technologically outdated, Congress had intended to bring new communication technologies within the scope of federal wiretap laws.

The ECPA consists of three distinct statutes: the Wiretap Act, the Stored Communications Act, and the Pen Register Act. The Stored Communications Act (SCA) provides privacy protections for electronic communications stored by third parties, which may implicate the Google Book Settlement. More specifically, the SCA regulates providers of an electronic communications service (ECS) or a remote computing service (RCS). ECS includes services that supply users with an “ability to send or receive wire or electronic communications.” Congress originally intended for the statute to cover electronic communications such as email. RCS means “the...
provision to the public of computer storage or processing services by means of an electronic communications system."\textsuperscript{188} The statute defines “electronic communications system” as “any wire, radio, electromagnetic, photooptical or photoelectric facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.”\textsuperscript{189} Congress intended RCS to control outsourced data-processing services, but it could arguably apply to services like Google Books depending on how broadly courts interpret “electronic communications.”\textsuperscript{190} “Electronic communication” signifies “transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.”\textsuperscript{191} Thus, some of the data collected by Google Books, such as book queries, likely fall within the scope of the SCA; however, Google Books also tracks and stores user information that courts would not likely consider communications. Such examples include collecting data on specific pages read and the time spent reading a particular work.

Whether or not the SCA applies to Google Books, Congress must update the statute to account for technological changes. The SCA draws distinctions based on 1980s technologies that have led to confusion in application.\textsuperscript{192} In fact, some judges may have incorrectly interpreted the statute, which led to unintended outcomes.\textsuperscript{193} Moreover, the SCA fails to address many Internet privacy problems.\textsuperscript{194} These SCA shortcomings demand a clearly drafted statute that accounts for newly developed electronic and Internet advances.

\textit{C. Case Law Clearly Demonstrates That User Privacy Requires Protection}

Americans place a high premium on privacy, and the Constitution establishes such a right against unwarranted government invasion. Currently, the Supreme Court has not extended privacy protection against corporations not deemed state actors, such as Google. Nevertheless, the case law recognizes the importance of privacy, which should extend to reading books without oversight.

\textsuperscript{188} 18 U.S.C. § 2711(2).
\textsuperscript{189} 18 U.S.C. § 2510(14) (emphasis added).
\textsuperscript{190} Tene, \textit{supra} note 7, at 1477.
\textsuperscript{191} 18 U.S.C. § 2510(12).
\textsuperscript{192} Kerr, \textit{supra} note 185, at 1213.
\textsuperscript{193} \textit{Id.} note 185, at 1213.
\textsuperscript{194} \textit{Id.}
1. The Constitution Protects a Right to Privacy

While the U.S. Constitution does not explicitly mention “privacy,” the Supreme Court has found a constitutional right to privacy.\textsuperscript{195} As expounded in \textit{Griswold v. Connecticut}, such a right exists in the “penumbras” and “emanations” of other constitutional protections, including the First, Third, Fourth, Fifth, and Ninth Amendments.\textsuperscript{196} Subsequent decisions supplemented this right to privacy. As the Supreme Court held in \textit{Martin v. Struthers}, the rights bestowed by the First Amendment “include[] not only the right to utter or to print, but the right to distribute, the right to receive, the right to read.”\textsuperscript{197} In \textit{Boyd v. United States}, the Court equated a search and seizure with a compulsory production of a man’s private books and papers.\textsuperscript{198} Such compulsory production, amounted to an unreasonable search and seizure under the Fourth Amendment.\textsuperscript{199} Interpreting \textit{Boyd} in a later case, the Supreme Court reiterated that the Fourth and Fifth Amendments protect from government intrusion “the sanctity of a man’s home and the privacies of life.”\textsuperscript{200} Thus, in interpreting the Constitution, the Supreme Court has added its imprimatur in support of privacy.

2. It Is Unlawful to Compel Exposure of Individual Reading Habits

Numerous cases confirm the right of a person to keep her book selection and reading habits anonymous. The government’s capabilities to spy on the reading activities of unknowing persons must be limited, and by extension, a similar standard should apply to an entity like Google Books. Specifically, the identities of users, and their reading material, should remain private.

According to the Supreme Court, the government cannot force individuals to reveal the reading habits of others. In \textit{United States v. Rumely}, the opinion narrowly interpreted a statute authorizing investigations of lobbyists to exclude any inquiry into their book purchases.\textsuperscript{201} The Supreme Court held that the defendant, the secretary of an organization that sold books of a particular political view, could not be convicted for refusing to disclose the names of those

\textsuperscript{196}. \textit{Id}.
\textsuperscript{197}. \textit{Id}. at 482 (emphasis added) (citing Martin v. Struthers, 319 U.S. 141, 143 (1943)).
\textsuperscript{198}. 116 U.S. 616, 634–35 (1886).
\textsuperscript{199}. \textit{Id}.
\textsuperscript{200}. \textit{Griswold}, 381 U.S. at 484 (emphasis added) (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).
\textsuperscript{201}. 345 U.S. 41, 47 (1953).
who made bulk purchases of those political books for further distribution.\textsuperscript{202}

Similarly, in \textit{Lamont v. Postmaster General}, the Supreme Court struck down a federal statute that predicated delivery of reading materials deemed “communist political propaganda” on a written request to the U.S. Post Office.\textsuperscript{203} In its opinion, the Court considered the deterrent effect of such a law: “Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as ‘communist political propaganda.’”\textsuperscript{204}

Faced with a similar issue, the District Court for the Western District of Wisconsin quashed a subpoena seeking the identities of more than one hundred book buyers.\textsuperscript{205} The court viewed the subpoena as problematic because it would allow the government to explore the reading habits of individuals without their consent or awareness.\textsuperscript{206} The opinion considered the negative repercussions of such a subpoena: “If word were to spread over the Net—and it would—that the FBI and the IRS had demanded and received Amazon’s list of customers and their personal purchases, the chilling effect on expressive e-commerce would frost keyboards across America.”\textsuperscript{207}

3. Right to Library Privacy and Freedom of Thought in One’s Home

The freedom to read any kind of material within one’s home without being monitored is an important liberty interest. In \textit{Stanley v. Georgia}, the Supreme Court invalidated a Georgia statute that criminalized the possession of obscene matter, such as films, as an attempt to control a person’s private thoughts.\textsuperscript{208} The defendant asserted his right to be free from inquiry into the contents of his library, and the Court found freedom from unwarranted intrusions into one’s privacy to be a fundamental right based on the First and Fourteenth Amendments.\textsuperscript{209} Moreover, the Court recognized that the Founders conferred “the right to be let alone—the most comprehensive

\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{203} 381 U.S. 301, 302–05 (1965).
\item \textsuperscript{204} Id. at 307.
\item \textsuperscript{205} In re Grand Jury Subpoena to Amazon.com Dated August 7, 2006, 246 F.R.D. 570 (W.D. Wis. 2007).
\item \textsuperscript{206} Id. at 572.
\item \textsuperscript{207} Id. at 573.
\item \textsuperscript{208} 394 U.S. 557, 566 (1969).
\item \textsuperscript{209} Id. at 564.
\end{itemize}
of rights and the most valued by civilized man.”\textsuperscript{210} Stanley helped establish an implied “right to privacy” when it determined that justifications for regulating obscenity do not “reach into the privacy of one’s own home.”\textsuperscript{211} Additionally, the Court in Lawrence v. Texas found “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, [and] expression.”\textsuperscript{212} Supreme Court jurisprudence has thus insulated from governmental intrusion the reading of private material on personal computers, especially at home. Therefore, reasonable privacy protections should also apply to corporations such as Google.

4. Modification of Fourth Amendment Protections

The Fourth Amendment shields individuals from unreasonable government searches and seizures of their “persons, houses, papers, and effects.”\textsuperscript{213} In Katz v. United States, the Supreme Court interpreted the Fourth Amendment to protect “reasonable expectations of privacy.”\textsuperscript{214} As long as an individual reasonably expects that his words will remain private, the Constitution protects his conversation from search and seizure.\textsuperscript{215} In this landmark decision, the Court found that the Fourth Amendment “protects people, not places... What [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”\textsuperscript{216} It held that the Constitution protects not only a person’s home and his physical person, but also the content of his telephone calls from wiretaps without a warrant.\textsuperscript{217} As such, a comparable protection should shield the personal reading habits of consumers from companies as well.

However, in a series of cases from the 1970s, the Court ruled that the Fourth Amendment does not apply to personal information revealed to or contained within records held by non-government actors. In United States v. Miller, the Supreme Court found that Fourth Amendment protection does not apply to bank records of personal financial transactions because account holders have no “reasonable expectation of privacy” in the contents of such

\begin{itemize}
  \item \textsuperscript{210} Id. (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)).
  \item \textsuperscript{211} Id. at 565.
  \item \textsuperscript{212} 539 U.S. 558, 562 (2003) (emphasis added).
  \item \textsuperscript{213} U.S. CONST. amend. IV.
  \item \textsuperscript{214} 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
  \item \textsuperscript{215} Id.
  \item \textsuperscript{216} Id. at 351.
  \item \textsuperscript{217} Id.
\end{itemize}
documents.\textsuperscript{218} The decision also employed an assumption-of-risk analysis: “[T]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.”\textsuperscript{219} A few years later, in \textit{Smith v. Maryland}, the Supreme Court decided that individuals have no legitimate expectation of privacy in the phone numbers they dial because, the Court presumed, callers know the phone company collects and uses such information for a variety of legitimate purposes.\textsuperscript{220} Thus, the telephone company’s monitoring of the phone numbers dialed at police request did not violate the Fourth Amendment.\textsuperscript{221} Additionally, the Court found that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”\textsuperscript{222} The Court distinguished the fact pattern from that in \textit{Katz} by noting that in \textit{Katz}—but not \textit{Smith}—the government acquired the contents of communications.\textsuperscript{223}

The precedents of \textit{Miller} and \textit{Smith} provide the foundation for arguments by companies, such as Google, that users lack an expectation of privacy by entering data into search engines and databases, such as Google Books. This case law, while still valid, is outdated. Tracking phone numbers dialed or handing over deposit slips is not comparable to the private process of searching for, selecting, and writing down reactions to reading material. The Google Books scenario differs in profound ways from the fact patterns of \textit{Miller} and \textit{Smith} because the information unknowingly supplied to third parties through Internet browsing is much more content-based, individualized, and personal. Book queries range from “Charlotte’s Web” to “breast cancer” or “divorce,” and each search, once compiled, can reveal details of a person’s private life in a way that phone numbers or bank statements often do not.

With few exceptions, Supreme Court decisions highlight the central importance of privacy. Private thoughts, book choices, and the right to be left alone have been deemed significant and worthy of protection in numerous rulings.\textsuperscript{224} Although Fourth Amendment jurisprudence does not protect Internet searches from government invasion, it does establish that privacy of thought extends far beyond the confines of one’s home. While established constitutional rights do

\begin{itemize}
  \item \textsuperscript{218} 425 U.S. 435, 442 (1976).
  \item \textsuperscript{219} \textit{Id.} at 443.
  \item \textsuperscript{220} 442 U.S. 735, 742 (1979).
  \item \textsuperscript{221} \textit{Id.}
  \item \textsuperscript{222} \textit{Id.} at 743–44.
  \item \textsuperscript{223} \textit{Id.} at 741.
  \item \textsuperscript{224} Stanley v. Georgia, 394 U.S. 557, 564 (1969).
\end{itemize}
not protect against corporations like Google, they should serve as a useful guide for Congress when contemplating new legislation. Given that privacy is a deep-rooted and widely held value, laws should protect persons from unwarranted intrusions—whether by the government or non-governmental third parties.

D. Google Books Has Avoided Privacy Safeguards Historically Required of Libraries Even Though It Provides a Functionally Similar Service

Google Books is sidestepping privacy safeguards long-recognized by traditional libraries despite the many commonalities between them. Indeed, the only real differences are that Google has moved the browsing from a building to the Internet, and that the Google service is private, rather than public. While public libraries prioritize patrons’ privacy, Google Books, which began with the digitization of library books, does not adhere to similarly strict standards. This technological change—without corresponding protection—is cause for concern.

Forty-eight states protect the confidentiality of library users’ records by law, and the attorneys general in the remaining two states have issued opinions recognizing the privacy of users’ library records. Underscoring the seriousness of this liberty, these statutes often categorize such offenses as misdemeanor criminal violations.

Librarians consider themselves “trusted guardians of patron privacy,” and protecting patron privacy and confidentiality has long been a core mission. Indeed, the American Library Association

225 Maggie Shiels, Tech Giants Unite Against Google, BBC NEWS, http://news.bbc.co.uk/2/hi/8200624.stm (referring to Google Books' potential to be the “world’s largest virtual library,” and arguing that if the Google Books Settlement is approved it has a “real shot at being ‘the library and the only library.’”).

226 Pamela Samuelson Letter, supra note 81, at 7.


228 Objection, supra note 4, at 19; see, e.g., FLA. STAT. ANN. § 257.261(4) (West 2010).

(ALA) has recognized a right to privacy since 1939. Existing ALA policies affirm that confidentiality promotes freedom of inquiry, and rights to privacy and confidentiality also are implicit in the Library Bill of Rights. The ALA interprets the Bill to mean that “in a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one’s interest examined or scrutinized by others.” A library satisfies the demands of confidentiality when it possesses personally identifiable information and keeps such data private. The ALA believes such rights are necessary for intellectual autonomy and fundamental to the ethics and practice of librarianship. Additionally, the ALA has proclaimed:

The library profession has a long-standing commitment to an ethic of facilitating, not monitoring, access to information. . . [Those] who provide[] governance, administration, or service in libraries ha[ve] a responsibility to maintain an environment respectful and protective of the privacy of all users. . . . Regardless of the technology used, everyone who collects or accesses personally identifiable information in any format has a legal and ethical obligation to protect confidentiality.

Librarians take this commitment to privacy very seriously and have designated Choose Privacy Week, a new initiative that invites people to join a national conversation about privacy rights in a digital age.

230. Id.
234. Id.
235. Id.
236. Id. (emphasis added).
The campaign provides individuals with the resources to make more informed choices about their privacy.\footnote{237} Critics have voiced apprehension about the Google Books’ departure from the strict ethical rules observed by librarians.\footnote{238} Librarians remove the link between a patron’s record and an item’s record when the item is checked back in; it is a feature of circulation systems.\footnote{239} As such, no documentation tying any patron to any book remains once it has been returned.\footnote{240} The ALA Policy Manual devotes an entire section to the maintenance of library records, which includes guidance on how to protect patron privacy.\footnote{241} The Manual directs librarians to “limit the degree to which personally identifiable information is collected, monitored, disclosed, and distributed”; “dispose of library usage records containing personally identifiable information unless they are needed for the efficient and lawful operation of the library”; and “ensure that those records that must be retained are secure,” among other directives.\footnote{242}

Unlike librarians who take special precautions to disassociate the identities of library patrons from the books they read, Google Books stores user information for extended periods of time.\footnote{243} Marketing considerations create incentives to retain such data.\footnote{244} While traditional libraries provide a safe environment for indulging intellectual curiosity without supervision, Google Books’ digital library lies at the other end of the spectrum.

\textbf{E. Additional Privacy Problems Presented by Google Books}

Google Books raises other unique privacy problems such as aggregating information, taking data out of context, and chilling user
behavior. Aggregation occurs because Google’s other services simultaneously gather personal data about individuals beyond their book selections and reading patterns.\textsuperscript{245} For example, Google likely possesses information on those same individuals’ Internet search queries.\textsuperscript{246} By aggregating seemingly insignificant data, collected in small quantities over many years, Google acquires copious amounts of information on each individual.\textsuperscript{247} Professor Daniel J. Solove, an internationally recognized expert in privacy law, neatly summarized this phenomenon:

[W]hen combined together, bits and pieces of data begin to form a portrait of a person. The whole becomes greater than the parts. This occurs because combining information creates synergies. When analyzed, aggregated information can reveal new facts about a person that she did not expect would be known about her when the original, isolated data was collected.\textsuperscript{248}

Especially since book or magazine choices can be revealing on their own, combining these selections with data about search queries, financial records, and emails can create a complex, personal story.

Without context, recorded book queries and reading habits can mislead those inspecting them. For instance, a person who searches for books related to breast cancer or heart disease might be thought to have the condition. Such an inference would be problematic if her insurance company requested the search histories. Undoubtedly, numerous other possibilities may explain why a person would want to read such books. Perhaps, for instance, a family member had the condition, or maybe the person is a medical student researching

\textsuperscript{245} Privacy Policy, supra note 5 (the Privacy Policy applies to “all of the products, services and websites offered by Google Inc.,” so the various products have similar capabilities to collect user data).

\textsuperscript{246} Id. (if a user uses the Google search engine, Google may collect information such as the web request, the interaction with a service, Internet Protocol address, browser type, browser language, the date and time of the request and one or more cookies that may uniquely identify the browser or account).

\textsuperscript{247} See Tene, supra note 7, at 1433–44. Tene explores how much users unintentionally reveal about themselves through the accumulation of search histories, looking at one searcher’s history that includes: “chai tea calories[,] calories in bananas[,] aftermath of incest[,] how to tell your family you’re a victim of incest[,] surgical help for depression[,] oakland raiders comforter set[,] can you adopt after a suicide attempt[,] who is not allowed to adopt[,] i hate men[,] medication to enhance female desire[,] jobs in denver colorado[,] teaching positions in denver colorado[,] how long will the swelling last after my tummy tuck[,] divorce laws in ohio[,] free remote keyloggers[,] baked macaroni and cheese with sour cream[,] how to deal with anger[,] teaching jobs with the denver school system[,] marriage counseling tips[,] anti psychotic drugs.” Id. at 1443. From approximately one dozen search queries, it is easy to identify the user’s health and mental condition, personal status, profession, geographic location, and even favorite sports team. Id. at 1444. When thousands of book and magazine searches are compiled and then combined with Internet searches, the depth of personal information revealed is striking. Id.

illnesses. Revealing private reading history allows such information to be misperceived, and the user inaccurately judged.249

According to a survey, 89% of respondents believe that their Internet searches are kept private, and 77% believe that Google searches do not reveal their personal identities.250 When consumers realize, as they inevitably will, that Google Books is essentially reading over their shoulders—collecting data on their book searches, purchases, and time spent reading—such knowledge will chill likely their behavior.251 Google Books’ invasion of privacy will deter users from reading potentially scandalous materials, or even innocuous texts, for fear of unwanted associations.252 As it stands, Google Books issues users an ultimatum: surrender privacy rights to use the monopolized services, or maintain anonymity, but lose access to many reading materials on the Internet.

At least one judge, in a similar context, has articulated this negative effect on user behavior: “[W]ell-founded or not, rumors of . . . investigation into the reading habits of Amazon’s customers could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever.”253 Such chilling effects also concerned the Supreme Court in Lamont, and such effects should motivate legislators to change the status quo and protect the confidentiality of users’ book queries and personal thoughts.254 In Lamont, the Court feared that requiring a written request for propaganda would inhibit reading choices.255 Self-editing reading material due to fear of discovery unduly limits personal freedoms, and implementing privacy safeguards could easily prevent such an undesirable effect.

III. A FEDERAL STATUTE SHOULD PROTECT PRIVATE DATA REVEALED TO THIRD PARTIES AND GOVERNMENTS

Limiting the protection afforded Google Books users to the safeguards established in the Settlement and the Privacy Policies of Google and Google Books does not adequately address the significant interest of privacy. Numerous federal statutes accentuate the importance of protecting personal information from exposure.

249. Tene, supra note 7, at 1459.
250. Rosencrance, supra note 126.
251. Objection, supra note 4, at 12.
252. Id.
255. Id.
Moreover, a long line of Supreme Court opinions provides a right to privacy of thought and reading habits. Therefore, Congress should fill the vacuum left by the ECPA and the Fourth Amendment, which do not explicitly cover the personal information of book choice, book browsing, and reactions to reading material.

Google is unlike other companies in the world today—it exists in a realm all its own. Potential measures by the states to provide greater privacy protections would prove inadequate as Google enjoys a world-wide presence, and traditional marketplace checks cannot solve the problem. The company has virtually monopolized the online reading of many works, and so users are left with no real alternative. As such, the public interest necessitates a federal statute to account for privacy concerns. Furthermore, although Google remains an anomaly today, it demonstrates the potential that companies have to pervade many aspects of individuals’ lives. Because technology changes the needs of users, only a new federal statute, correcting the inadequacies of the ECPA, would adequately ensure such protections moving forward. Modifying the Settlement itself would be a positive step, but lasting change requires a wider-reaching solution.

Congress should enact a comprehensive statute that provides privacy coverage to personal electronic information, not only electronic communications, supplied to governmental and non-governmental actors. This statute should require appropriate safeguards to protect unsuspecting users who unintentionally reveal vast amounts of personal data though an aggregation of their digital footprints. Emulating the standards set forth in the Privacy Act and the goals of librarians, this federal statute should require: (1) transparency to make consumers aware of what data companies collect and store and what consumers implicitly authorize those companies to do with that data by merely using online products; (2) boundaries on what user information can be tracked and limits on the timeframe in which it can be retained; (3) user access to personal information; and (4) protection against release of acquired information to other parties.

Such a statute should demand greater transparency as to what information private parties may gather and store on each user. Specifically, the statute should require that companies inform consumers in a more direct way whenever personal information is collected. Many users of Google Books and Google’s other services are

256. Pursuant to its Commerce Clause powers, Congress has the power to pass this proposed statute. See U.S. CONST art. I, § 8, cl. 3.

257. Objection, supra note 4, at 24. The Objection has some similar ideas for needed privacy safeguards, but its solution is limited in scope to protections that should be incorporated into the Settlement itself. Id. at 20.
either unaware that Google tracks their actions or do not realize the extent to which Google records and maintains their Internet browsing data. This ignorance likely persists because Google conceals its privacy policies. Users must notice tiny font and follow several hyperlinks to find the applicable policies. Making users take numerous steps to locate privacy standards unreasonably obscures these ostensibly public disclosures. Google ought to display its privacy policies more prominently to users so they may inform themselves, such as by changing the hyperlink to a larger font, and directing it to the privacy policy itself, rather than the Privacy Center. Alternatively, the privacy policies could be made accessible through a tab at the top of the homepage. Regardless of the chosen means, clearly identifiable policies and easier access would enable users to provide meaningful consent to Google’s policies.

The availability of resources to identify the data that companies exchange with third parties is also crucial. Those entities that collect and store personal information acquired over the Internet should be required to publish statistics regarding the nature and total number of requests they receive about users from government entities and third persons, and the number of requests complied with and denied each year. Individuals have the right to know not only what data they are surrendering by using a service, but also the demand for that information so they can take appropriate precautions to protect themselves. Even users that comprehend the privacy policies may have a false sense of security regarding the safety of their personal data without knowing the frequency of third-party requests for information.

A statute is necessary to limit what interested third parties may track because personal data is more accessible, more intimate, and available in greater quantities than ever before. Currently, companies such as Google face virtually no restrictions on what data they can collect from users. To begin, Google should allow users to search, browse, and preview books without identifying themselves. Although Google should legitimately track IP addresses and cookies to limit the number of pages users can view from a particular book, safeguards should prevent the uncovering of personal information with those tracking devices. By disconnecting the identifying features of the computer from the person, Google Books can function effectively without unduly infringing on the privacy rights of the consumer.

258. Rosencrance, supra note 126.
259. See supra notes 127–31 and accompanying text.
261. Id. at 22.
Similarly, watermarks and other technologies must not contain identifying information on users in a format that third parties could potentially understand. As private thoughts never intended for others, the comments users make to themselves in the margins should not accumulate at all.

The privacy protections available in libraries should extend to the virtual realm by delinking consumer selections from their browsers after a limited period of time. User search data should be purged from the servers after a reasonable period, perhaps no more than a few months. Libraries remove patron identity from books immediately upon return, so Google’s unofficial practices—erasing IP addresses after nine months and purging cookies in the search engine logs after eighteen months—appear unreasonable. A few months is a suitable compromise; it accommodates Google’s interest in amassing data for targeted advertising while not rendering consumer information overly vulnerable to third parties.

Furthermore, users should control their own information. The opportunity to remove their reading material search histories should be made available without limiting the number of deletion requests. Also, users should have the capability to delete records of their past purchases of books or magazines without a trace. Google should not wield total control over an individual’s data. Ideally, Google should enable users to opt out of having their future searches and purchases tracked at all. Furthermore, users should have the ability to view the information collected on them so they know what personal data they surrendered using various online services. This knowledge would enable them to decide whether to delete sensitive records.

Finally, the proposed statute must defend users from information requests by both the government and private third parties. The primary means of shielding Google Books’ pool of data is to raise the threshold required to reveal such records. This heightened standard should require a court order, instead of a subjective belief or subpoena, before any user information could be disclosed. By replacing the low standard of relevance with mandatory judicial approval, information would remain private more frequently. The statute should require the supplier of personal data to notify each user of the request before complying with the demand so the consumer has a chance to challenge the information petition.

262. *Id.* at 24.
263. *Id.* at 23.
264. Objection, supra note 4, at 22.
This proposed statute with specified safeguards would protect the millions of current and potential users of services such as Google Books. Because the impact of Google Books is likely to be significant, establishing regulations before the service becomes even more widespread would protect millions against potential privacy invasions.

IV. CONCLUSION

If approved, the Settlement will offer access to millions of hard-to-find, out-of-print books; provide new opportunities for authors and publishers to sell their works; and further the efforts of library partners to preserve and maintain their collections while making books more accessible. However, the Settlement does nothing to address existing privacy concerns associated with Google Books.

Google collects an overwhelming amount of personal information about users—from the new places they drive each day, to the amount of money in their investment accounts, to the information in their personal emails. As Google Books becomes more popular, Google will gain access to yet another intimate part of its users’ lives: the books they read. Trusting corporate giant Google with still more personal data warrants regulation of information accumulation.

Privacy is a fundamental right and a prominent concern for Congress, librarians, and critics of the Settlement, so statutory protections need to safeguard customers’ freedom of thought. As Internet use grows exponentially, and as more personal data is collected online, this issue will continue to grow in importance.

The numerous potential privacy protections for Google Books consumers are all clearly insufficient. First, the Settlement barely addresses privacy at all; it offers no limitations on how Google Books can collect data or reveal it to third parties. Second, even determined users will find it hard to locate the Google and Google Books’ Privacy Policies, which fail to shield from subpoenas a huge aggregation of user information—a treasure trove for the government and third parties alike. Third, the outdated statutes currently in place inadequately address Internet privacy concerns. Fourth, the constitutional protection offered by the Fourth Amendment only shields data from search and seizure by the government and does not include protection of personal information transferred to third parties.

The right to privacy of thought and reading material is inherently important, yet the current safeguards are simply inadequate; therefore, Congress must take measures to protect

citizens from privacy invasions. Specifically, the law should safeguard personal information revealed to third parties. The reading habits of people around the world reveal inherently personal thoughts, especially when aggregated over time. Thus, information about users’ reading habits should be insulated from those who would use that information to the users’ detriment.

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