

Is the Google Book Settlement an Abuse of Class Actions?

by

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Let's start with two givens. First, Google is an outstandingly innovative company. Millions of us use Google search, email, maps, and other applications on a daily, if not hourly, basis. Second, Google is no more above the law than any other company, no matter how much social benefit one of its projects would arguably bestow on society. Its proposed settlement of a copyright lawsuit initially brought by a small number of authors and publishers goes far beyond what class action settlements are supposed to achieve, and is tantamount to private legislation.

Google has been scanning books from major research libraries, such as the University of Michigan, since 2004. The initial goal was to index the contents of books to provide snippets to users whose queries yielded Google Book Search (GBS) results. Google believed that its scanning of in-copyright books was fair use because Google wasn't displaying substantial parts of book contents and facilitated access to them by linking to libraries or bookstores from which they could be obtained. (Fair uses do not infringe copyrights insofar as they are done for a beneficial purpose and do not unreasonably harm the copyright owners' interests.)

In the fall of 2005, the Authors Guild and five major book publishers sued Google, claiming that its book scanning was copyright infringement. Soon thereafter, Google began negotiating a settlement of this dispute with the Guild and publisher members of the Association of American Publishers (AAP). In October 2008, Google, the Guild, and AAP collectively announced a settlement agreement they devised on behalf of a class of all persons who own a U.S. copyright interest in one or more books, with the Guild representing the author subclass and AAP the publisher subclass. Owing to U.S. treaty obligations, the proposed settlement class includes all owners of copyright interests in all books in the world. Google has pledged \$125 million to settle the lawsuit, \$45.5 million of which will go to the lawyers who negotiated it. (The lawyers are getting \$500,000 more than Google has set aside for payments to rights holders of all of the in-copyright books now in the GBS corpus).

Members of the class had until September 4 to opt out, object, oppose or comment on the settlement. The court received more than 400 submissions about the settlement, the overwhelming majority of which expressed opposition, objections, or concerns. Among the objectors were the governments of France and Germany, several states, and prominent authors such as Harold Bloom and Michael Chabon. Library associations and academic authors expressed concern about lack of user privacy and risks of price gouging. Amazon.com, Microsoft, Yahoo!, and the U.S. Department of Justice (DOJ) asserted that the deal was anticompetitive and a misuse of the class action process.

In late September the lawyers for the author and publisher subclasses asked the court for time to work on amendments to respond to DOJ's concerns. A revised settlement is expected to be filed by November 9, and the lawyers have asked the judge to hold a hearing about whether to approve the settlement by the end of the year.

So what does the deal provide and why are some opposed to it? The main feature of the proposed settlement agreement is the license it would give Google—and Google alone—to commercialize all in-copyright, out-of-print books in three ways: through the sale of ads next to search results that yield GBS responses, consumer purchase of individual books in the cloud, and institutional subscriptions to libraries and the like. Google would keep 37% of these revenues and would give the other 63% to a newly created Book Rights Registry, which would be responsible for finding rights holders and paying them for Google's uses of their books.

The fundamental idea underlying class action lawsuits is one all good liberals can get behind. Corporations sometimes do bad things to others (e.g., their customers). Often, the harm to each person is too small to make it worthwhile to bring individual lawsuits. Yet, in aggregate, the harm to similarly injured persons may be very large indeed. If a firm overcharges a million customers \$10 each for the same item, for instance, the aggregate harm is \$10 million. Class action lawsuits allow recovery of the aggregate harm to the class; and if these lawsuits settle, as many of them do, class members will generally get some benefit (e.g., a \$5 refund) and hopefully wrongdoers will be deterred.

The GBS agreement is, however, less a settlement of a class action lawsuit than a forward-looking commercial joint venture that far exceeds in scope the scanning-to-index issue being litigated. Class action settlements typically resolve only the specific dispute between the parties. The more forward-looking the settlement, the broader its scope, the broader the class, and the more the deal tries to release the defendant from liability for future conduct, especially conduct different in kind from the litigated issue, the less likely it is that judges will approve it. The GBS deal is troublesome on all four grounds. Moreover, serious questions exist about whether the authors and publishers who negotiated the settlement adequately and fairly represented the interests of the class as a whole.

An important policy underlying the requirement that named plaintiffs in class action lawsuits fairly and adequately represent the interests of the defined class is to prevent collusion between plaintiffs and defendants that would accomplish an outcome beneficial for them, but not so much for other class members whose rights are being affected. With the powerfully strong commercial interests at stake in the *Authors Guild v. Google* case, there is reason to be concerned that the GBS settlement agreement with its extensive new regime for rights clearances, procedures for determining the copyright and in- or out-of-print status of books, criteria for price setting for subscriptions, payout schedules, and compulsory dispute resolution, among others, is one that will serve well the interests of those who negotiated the settlement, but not necessarily a majority of class members. Dozens of authors have argued that the GBS settlement is fundamentally unfair to them. Of particular concern to academic authors is that once the settlement is approved, Google

has the right to sell the corpus to anyone—even Rupert Murdoch or China—if it so chooses.

Google is arguing that the settlement should be approved because of the social benefit of providing greater public access to out-of-print books. However, an extensive restructuring of the market for digital books, such as that which the GBS deal would accomplish, should be done either on a voluntary basis with consenting book rights holders, or through legislation. Arguments that the settlement is in the public interest should be directed to Congress, not the courts. Private legislation through the GBS class action settlement would set a dangerous precedent and undermine democratic values.