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Legally Speaking Should the Google Book Settlement Be Approved?

Considering the precedent that could be established by approval of the controversial Google book settlement.

THE COURTROOM WAS packed for the long-awaited hearing about the proposed settlement of the *Authors Guild v. Google* lawsuit on February 18, 2010. Class action lawsuits cannot in the U.S. be settled without a judicial determination that the proposed settlement is “fair, reasonable, and adequate” to the class on whose behalf the case was brought.

Judge Denny Chin heard five hours of oral argument about the proposed settlement not only from lawyers representing Google, the Authors Guild, and the Association of American Publishers (AAP) who negotiated it, but also from the U.S. Department of Justice (DOJ), five non-party supporters, and 21 objectors or opponents, of which I was one. Judge Chin announced at the outset of the hearing that he would not rule on the matter that day.

Because the DOJ has spoken out strongly against the settlement—along with the governments of France and Germany and hundreds of others from the U.S. and abroad—the settlement is facing an uphill battle. An appeal seems likely; so whatever Judge Chin decides, the case is far from over.

This column describes the genesis of the lawsuit and reasons the proposed settlement is so contentious. It presents my argument that the settlement should not be approved without substantial modifications to address concerns of academic authors whose books will make up a substantial por-

tion of the Google Book Search (GBS) corpus of out-of-print books that Google would be able to commercialize if the settlement is approved.

The Authors Guild Lawsuit and the Proposed Settlement

In the fall of 2005, the Authors Guild and three of its members sued Google for copyright infringement because Google was scanning in-copyright books from the collection of the University of Michigan Library. The Guild members claimed to represent the interests of a class consisting of persons holding a U.S. copyright interest in one or more books in Michigan’s library. Five trade publishers brought a similar suit one month later.

After 30 months of negotiations, the litigants announced in October 2008 a proposed settlement of the now-com-

bined lawsuits. The class on behalf of which the litigants now propose to settle consists of all owners of U.S. copyright interests in books published in the U.K., Canada, and Australia and books registered with the U.S. Copyright Office.

The only issue in litigation in the *Authors Guild* case is whether Google’s scanning of in-copyright books for purposes of making snippets of their contents available in response to Google Book Search (GBS) user queries is copyright infringement or fair use.

If the settlement resolved only that dispute (for example, with Google offering \$60 per book for past scanning in exchange for a license to make snippet-displays), approval would almost certainly be granted.

The settlement is controversial because it would give Google a license to commercialize all out-of-print, but still in-copyright books owned by class members as long as Google provides 63% of the revenues from its commercialization efforts to a newly created Book Rights Registry, which would be charged with locating rights holders and paying them money from Google’s commercialization of their books.

At first blush, the GBS settlement looks like a win-win-win. The public would get access to up to 20% of most out-of-print books in response to user queries and full text access in public libraries and higher education settings, either through public access terminals or institutional subscriptions to a database of millions of out-of-print

What should be done about orphan works is a public policy issue that should be decided by Congress, not private parties or the courts.

books. Copies of the books would also be available for individual purchase. Publishers and authors would get paid for the new market Google created for out-of-print books. Google would not only make some money from its 37% share of GBS revenues, but would also be able to make “non-display uses” of books for purposes such as refining its search technologies.

The DOJ agrees that the public would benefit from the enhanced public access to millions of books that would attend approval of the settlement. Yet it has reluctantly concluded that Judge Chin lacks power to approve this settlement because it goes so far beyond the issues actually in litigation that it is “a bridge too far.” The GBS settlement abuses the class action process because the litigants took the occasion of a lawsuit on one narrow issue and used it to dramatically restructure the market for digital books.

The DOJ would endorse a settlement that required class members to opt-in to Google’s commercialization plans. But Google has insisted that the settlement’s opt-out approach (that is, Google gets to commercialize the books unless the copyright owner comes forward to say no) is essential for establishing the new marketplace it envisions.

My Objection to the GBS Settlement

I was one of the 26 non-party speakers to whom Judge Chin granted five minutes to present their views. After introducing myself and noting that I had filed two letters objecting to specific terms of the GBS settlement, the latest one on behalf of 150 academic authors, I made the following points:

► Most of the books that will be regulated by the settlement agreement are out-of-print books from the collections of major research libraries such as the University of California, and most of these books were written by scholars for scholarly audiences.

► Many scholars own copyright interest in their books at least for electronic versions. Many have clauses in their contracts that allow author reversion rights upon the book going out of print. These books will be core parts of the institutional subscription database that will be licensed to universities such as UC Berkeley.

► In the past year I have spoken to many colleagues at UC Berkeley and elsewhere about the proposed settlement. When I asked them whether they would be willing to allow their out-of-print books to be made available on an open-access basis, to a person, they have said yes. Academic authors also tend to believe that orphan books should be available on an open access basis.

► Orphan books are not a trivial matter. The *Financial Times* has estimated the number of U.S.-published books likely to be orphans as between 2.8 to five million. These books will form a substantial part of the institutional subscription database to which my university and others are expecting to subscribe.

► The Plaintiffs have characterized open access advocacy as “a prime example of...parochial self-interests.” They also stated that the interests of open access advocates “plainly are in-

imical to the class.” (As if the word “inimical” wasn’t strong enough by itself, they italicized the word to emphasize just how inimical they think open access advocacy really is.)

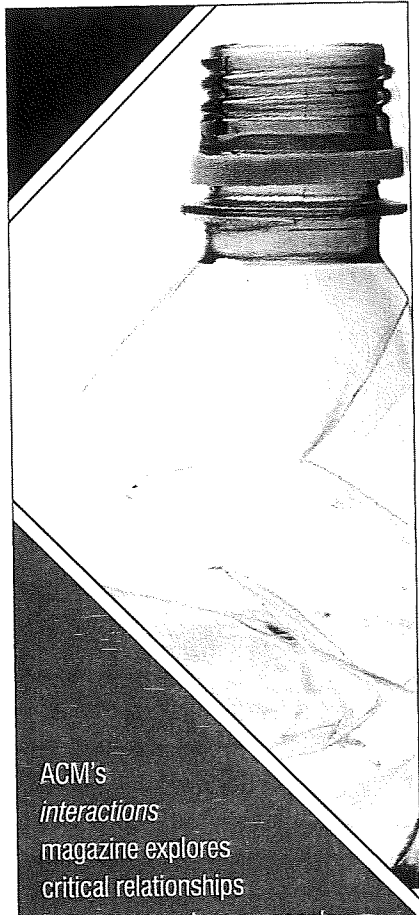
These statements show that the Authors Guild has not fairly represented the interests of academic authors who are members of the author subclass.

It also bears mentioning that academic authors would not have brought this lawsuit against Google because we tend to think that scanning books to make snippets is available is fair use. If this case goes back into litigation instead of being settled, I will be writing briefs in support of Google, not in support of the Authors Guild.

But it’s not just me and the 150 people who signed the supplemental academic author objection letter who endorse open access. Last August a letter was sent to the court on behalf of the UC Academic Council, which represents 16,000 faculty members at



Author Susan Davis, representing the National Writers Union, arrives for the Feb. 18, 2010 hearing in New York about the proposed settlement of the *Authors Guild v. Google* lawsuit.



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If this settlement agreement is approved, Google may feel free to go out and scan other copyrighted works.

the University of California, expressing concern that open access preferences of academic authors would not be respected by the Plaintiffs.

More important, though, is the open access recommendation of the U.S. Copyright Office in its report on orphan works. The Office considered and rejected an escrow model for orphan works akin to that in the amended settlement agreement. Once the orphan status of a work has been determined, the Copyright Office thought the work should be available for free use. Congress has modeled its orphan works legislation on the Office's recommendation. What should be done about orphan works is a public policy issue that should be decided by Congress, not private parties or the courts.

It is far more consistent with the utilitarian principles of copyright law to allow orphan books to be made available on an open access basis once we know that they are, in fact, orphaned. This is important to academic authors because what the Plaintiffs want to do is maximize revenues for the millions of orphan books that will be in the institutional subscription database. This is why I have asked for some meaningful constraint on price hikes as part of the settlement agreement.

There is a fundamental difference in perspective between the Plaintiffs and academic authors about what books are really about. For the Plaintiffs, books are commodities to be exploited for maximum revenues.

Books for academics are more like a slow form of social dialogue. The books from the past open the conversation that scholars pick up and carry on. The books we write further that conversa-

tion, and set the stage for the conversation to be carried on by our successors.

The set of objections I made on behalf of academic authors should not be swatted down one by one, as they were in the Plaintiff's Objection memo, but viewed as important component parts of the cultural ecology of knowledge in academic communities. This ecosystem will be impaired if the ecosystem envisioned in the settlement agreement is adopted instead of the one that has long prevailed and should prevail in the future for academic communities.

Setting a Precedent?

While I could live with the GBS settlement if it was amended as suggested in my letters, I worry very much about the precedent that would be set by approval of this particular settlement.

Google's founders say the company's goal is to organize all of the world's information. As we all know, books are not the only type of work that contains the world's information. I have been wondering for some time which sector of the copyright industry will be next to have its works scanned by Google for inclusion in its search database.

If this settlement agreement is approved, Google may feel free to go out and scan other copyrighted works. And if their rights holders object, the pragmatic response might well be: we could litigate about this, but I have a good fair use defense, and it would be expensive and ugly to litigate, so why don't we just reach a deal on my terms right now? Approval of the settlement would give Google unfair leverage in such negotiations.

But beyond that, I think that approval of this settlement would encourage other class action lawsuits that would then seek to justify their efforts to remake copyright law by saying: Congress is too dysfunctional to address this problem, so we must be allowed to do it through a class action settlement. This is just bad public policy. □

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A transcript of the fairness hearing, along with all documents filed with the court, is available at <http://www.thepublicindex.org>.

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