STANDING UP FOR COPYRIGHT:
MARYBETH PETERS AND THE GOOGLE BOOK SETTLEMENT

by Pamela Samuelson*

When Google, the Authors Guild, and the Association of American Publishers (AAP) announced in October 2008 that they had reached a settlement about the copyright lawsuit challenging Google’s systematic scanning of books from major research libraries and serving up snippets of the books’ contents in response to user queries, the initial reaction of most copyright professionals was quite positive.¹

At first blush, the settlement looks like a win-win-win. Approval of the Google Book Search (GBS) Settlement would bring about a number of benefits: the public would get substantially greater access to millions of in-copyright, out-of-print books; authors and publishers would enjoy new revenue streams from uses of books that, because of their out-of-print status, are not currently generating any revenues for rights holders; a new Book Rights Registry (BRR) would be created to handle payments to authors and publishers, as well as potentially to license third party uses of the books; higher education and public libraries would get some public access terminals to enable their patrons to have access to a database of millions of books; these libraries could also subscribe to a database service that would enable patrons to have much wider and fuller access to the contents of the books in the subscription database; two universities would be licensed to make the full Google Book corpus available for nonprofit non-consumptive research; and Google would have an opportunity to recoup its investment in the GBS project by selling subscriptions and individual books.² Resolution of the difficult fair use question posed by the Google book-scanning project, which would have taken many years of additional litigation to resolve definitively, was also thereby averted.³

¹Richard M. Sherman Distinguished Professor of Law, Berkeley Law School. Editor’s note: This tribute was written prior to the retirement of Marybeth Peters.
³Most academic commentators have argued that the GBS scanning and snippet-display is fair use. See, e.g., Matthew Sag, The Google Book Settlement and the Fair Use Counterfactual, 55 N.Y.L.S. L. REV. 19 (2010); Hannibal Travis, Google Book Search and Fair Use: iTunes for Authors or Napster for
Despite the high praise heaped upon the agreement by AAP and Authors Guild representatives,\(^4\) Marybeth Peters and others at the U.S. Copyright Office began to have reservations about the proposed settlement as they studied and reflected on it further.\(^5\) At a conference at Columbia Law School in March 2009, Peters expressed concern about the scope of the GBS settlement and its impacts on owners of rights in books.\(^6\) Peters questioned whether the settlement adequately accommodated the interests of all authors who would be affected by it, including foreign rights holders.\(^7\) The settlement seemed troublesome to her because it would, in effect, give Google a compulsory license to make out-of-print books available to the public.\(^8\) She questioned whether courts had the power to grant a compulsory license by approving a class action settlement, suggesting that congressional authorization might be necessary for such a license and expressing doubt that Congress would be willing to grant a compulsory license that would benefit only one firm.\(^9\) She wondered also about the effect of the settlement on orphan works legislation and on existing proposals to reform copyright exceptions for libraries and archives.\(^10\) In short, Peters thought the settlement posed serious public policy issues that were more appropriate for legislative action.\(^11\)

While the Columbia conference gave Peters an opportunity to explore some concerns about the settlement, she was in an awkward position to affect the court’s judgment about the settlement or to contribute to a broader public debate about it. Because the Copyright Office is a subunit of the Library of Congress, which in turn is a subunit of Congress, it was unclear whether Peters could submit a statement \textit{sua sponte} to the court about the Office’s concerns about the settlement, for taking a position for the government is usually the role of the U.S. Department of Justice (DOJ). While Peters was quite willing to make a statement to members of Congress, she noted in her Columbia talk that not a single Congressman

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\(^5\) Peters Statement, \textit{supra} note 1, at 1-2.


\(^7\) \textit{Id.}

\(^8\) \textit{Id.}

\(^9\) \textit{Id.}

\(^10\) \textit{Id.}

\(^11\) \textit{Id.}
had asked her to comment on the proposed settlement, even though approval of the GBS agreement would, in effect, usurp congressional prerogatives and have significant impacts on copyright and the public.\textsuperscript{12}

Yet, Peters eventually had the opportunity to be influential both in the public debate about the proposed GBS settlement as well as in submissions to the court responsible for judging whether the GBS agreement should be approved. One was through her testimony at a congressional hearing in September 2009, a few weeks before the scheduled fairness hearing on the settlement.\textsuperscript{13} A second was in connection with an investigation of the settlement initiated by the Antitrust Division of the DOJ.\textsuperscript{14} Peters participated in intergovernmental consultations about the proposed settlement, which gave her a chance to explain why the DOJ should be concerned about copyright implications of the settlement as well as by antitrust and class action issues.

Peters’ congressional statement made three points, each of which expanded on concerns she first raised at the Columbia conference. Peters first explained why approval of the settlement would be tantamount to the creation of a private compulsory license through judicial fiat, for it would grant Google the right to scan all in-copyright books and to commercialize those that were out-of-print unless a rights holder showed up to tell Google to stop doing this.\textsuperscript{15} A compulsory license to undertake a large-scale book digitization project might, she indicated, be a worthwhile idea. But “such decisions are the domain of Congress and must be weighed openly and deliberately, and with a clear sense of both the beneficiaries and the public objective.”\textsuperscript{16} Peters pointed out that Congress is generally quite reluctant to grant compulsory licenses unless there has been some sort of market failure that can only be cured by such a license. Such licenses, moreover, tend to be carefully tailored to address the market failure and concerns of various stakeholders who participated in the legislative deliberations about it.\textsuperscript{17}

In considering a proposal to grant a compulsory license for mass digitization of books, Congress would, in her view, want to consider a number

\textsuperscript{12} \textit{Id.}


\textsuperscript{15} Peters Statement, supra note 1, at 2-3.

\textsuperscript{16} \textit{Id.} at 3.

\textsuperscript{17} \textit{Id.} at 5.
of issues, such as who should be eligible to engage in such digitization, what kinds of books should be digitized (or not), how to compensate rights holders, and how the license might comport with U.S. treaty obligations.\textsuperscript{18} With a wider group of stakeholders able to participate in legislative deliberations, it seemed unlikely to her that Congress would make the same set of choices that the GBS settling parties had done.

Peters’ second point was that the settlement treated owners of rights in out-of-print books very differently than owners of rights in in-print books in contravention to copyright law which regards all owners as entitled to the same rights.\textsuperscript{19} This resonated with a concern she had expressed at Columbia about whether the interests of all authors were adequately protected by the settlement.\textsuperscript{20} The inequality in the settlement’s treatment of authors was most apparent in the provisions that would allow Google to make “display uses” of all out-of-print books.\textsuperscript{21} These uses included the right to display up to 20 percent of out-of-print book contents to GBS users and to run ads adjacent to these displays; Google could also sell these books to consumers on a book-by-book basis or through license fees that libraries and other organizations would pay for access to the institutional subscription database of out-of-print books.\textsuperscript{22} The settlement would also immunize Google from federal court lawsuits if disputes arose about GBS out-of-print books.\textsuperscript{23}

Peters is not opposed, in principle, to making distinctions among different types of copyrighted works or among different types of owners. She has, in fact, been a champion of legislation that would allow reuses of copyrighted works whose rights holders cannot be located after a reasonably diligent search (widely known as “orphan works”).\textsuperscript{24} The GBS settlement would, in her view, frustrate Congress’ ability to address and resolve the orphan work problem, for the settlement would automatically license Google to commercialize orphan books without the need to undertake any search to find the rights holders.\textsuperscript{25} She reiterated her point at Columbia.

\textsuperscript{18} Id. at 6.
\textsuperscript{19} Id. at 3, 6.
\textsuperscript{20} Hirtle, supra note 6.
\textsuperscript{21} Settlement Agreement, supra note 2, § 3.3.
\textsuperscript{22} Id. at §§ 4.1-4.4.
\textsuperscript{23} Id., Art. IX.
\textsuperscript{25} Peters Statement, supra note 1, at 7-8.
that Congress was better situated to adopt a sound resolution to the orphan work problem.\textsuperscript{26}

The third point in Peters' congressional testimony was that the GBS settlement was causing "diplomatic stress" for the United States.\textsuperscript{27} This was in part because if approved, the settlement would allow Google to scan and to commercialize millions of books published abroad whose rights holders had deliberately chosen not to enter the U.S. market.\textsuperscript{28} Even foreign rights holders who were operating in the U.S. market wanted to be able to control the exploitation of their works in the U.S. and not be swept into a class action settlement that forced them to participate in a commercial arrangement with Google. Peters reported that she had talked to copyright experts from other countries who were distressed that non-U.S. books were included in the settlement, and she was aware of numerous other foreign rights holder objections.\textsuperscript{29}

Indeed, the governments of France and Germany had filed oppositions to the GBS settlement with the court, arguing that the settlement violated U.S. treaty obligations in several respects.\textsuperscript{30} While Peters, in her testimony to Congress, was not suggesting that the United States was, in fact, out of compliance with treaty obligations, she observed that "it was a cause of concern when foreign governments and other foreign stakeholders make these types of assertions."\textsuperscript{31} U.S. leadership in the international arena as to intellectual property policy would be undermined, she intimated, if the GBS settlement was approved.

As important as her testimony before Congress was in fanning the flames of the growing controversy about the GBS settlement, the hearing was inconclusive in the sense that it merely aired some differences of opinion, with some witnesses arguing in favor of the settlement and others arguing against it.\textsuperscript{32} No legislation has since been introduced to deal with any of the matters that the settlement addresses. Congress seemingly has many other things on its agenda, and the GBS settlement is not high on the list of its priorities.

Just over a week after Peters appeared at the congressional hearing on the proposed GBS settlement, the DOJ filed a Statement of Interest with the court responsible for deciding whether the agreement should be

\textsuperscript{26} Id. at 8. See also Pamela Samuelson, Academic Author Objections to the Google Book Search Settlement, 8 J. Telecom. & High Tech. L.J. 491, 503-08 (2010) (criticizing the settlement’s treatment of orphan works).

\textsuperscript{27} Peters Statement, supra note 1, at 3.

\textsuperscript{28} Id. at 8-9.

\textsuperscript{29} Id. at 9, n.12 (citing to sources).

\textsuperscript{30} Id. at 10 (noting these filings).

\textsuperscript{31} Id.

\textsuperscript{32} Witness statements for the House hearing are available at http://thepublicindex.org/documents/judiciary.
approved.\textsuperscript{33} The filing of this statement did not come as a surprise, given that DOJ had informed the presiding judge that it had initiated an investigation into the antitrust implications of the settlement and the judge ordered DOJ to submit its views by September 18 so that he and the settling parties could have a chance to consider its views before the hearing on the fairness of the settlement, which was at the time scheduled for early October.\textsuperscript{34}

It was, however, something of a surprise that DOJ raised strong objections to certain provisions of the settlement on antitrust grounds,\textsuperscript{35} but even more surprising was that the DOJ Statement took up Register Peters' refrain about the GBS settlement as "alter[ing] the traditional understanding of copyright law that allows the owner to exclude others from using a copyrighted work absent authorization of the copyright owner."\textsuperscript{36} Echoing Peters, DOJ raised questions about the settlement's treatment of foreign rights holders:

The Proposed Settlement operates to sweep in untold numbers of foreign works, whose authors, under current law, are not required to register in the same manner as U.S. rights holders. Many of those authors have never published works in the United States and are not members of the Authors Guild or the Association of American Publishers, which exclude many foreign copyright owners from membership by virtue of their membership criteria. . . . As the filings of France and Germany make clear, some of the United States’ trading partners have serious concerns about application of the Proposed Settlement to foreign authors and, in any event, the parties have not demonstrated that the class included representation sufficient to protect the interests of these foreign rights holders.\textsuperscript{37}

DOJ recommended a number of changes to the proposed settlement that might make it less objectionable on antitrust, copyright, and class action grounds.\textsuperscript{38}

\textsuperscript{33} Statement of Interest by the U.S. Dept. of Justice Regarding the Proposed Settlement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 18, 2009), 2009 WL 3045979.

\textsuperscript{34} See Order, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. July 2, 2009), available at http://thepublicindex.org/docs/motions/approval/doj.pdf.

\textsuperscript{35} DOJ Statement of Interest, supra note 33, at 16-26 (articulating reasons to believe the settlement was a horizontal price fixing and term of sale agreement that might violate antitrust laws; also raising concerns about the potential for anticompetitive foreclosure of competition).

\textsuperscript{36} Id. at 11, n. 3.

\textsuperscript{37} Id. at 11.

\textsuperscript{38} Id. at 15-16, 22-26. DOJ suggested, for instance, that foreign rights holders' works be included in the settlement only on an opt-in basis, rather than the opt-out basis set forth in the settlement. It also suggested adding some foreign rights holders to the group of class representatives.
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Shortly after the DOJ filed its Statement of Interest, the plaintiffs’ lawyers asked the court to postpone the fairness hearing so that the settling parties could renegotiate some terms to respond to various objections lodged by DOJ and others. On November 13, 2009, the parties filed an Amended Settlement Agreement (ASA) that significantly narrowed the settlement class by excluding most non-Anglophone foreign works from its scope. The amended settlement also made some changes to terms that DOJ thought raised antitrust concerns. The presiding judge reset the fairness hearing date to mid-February 2010, announced a new deadline for the filing of objections and opt-outs, and asked the DOJ to file any additional Statement in the first week of February.

Despite the narrowed settlement class, the Republic of Germany and many foreign publishers and authors filed a further round of objections to the GBS settlement in late January 2010, in part because many German and other non-Anglophone books were still in the settlement class because many of these works had been registered with the U.S. Copyright Office. The German submission agreed with Register Peters that compulsory licenses should only be granted by legislatures. “Google’s conduct,” it went on to say, “is an anathema to the fundamental principles of German and European law,” and approval of the settlement would “destroy the landscape of world copyright law.” Those who negotiated the settlement may have had good intentions, but the German submission reminded the court that “the most ominous of roads is paved” with such intentions.

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44 Id. at 11.

45 Id.

46 Id. at 3.
Because numerous amendments to the GBS settlement addressed objections that DOJ raised in its September 2009 Statement of Interest, there was some reason to think that the second submission by DOJ would be much milder in its statement of concerns about the GBS deal. Yet, if anything, the DOJ’s second Statement of Interest was much more critical of the settlement than its first submission had been. The amended settlement, in DOJ’s view, “suffers from the same core problem as the original agreement: it is an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation.” Because of this, the DOJ concluded that “the use of the class action mechanism in the manner proposed in the ASA was a bridge too far,” by which it meant that the court lacked jurisdiction to approve the settlement before it.

The influence of Register Peters was also even more evident in the DOJ’s second Statement than in its first. In discussing Google’s argument that the settlement furthered the objectives of the law upon which the complaint was based, DOJ pointed out that “[i]n its current form, the ASA is inconsistent with the policy of the Copyright Act, as established by Congress,” for it “seeks to carve out an exception from the Act’s normal rules and presumptions, which requires a rights holder to affirmatively grant permission for the kinds of uses contemplated by the ASA.” In response to the claims that the settlement would further the constitutional objectives of copyright by promoting progress of science, DOJ responded simply that this was “a judgment better suited for legislative consideration,” as Peters had argued in her congressional testimony.

Peters’ effectiveness in the intergovernmental consultation process was notable, given that Google has some influence within the Obama Administration. Some officials who were consulted must have argued in favor of the settlement or at least against taking as strong a stance against the settlement as that which ultimately prevailed within DOJ. Like Register Peters, DOJ recognized that the idea underlying the GBS scheme of

47 Second Statement of Interest, supra note 41, at 1 (giving examples of significant amendments to the GBS settlement).
48 Id. at 2.
49 Id. at 3.
50 Id. at 11. DOJ also viewed the amended settlement as continuing to pose serious antitrust risks, notwithstanding numerous changes to its terms. Id. at 16-22.
51 Id. at 9.
52 Id. at 10.
53 Eric Schmidt, Google’s CEO, is, for example, an economic advisor to President Obama. Andrew McLaughlin, formerly Director of Global Public Policy for Google, is now the Deputy U.S. Chief Technology Officer at Executive Office of the President.
“widespread lawful electronic distribution and use of copyrighted works, including in-print, out-of-print, and so-called ‘orphan’ works, holds vast promise.” DOJ lauded the worthy objectives of “[b]reathing life into millions of works that are now effectively dormant, allowing users to search the text of millions of books at no cost, creating a rights registry, and enhancing the accessibility of such works for the disabled and others...” The question was only whether these objectives could be fulfilled through a class action settlement, and DOJ fully concurred with Register Peters’ opinion that these objectives were more properly the province of the legislature, rather than judicial approval of a private order- ing regime negotiated by the settling parties in the GBS case.

It remains to be seen how Judge Chin will rule on the fairness (or not) of the GBS settlement. In the meantime, Peters continues to support legislative reforms that would achieve at least some objectives of the Google Book settlement. These reforms would allow reuses of orphan works and expand library and archival privileges to enable greater digitization and utilization of in-copyright works. The Office has also been actively exploring ways in which visually impaired persons might be able to get greater access to copyrighted works, which the GBS settlement would do. The World Intellectual Property Organization (WIPO) has, moreover, been hosting meetings on a proposal for an international agreement on exceptions and limitations to copyright, including exceptions to benefit visually impaired persons and libraries; as yet, however, there has not been sufficient consensus on specifics of the proposal to warrant a diplomatic conference to consider such an instrument.

Whatever Judge Chin decides on the GBS settlement, the Google Book initiative has dramatically changed the policy landscape about orphan works, library privileges, and the future of fair use in the digital environment. Google has already scanned well over 12 million books, and it appears that Google is planning to scan every book on the planet, which

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54 Second Statement of Interest, supra note 41, at 1. Cf. Peters Statement, supra note 1, at 2 (noting that some terms of the settlement have merit).
55 Second Statement of Interest, supra note 41, at 1.
its engineers estimate at 174 million volumes. Google is making extensive uses of the books in the GBS corpus to display snippets of book contents in response to user queries, as well as for internal research & development to improve search techniques, automated translation tools, and the like. Google has given its library partners digital copies of books in their collections, and the Hathitrust has emerged as a repository of library digital copies which are being used for non-consumptive research, library privileged acts under existing law, and fair uses. Google is about to launch Google Editions through which it will sell books "in the cloud" to individual consumers. During the pendency of a ruling on the fairness of the settlement, Google is almost certainly signing up more partners for its Google Editions initiative, including for books that are out-of-print. The status quo, in other words, is similar in some key respects to the regime envisioned by the settlement.

Given the strength of the opposition to the settlement from the DOJ, the governments of France and Germany, and hundreds of other authors and publishers, it seems likely that Judge Chin will disapprove the GBS settlement agreement. Some objectors will certainly appeal if the settlement is approved by Judge Chin, and I predict the Second Circuit would reverse a straight-out approval. Perhaps Judge Chin is trying to develop a plan for possible changes to the settlement that might make it more approvable. It is, however, far from clear that the settling parties will accept significant changes to the settlement terms. DOJ, for instance, has suggested that the forward-looking commercial regime envisioned by


62 I have elsewhere argued that the GBS settlement raises many serious concerns. See, e.g., Pamela Samuelson, The Google Book Settlement as Copyright Reform, WISC. L. REV. (forthcoming 2011) (arguing that the GBS settlement should not be approved); Pamela Samuelson, Google Book Search and the Future of Books in Cyberspace, 94 MINN. L. REV. 1308 (2010)(discussing several categories of problems with the GBS settlement).

63 The Second Circuit has been reluctant to approve class action settlements insofar as they release claims against the defendant that were not presented in litigation unless the claims arise out of the identical factual predicate as that being litigated. See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 107 (2d Cir. 2005). The GBS settlement does not satisfy this standard. Second DOJ Statement of Interest, supra note 41, at 11.
the settlement might be approves as long as it is available on an opt-in basis, but a lawyer for Google stated at the fairness hearing that there would be no settlement unless the opt-out feature is retained (that is, the settlement’s license will allow Google to commercialize all out-of-print books unless rights holders show up to direct it not to do so).\textsuperscript{64} Disapproval of the settlement may well give rise to a push for legislation to address issues presented by the settlement, as none of the parties to the settlement seems hungry for further litigation.\textsuperscript{65}

Peters’ retirement as Register of Copyrights may limit the role that she will play in any future legislation that Congress takes up on orphan works, library privileges, print-disabled access to copyrighted works, and other post-GBS settlement matters. But we have her to thank for her vision and courage. Others with less courage or more willingness to defer to copyright industry players, such as the Authors Guild and AAP, might have bowed to the seeming inevitability of the GBS settlement, but Marybeth Peters stood up for the rights of authors to control decisions about which firms are entitled to commercialize their works and she further stood up for congressional prerogatives to make copyright law and policy.

Congress may eventually decide upon an extended collective licensing regime for mass digitization projects, akin to the licensing regime envisioned in the GBS agreement.\textsuperscript{66} Under such a license regime, Google and other organizations might get licenses to engage in mass-digitization of copyrighted works owing to the market failure arising from the extraordinarily high costs of doing rights clearances on a book-by-book basis. Under such a license, revenues might flow from the digitizers to rights holders, with some set aside for those who have yet to come forward. This might achieve some of the objectives of the GBS deal, but without the risk of monopoly that the GBS deal poses and without the abuse of the class action settlement rules that proponents of the GBS deal argue that the courts should accept. Congress may not be the ideal legislature that our high school civics lessons might have imagined, but it is important to our democratic system to believe that it can craft legislation that will promote the progress of science, as the Constitution directs Congress to do when enacting copyright rules. The progress of science would be furthered by the mass digitization of the cultural heritage of humankind that is embodi-

\textsuperscript{64} Transcript of the Fairness Hearing, supra note 56, at 125-26, 146-47.

\textsuperscript{65} I have elsewhere explained why I believe the Authors Guild case is unlikely to be litigated to final judgment on the merits of the plaintiffs’ complaint. See Samuelson, Future of Books, supra note 62, at 1366-67.

\textsuperscript{66} See, e.g., Thomas Ris & Jens Schavaso, Extended Collective Licensing and the Nordic Experience – It’s a Hybrid but Is It a Volvo or a Lemon?, 33 Colum. J. L. & Arts 411 (2010).
ied in the books of major research libraries and by wider public access to this heritage. It would be tragic to lose the opportunity of achieving the positive vision of the GBS initiative because of copyright obstacles, but it would also be tragic to hand off this heritage to one company with too few checks and balances on its exploitation of this digital resource.