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COMPETITION AND COMMERCE IN DIGITAL BOOKS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

SEPTEMBER 10, 2009

Serial No. 111–31

Printed for the use of the Committee on the Judiciary

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CONTENTS

SEPTEMBER 10, 2009

Page

OPENING STATEMENTS

The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 1
The Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Committee on the Judiciary 1
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary 2

WITNESSES

Mr. David C. Drummond, Senior Vice President of Corporate Development and Chief Legal Officer, Google Inc.
Oral Testimony 4
Prepared Statement 7
Mr. Paul Misener, Vice President of Global Policy, Amazon.com
Oral Testimony 15
Prepared Statement 17
Mr. Marc Maurer, JD, President, National Federation of the Blind
Oral Testimony 22
Prepared Statement 23
Mr. John M. Simpson, Consumer Advocate, Consumer Watchdog
Oral Testimony 26
Prepared Statement 28
Mr. Paul Aiken, Executive Director, Authors Guild
Oral Testimony 32
Prepared Statement 34
Ms. Marybeth Peters, Register of Copyrights, U.S. Copyright Office
Oral Testimony 64
Prepared Statement 66
Mr. Randal C. Picker, Paul H. and Theo Leffmann Professor of Commercial Law, University of Chicago Law School
Oral Testimony 76
Prepared Statement 79
Mr. David Balto, Senior Fellow, Center for American Progress
Oral Testimony 111
Prepared Statement 113

APPENDIX

Material Submitted for the Hearing Record 163

COMPETITION AND COMMERCE IN DIGITAL BOOKS

THURSDAY, SEPTEMBER 10, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Watt, Lofgren, Jackson Lee, Waters, Cohen, Johnson, Quigley, Sherman, Gonzalez, Schiff, Smith, Coble, Goodlatte, Lungren, and King.

Staff Present: (Majority) Perry Apelbaum, Staff Director and Chief Counsel; Christal Sheppard, Counsel; Brandon Johns, Staff Assistant; (Minority) Sean McLaughlin, Chief of Staff and General Counsel; and Stewart Jeffries, Counsel.

Mr. CONYERS. Good morning, ladies and gentlemen. We are going to start some opening statements. Time is of essence here.

We come here to discuss among ourselves "Competition and Commerce in Digital Books." The Google Books settlement represents, without exaggeration, one of the most innovative developments since the press.

I am going to start off by asking Zoe Lofgren, also from Silicon Valley, to just take a couple of minutes to get us off. And then I will turn to the distinguished Ranking Member. The Chair recognizes Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. And I thank you for holding this hearing today.

The future of literacy does, I think, indeed rely a great deal on how we get right digitizing written material. And, in fact, we probably wouldn't be here today if the Congress had been successful in dealing with the orphan works measure.

As you know, Mr. Chairman, I was a coauthor in working with Howard Berman. We made a very grand effort to do something in that regard. It was brought to our attention by Justice Breyer in the Eldred case. And it seemed to me the fact that potentially a majority of the written works in this country are unavailable to the culture is a problem—is a problem. And that is why we worked so hard to try and come up with a solution. And we failed. We failed.

We could not get parties—you know, the fact that orphan works are not being exploited tells us some things, which is: The rights holder, whoever he or she was, decided they couldn't make money on it. But as soon as the prospect of money was in the air, no one

wanted to do a deal. And so I think we are here today because somebody in the private sector decided to seek forgiveness rather than permission. And that, in a way, is what this settlement is. It is a resolution of the rights that we, the Congress, could not accomplish—could not accomplish.

And so I think that there are legitimate issues that we need to look at. I think this hearing is important because of that. But I am also mindful that, as with all antitrust and copyright issues, there are competitors who sometimes try and seek a business advantage out of a dispute. It is important for us—you know, and that is fair. This is America; people can do that—but to separate out that kind of squabbling from the actual legal issues that are before us.

Now, I did want to mention one thing because it is something that has been overlooked, but I am a believer in the utility, at times, of class action lawsuits. I have been a critic of coupon settlements, but there are times when the class is so big that you have to actually group them together. And I am very disturbed by any criticism that would eliminate rule 23, which is an undercurrent in some of this. That is not on the table, as far as I am concerned, Mr. Chairman. And I know that you have felt that way in the past. So I just wanted to state that.

And in this final matter, I just want to say, I am quite distressed that we only received testimony from the Copyright Office this morning. There is a rule that the testimony has to be here at least 24 hours in advance. I can recall when Mr. Sensenbrenner was Chairman that he refused witnesses to testify if their testimony was not here. I had looked forward to reviewing the testimony, and I didn't have the opportunity to do that. So I just think, you know, the office is not some newbie. It is not, you know, some volunteer. And it is just scandalous, really, outrageous. And I am ashamed that the government did that.

With that, Mr. Chairman, I am not going to speak further because we have a lot of witnesses and we want to get through them this morning. I appreciate your hearing, and I appreciate all those who are here as witnesses. Thank you.

Mr. CONYERS. Yes, only eight witnesses.

The Chair is now pleased to recognize the distinguished gentleman from Texas, the Ranking Member, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Today's hearing allows the Committee to explore the intersection of two areas of the Committee's jurisdiction, antitrust and copyright.

In September 2008, copyright owners and Google reached a settlement agreement in a class action lawsuit concerning Google's digitization and use of millions of books in the Google Book Search program. The District Court for the Southern District of New York has scheduled a hearing for October 7, 2009, to review and possibly approve the terms of this settlement agreement.

Under this settlement, copyright infringement claims against Google for the unauthorized digitization of millions of books would be dropped and Google would be allowed to make commercial use of books it has scanned that were published prior to January 5, 2009. This includes offering individual books for sale and subscriptions to the entire digital collection of scanned books.

In return, Google will share proceeds from use of the works with copyright owners. To facilitate the distribution of these royalties, the settlement calls for the creation of a Book Rights Registry that will serve as a collecting society for affected copyright holders.

Google Book Search is a novel and innovative way for people to acquire knowledge. Google has made accessible literally millions of books that were out of print or otherwise largely unavailable to readers and researchers.

The Google Books settlement also anticipates the creation of a Book Rights Registry that may be useful in resolving the so-called orphan works program. In the past, the absence of such a registry has been considered a stumbling block to the ultimate resolution of this matter.

But there are countervailing concerns. Some complain that Google was able to negotiate this agreement only after they allegedly infringed the rights of tens of thousands of copyright holders. Without that action and the litigation that led to the subsequent certification of a class, we would not be here today.

The class action system, by its very nature, can only address Google's actions. Thus, the benefits that Google would obtain through this settlement are not readily available to any of their actual or potential competitors in book search and sales. As a practical matter, the only way a competitor would be positioned to benefit from a similar arrangement would be to follow the same course of action pursued by Google: in other words, divest risk liability by digitizing massive amounts of copyright protected works without first receiving the express permission of the authors or other rights holders. Even then, there is a question as to whether the competitor would receive the same settlement terms as Google.

From a public policy perception, it is unclear whether the Google Book Search settlement is the ideal way to address the orphan works issue. Congress had been wrestling with this issue for years, and the settlement agreement at issue today is but one, and not necessarily the right, solution.

There is also the question of whether the Book Rights Registry between the publishers and authors would facilitate price-fixing of works not just to Google but to all book resellers. This would undoubtedly be a bad deal not just for Google and its competitors but for consumers as well.

Mr. Chairman, these are a few of the questions raised by this settlement, and I think it is very helpful today to have such a balanced panel of experts address these concerns. And I thank you for holding the hearing.

I will yield back.

Mr. CONYERS. Thank you for your thoughtful introductory set of comments.

For my part, I would welcome this hearing and the eight participants by observing that it is a good thing to provide millions of Americans access to published works that otherwise wouldn't be available to them. A library will be available in every household with an Internet connection. This could be the greatest innovation in book publishing since the Gutenberg Press.

The heart of the matter is that my primary concern is that, because Google reached this settlement, they now have exclusive ac-

cess to orphan works. However, this can be remedied by legislation that would include others. And I have indications from that organization that they would support such a remedy.

The fact is that Google is in this position, in my view, not because they have engaged in predatory or anticompetitive behavior but because they have, to date, built a better mousetrap in the eyes of mousetrap purchasers.

The settlement has, in my view, been fair with copyright owners. It explicitly gives copyright owners the ability to determine the type and cost of access for consumers. As copyrighted books become part of the Internet, we need to be careful. It is important that others who wish to compete with Google Books adhere to the same type of copyright protections that Google has agreed to.

For some books, the rights holder cannot be found. These are "orphan works." For other works, the rights holder can be found but it requires some effort. We must ensure that the law continues to create incentives to make best efforts to find the rights holders of these books.

We also should make sure that access is provided to the sight-impaired and others with disabilities, as this settlement does.

Now, are there any other Members in the Judiciary Committee that have a burning desire to make a 1-minute statement?

None. And so we will now turn to our list of witnesses. And what a group we have.

We welcome senior fellow from the Center for American Progress David Balto. We welcome Mr. Randal Picker, the Paul H. and Theo Leffmann professor of commercial law, University of Chicago. And of course the register of copyrights for the United States Copyright Office, we welcome back again Ms. Marybeth Peters. We have also the executive director of the Authors Guild, Mr. Paul Aiken. And then we have John Simpson, consumer advocate, Consumer Watchdog; from the National Federation of the Blind, its president, Dr. Marc Maurer; the vice president of global public policy, Amazon.com, Mr. Paul Misener.

And we begin with David Drummond, who will be our first witness. He is the senior vice president of Google's corporate development and its chief legal officer. He has been with Google since 2002, worked as outside counsel, and is no stranger to the Judiciary Committee.

We will accept into the record all the witnesses' statements, including yours, Mr. Drummond. And we welcome you to begin our discussion this morning.

TESTIMONY OF DAVID C. DRUMMOND, SENIOR VICE PRESIDENT OF CORPORATE DEVELOPMENT AND CHIEF LEGAL OFFICER, GOOGLE INC.

Mr. DRUMMOND. Well, thanks so much, Chairman Conyers. It is indeed an honor to be back. Ranking Member Smith, Committee Members, thanks for having me here to discuss how the Google Books settlement will benefit the reading public and spur competition in the emerging electronic book industry.

Imagine if a student living in a rural area or inner-city could go to a local public library and read from millions of books in the combined collections of some of our Nation's greatest universities and

libraries—the University of Michigan, University of Texas, Stanford, the New York Public Library—or if a blind student suddenly could access millions of digital books to unlock knowledge foreclosed from the visually impaired today. Then consider the author, whose life's work, a book no longer in publication, suddenly becomes available online so anyone could find it, buy it, and read it.

That is why I am excited to be here: Because these and other opportunities will be created by the settlement of a lawsuit brought against Google by authors and publishers.

Now, this settlement is the result of 3 years of painstaking negotiation, but I am proud of what we have achieved. The settlement will create an educational, cultural, and commercial platform to expand access to millions of long-forgotten books for anyone in the United States. It will enrich our country's cultural heritage and intellectual strength.

As I will explain, the product we provide today is fully compliant with copyright law. The settlement will let us improve our product in ways that will expand access for the public, provide rights holders choice and compensation, lower barriers to entry in the electronic book market, complement orphan works legislation, and preserve Congress's role in setting copyright policy.

Now, there has been a lot of talk that our scanning efforts originally violated copyright law. I reject that, and I reject it wholeheartedly. We strongly believe that we would have won the case on the basis that copying for the purpose of indexing, which is the same thing we do on the Internet, is a fair use under existing precedent.

And let me be clear about one thing, because there is some confusion. It is an important point. Although we have scanned books, if it is an in-copyright book, we are not displaying any more than a few lines of text around the search term. We call this a snippet view. And we believe that just like Web search, indexing and showing snippets does not violate anyone's copyrights.

Now, if you are on Google Books today and you see more than a short snippet, you are looking at a book that is directly licensed to us from one of our 30,000 publishing partners or you are looking at a book that is in the public domain.

Now, since 2004, Google has scanned more than 10 million books: 2 million public domain books and 2 million from our partners. The other 6 million are still subject to copyright protection but largely out of print, meaning that there is no current market or easy access to these books.

The settlement dramatically expands access to these out-of-print books, and it's this new access that makes the settlement a far better outcome for the parties and for society than if either of us had won the lawsuit.

First, rather than showing just snippets, we will now be able to show a preview of up to 20 percent of the book. This will let users browse books and read a few pages, as they do in bookstores today.

Second, Google can offer for sale a digital version of the book, with 63 percent of the revenue going to the rights holder. We don't sell books today, so we are entering this with absolutely zero market share.

Third, we can provide an institutional subscription for colleges, libraries, and other organizations. Small colleges are eager to use the subscription to attract faculty and students and level the playing field with larger institutions. And we will give every public library across the country free access to our database at one on-site computer.

Now, at any time, a rights holder can direct Google to turn these displays off, set the purchase price itself, or make other granular choices.

Out-of-print books stopped generating revenue for authors and publishers long ago, so no incentive exists to resolve the complicated question of who owns the digital rights. And it is not simply a matter of locating the author. Decades-old contracts may or may not have included digital rights. Long ago, communications may have been disputed, and clearing the rights often costs more than the economic value of the out-of-print work. The settlement will change that. It creates a registry to locate rights holders, distribute revenue, resolve disputes, and license works to other providers besides Google.

Some claim that the settlement will harm competition, but the agreement is nonexclusive in every possible respect and actually lowers barriers. Let's be clear about this: Any search engine that wants to scan and index in-copyright books to compete with us can already do that as a fair use. And any book retailer who wants to scan books can make deals with our library partners and do what we did.

So, many of the critics confuse orphan works with the real problem, which is rights clearing. It is not that the book is orphaned; it is that the two parents, sort of, can't work out who owns it, and it is not really cost-effective to try. The settlement doesn't make it any harder for anybody to do this. It actually makes it easier.

Now, there might be a small portion of books that are truly abandoned, and here the settlement complements orphan works legislation. Past measures didn't really address the rights-clearance issues, which really are the lion's share of the problem. Years ago we called for effective orphan works legislation, as the Chairman alluded to. We will continue to support these efforts. And we believe that the settlement makes this legislative task easier, as we have funded a private-sector initiative and a mechanism to clear rights that actually reduces the scope of the problem.

Now, let me clarify one last thing. The settlement of private litigation does not take away Congress's power to set copyright policy. Critics may dislike the use of class actions in copyright cases, but it is the judge's role to apply rule 23 to assure a fair process for the class members. And as a means to redress private litigation in the U.S., the settlement is consistent with all of our international treaty obligations, which is a view that is confirmed by the leading scholars.

While much time and energy has been spent on the settlement, it is not really Google's vision for the future of digital books. It is kind of the past. We are partnering with bookstores, publishers, and device-makers to develop an open platform that allows readers to find and purchase digital books from any device. It is this open platform and the availability of the newest titles that is going to

drive competition and commerce with digital books, not the out-of-print books.

Thanks very much, Mr. Chairman.

[The prepared statement of Mr. Drummond follows:]

PREPARED STATEMENT OF DAVID DRUMMOND

Google

Testimony of David Drummond
Senior Vice President of Corporate Development and Chief Legal Officer, Google Inc.

Before the House Committee on the Judiciary
Hearing on "Competition and Commerce in Digital Books"
September 10, 2009

Imagine if a student living in a rural area or inner city could go to her local public library and read from millions of books in the combined collections of some of our nation's greatest libraries, including the University of Michigan, the University of Texas at Austin, Stanford University, the University of Wisconsin-Madison, and the New York Public Library. Or if a blind student suddenly could access millions of digital books, using a refreshable Braille reader to unlock knowledge foreclosed from the visually impaired today. Then consider the author whose life's work, a book no longer in publication, suddenly becomes available online so that anyone could find it, buy it and read it.

That's why I am excited to be here today – because these are the types of opportunities that will be created by the settlement of a lawsuit brought against Google by authors and publishers. If approved by the U.S. District Court for the Southern District of New York, the settlement will create an educational, cultural and commercial platform to expand access to millions of books for anyone in the United States, enriching our country's cultural heritage and intellectual strength in the global economy.

As explained below, we believe Google Books is fully compliant with copyright law today, and, if approved, the settlement will expand access for the public while providing rightsholders choice and compensation; lower barriers for other entrants; complement orphan works legislative efforts; and preserve Congress's role in setting copyright policy.

But this settlement is not what is driving our digital books efforts. The world of online books is changing in far more revolutionary ways. From the Kindle to the cloud, companies are racing to offer new ways for readers to access digital books. Despite its cultural significance, our settlement is about the past – it only covers books published before January 5, 2009, most no longer in publication and with low commercial demand. It's the newest titles and books yet to be written that will drive competition and commerce for digital books, not out-of-print books held in libraries.

The Evolving Book Industry

The vast majority of books sold in the United States are in print. The $25 billion retail market skews heavily toward new releases, with out-of-print representing only two to three percent. Even used bookstores sell mostly in-print works. So don't let anyone fool you that the future of books depends on what happens with the settlement of a lawsuit over out-of-print library books.

What we anticipate will revolutionize the way some people read books is an open cloud-based platform, where users buy and store digital books in online personal libraries accessible from any Internet-connected device. Amazon's Kindle approach links its online bookstore with its hardware device in a proprietary system, where users buy their books and device from a single source – Amazon. We are partnering with bookstores, publishers, and device manufacturers to develop an open platform. In this open platform, readers can find and purchase digital books from any bookstore and read them on any device, including laptops, mobile phones, and e-readers from multiple vendors. Smaller, independent bookstores, such as BookPeople in Austin, will benefit from an open platform that helps them stay relevant as book consumption moves online. Ours and other retail syndication efforts may be critical for consumers to retain a diverse range of options when shopping for books.

Google does not currently sell books. We are a new entrant, starting with zero market share. We're excited that the settlement will let us sell out-of-print books online through an open platform to anyone in the United States. Indeed, we believe it may be the development of this open platform, rather than concern about the marginal economics of out-of-print works, that underlies corporate opposition to this agreement. After all, in a market driven overwhelmingly by new titles, sales from the settlement will be a tiny fraction of overall book sales. We didn't settle the lawsuit thinking it would catapult us to be the next Amazon – rather, opening up access to these books helps fulfill our founders' vision for our digitization efforts.

Google Books – Origin and Product Features

Larry Page and Sergey Brin, Google's founders, have long believed in the power of unlocking information contained in books. Their interest in making digital libraries accessible dates back to 1996 when they worked on the Stanford Digital Library Technology Project as graduate students.

When Larry and Sergey approached me with the bold vision of doing for books what we do for the web – namely, making copies and indexing the text to make it searchable – as the company's lawyer I was a little taken aback. But as I thought about it, it made perfect sense. Today it is understood that the act of copying the web to index it is a fair use under our nation's copyright laws. Fair use is the very reason search engines exist. Well, the same fair use principles apply here – we make copies of books, index them, and only show users a few lines of text if the book is still under copyright protection. If you have used Google Books and seen more than short snippets, then you were looking at a book that was licensed to us or is in the public domain.

Since we started in 2004, we have scanned more than 10 million books. We get the books in two main ways. First, publishers partner with us on a non-exclusive basis to give us licenses to display and preview often their newest and commercially valuable titles. We have more than 30,000 publisher partners, representing more than two million books. For example, we partnered with the University of Michigan Press to make available a 2001 book entitled *Before Motown: A History of Jazz in Detroit 1920-1960*, for which users can browse several pages online. Our "Partner Program" was not the subject of the lawsuit or settlement.

The main way we get out-of-print books is from 42 global library partners, including 30 major institutions in the United States. Libraries have long been entrusted to preserve information spanning the range of human knowledge. Our partners have enriching historic collections, such as the Nettie Lee Benson Collection at the University of Texas comprising rare books that chronicle the history, politics and society of Latin America. Our library agreements are non-exclusive, and several participating libraries partner with other digitization efforts.

Of the 10 million books, we estimate that at least two million are clearly in the public domain and not part of the lawsuit. These include books published before 1923. For these books, when a user enters a relevant query we display the entire text. Users can freely download the book in multiple formats. Making public domain texts discoverable online is already advancing education and scholarly pursuits. Tim Barton of Oxford University Press describes a Columbia University classics class assignment, in which 70 percent of the undergraduates cited a book published in 1900 that was not on the reading list and long overlooked in classics scholarship.

That leaves six million books that are likely still under copyright protection but mostly out-of-print, although not all orphaned. For these books, we currently show users three small snippets of text around the search term, often just a few lines from the book. This snippet view is not particularly useful to our users – they cannot replicate the experience in physical bookstores, where people tend to pick up books and browse through a few pages before buying. Google Books also provides links to show users where to locate the book in a library or buy it from retailers. We drive traffic today for free to Amazon, Barnes & Noble, used book stores, and other booksellers through these links.

Even with our limited uses of library scans and restricted snippet view, in 2005 authors and publishers sued us in separate lawsuits, with the authors filing a class action. The lawsuits essentially claimed copyright violations for scanning, indexing and displaying portions of in-copyright works. We strongly disagreed then, and we still disagree today. Nothing about the settlement changes our firm belief that copying for the purpose of indexing is a fair use that is encouraged by existing copyright law precedents. Fair use is critical to the way web search and book search work, and Google vigorously defends fair use in this and other contexts.

Settlement Expands Access to Locked-Up Information and Benefits Copyright Owners

As the lawsuit progressed, at the authors' request, we sought to find common ground among authors, publishers, libraries and Google to expand distribution channels and make out-of-print books more accessible. In October 2008, we announced a settlement that will:

- Allow anyone, anywhere in the U.S. to preview out-of-print books and purchase an online version, right from their computer;
- Provide every public and university library across the U.S. free viewing of millions of books at a designated computer, plus the ability to purchase an institutional subscription;
- Provide the print disabled and visually impaired unprecedented access to the written literary record;
- Create new opportunities for authors and publishers to sell their books; and

- Enhance innovation and competition in digital books by creating a non-exclusive registry to clear rights, collect revenue and license works efficiently to Google and others.

The Reading Public – Google settled the case mainly so we can provide readers greater access to books. Rather than continue showing only snippets of out-of-print books, the settlement will allow us to display previews of up to 20 percent of the book, sell digital versions and provide access to institutional subscriptions, unless the rightsholder instructs us otherwise. With strong privacy protections, users will be able to browse and buy digital copies of millions of books that otherwise might be left behind in the digital age.

Out-of-print books are not sold through most bookstores and typically are found only in a limited number of research libraries, making access difficult or time consuming for much of the population. Expanded access will broadly benefit readers, researchers, and students, but it will be felt most tangibly by those who historically have had the least access to books, particularly those living in under-funded areas or with a disability that hinders traveling to, or reading from, their local libraries. Regardless of geography, income or physical disabilities, the settlement will greatly expand access to the world of knowledge contained in our nation's largest libraries. According to Wade Henderson of the Leadership Conference on Civil Rights, "[f]ailure to approve the settlement would be tragic, in that it would impede meaningful access to vital information for many of who have been denied for far too long."

Libraries and Academic Institutions – The settlement will let Google sell an institutional subscription enabling libraries, universities and other organizations to offer access to millions of books from the world's leading libraries. Expanded access to these vast collections will serve as an important equalizer. Historically black colleges and community colleges are eager to attract faculty and students and level the playing field with larger institutions. The institutional subscription will be priced to assure a market rate for the rightsholder and broad access by the public. Under the settlement, public libraries and non-profit higher education institutions can obtain free access to the institutional database at one on-site computer.

Scholars and Researchers – Many scholars and librarians support our work as complementary to their efforts to make books accessible in an increasingly digital society. Gregory Crane, who runs the Perseus Digital Library Project to preserve Greco-Roman literature and culture, believes the settlement "is a watershed event and can serve as a catalyst for the reinvention of education, research and intellectual life." Google also will provide $5 million to create two research centers for computational research across the corpus.

Disability Access – Millions of print-disabled Americans will receive revolutionary new access to books through the settlement. As CNET reported earlier this month:

> "Blind people ... have access to a special library run by the Library of Congress that converts print books into formats readable by the visually impaired, but that library – in existence since 1931 – only has 70,000 texts, said Chris Danielsen, director of public relations for the National Federation of the Blind. If the settlement is approved in October, it will give 'print-disabled' people 'access to more books than we have ever had in human history,' he said."

After the settlement, millions of out-of-print texts will be accessible via screen enlargement, screen reader, and refreshable Braille display technologies. The National Federation of the Blind believes this will be pivotal in shifting the current inaccessible e-book archetype to one that assures equal access. For the first time, the print disabled will access our printed heritage to a degree comparable to that enjoyed by other Americans.

Authors and Publishers – The settlement provides a means to locate and compensate authors whose works might otherwise never be distributed online, while preserving rightsholder choice. Under the settlement, the rightsholder is in control, regardless of whether the book is in print or out of print. At any time, the rightsholder can direct Google to turn displays on or off, start or stop selling digital versions, or not scan particular books. Rightsholders will receive 63 percent of revenue earned from purchases, advertising, and subscription sales. For consumer purchases, rightsholders can set their own price (including a price of zero, as some authors simply want to give away their older books), or they can choose to have Google set a competitive price using an algorithm. The registry will provide authors a low-cost mechanism to resolve ambiguity over digital rights and license works to other providers in addition to Google.

Settlement Lowers Barriers for Other Entrants

We are the only company to date that has attempted to digitize the vast in-copyright collections of U.S. libraries. Even so, nothing in the settlement prevents anyone from doing what we have done. The agreement is non-exclusive in every possible respect, and the creation of the registry will make it easier for other companies to enter the market. That is why several leading antitrust scholars have praised the settlement's pro-competitive benefits. Indeed, e-reader manufacturer Sony Electronics believes the settlement "will foster competition, spur innovation, and create efficiencies that will substantially benefit consumers."

Search Engines – Any search engine that wants to scan and index in-copyright books can already do so. It is understood that scanning for the purpose of indexing is fair use. The settlement therefore has no affect on the ability of other search engines to compete by scanning and indexing in-copyright books, whether orphaned or not. Microsoft announced its own digitization initiative in 2005 for public domain and partner books. Three years later, after scanning 750,000 books, Microsoft shut down the program for financial reasons, preferring to crawl the repositories created by others instead. After the settlement, just as before, search engines no doubt will continue making their own business decisions about digitization.

Book Retailers – Next is the question of whether the settlement harms competition for book sales. Because the settlement largely deals with out-of-print works, it does little to change the state of competition for new, in-print titles, which comprise 97 percent of the market. Through Google Editions, we will work with publishers to offer digital versions of in-print books through multiple retailers. Our open retail platform will expand distribution in a way that is clearly beneficial for the public.

Competition for out-of-print books is restrained for everyone. Unlike newer titles, as a practical matter it is nearly impossible to clear ownership rights to millions of older, out-of-print books. It's not simply a matter of locating the author. A tangle of legal uncertainties apply, including

decades-old contracts, different copyright regimes depending on when and where in the world the book was published, whether the book was registered or renewed with the Copyright Office, and whether the inserts, illustrations or images have separate copyright holders. The right to publish the hard copy may or may not include digital rights, an unresolved legal entanglement between authors and publishers. Long ago communications between author and publisher may have left either one with the sole ability to license the work. Facing the threat of statutory damages liability (as much as $30,000 per work) for making a mistake even if the rightsholder is not harmed, often neither author nor publisher is willing to commit that they can license the work for online use. The cost of ascertaining for certain who has the rights to an out-of-print book likely exceeds the economic potential of any given book. The result is that these books, which collectively represent much of our nation's printed cultural heritage, have remained inaccessible.

Nothing in the settlement makes it any more difficult for others to license these books. Rather, the settlement is structured to make it easier for anyone – including Google's competitors – to clear rights. Google is funding a non-profit registry, controlled by authors and publishers, to resolve ownership disputes. As rightsholders come forward, information about what books were claimed and who claimed them will be publicly available, thereby lowering the costs and risks for other providers. Google's competitors can use this information to avoid scanning books with limited market potential and focus on commercially valuable works. Later entrants also can take advantage of Google's efforts to identify books in the public domain. Moreover, while rightsholders retain licensing of their own works, they also can authorize the registry to license to third parties to the extent allowed by law. Many books that were once difficult for anyone to license will become books that are easy for everyone to license.

If within ten years the registry licenses a significant number of unclaimed works to another distributor on more favorable terms (less favorable for the rightsholder), Google can receive equal treatment. This simply protects against others free riding off the investment of Google in creating the registry, and reflects the fact that, unlike Google whose terms are fixed through the settlement, competitors can negotiate terms based on future market realities. Moreover, the provision does not apply to claimed books, which hold the lion's share of economic value. Importantly, it does nothing to reduce the registry's incentives to license our competitors. If a competitor offers the registry a better deal, the registry has every incentive to take it, and the provision doesn't apply. While this clause has generated much controversy, the structure is relatively commonplace and understood to be pro-competitive in contexts like this.

Settlement Reduces the Problem of Orphan Works for Everyone

Many people have expressed concern about the problem of "orphan works," a concern we share. We have long supported an effective orphan works legislative solution, and we will continue to do so. This settlement is a strong complement to, and not a substitute for, orphan works legislation.

An "orphaned" book is an abandoned book. Many out-of-print books, however, are not abandoned but instead have two parents whose ownership rights are uncertain. We call these books "neglected" books. Data points indicate that orphaned books are at most about 20 percent of out-of-print books, and likely would be lower with a financial incentive and efficient

mechanism for rightsholders to claim books and clear rights, which the settlement provides. Even among the orphans, a substantial portion may be commercially insignificant or miscellaneous works, such as a transistor handbook from 1966 that we scanned and is now likely abandoned.

Over time, the structure of the settlement will reduce the orphan work problem for everyone. The settlement will create a registry whose job it is to go out and find rightsholders. It also will create a financial incentive for rightsholders to come forward. And it creates a database that identifies these rightsholders, making it easy for other providers to find them and obtain a license for their books. We believe over time a significant number of works will be claimed. Ideally, the registry would eliminate orphan books altogether. But realistically some small portion of rightsholders will still be unable to be found, resulting in a true abandoned book, or orphan.

The settlement will enable Google to make certain uses of abandoned books. So far we are the only company that has sought to digitize in-copyright, potentially orphaned books. We believe anyone who wants to re-use abandoned works should have a fair, legal way to do so. In our view, the settlement helps here too.

To the extent that other providers want a legal framework to re-use orphaned books (without having to defend against a lawsuit like we did), Google would support a legislative solution. The settlement provides a working model – a private sector incentive and mechanism to clear rights – that will reveal the scope of the orphan problem and spur legislation. Indeed, past legislative efforts have contemplated and encouraged private sector initiatives to build rights databases like the one Google will fund, which the Copyright Office called "indispensable" to solving the orphan works problem.

Some scholars have taken a well-intentioned view that it is preferable to pass orphan works legislation before letting Google make abandoned books more accessible. This would mean we all wait for enactment of a broader bill that addresses not only orphan works but also rights clearance challenges for neglected works. In the meantime, instead of having multiple potential providers of neglected books and at least one provider of abandoned books, we will have no providers of any of these books. Moreover, absent the settlement or a government-funded registry, it remains unclear whether the private sector will fund the necessary databases.

For truly orphaned books, why is one provider now better than none? Because one company spending the resources to make orphaned books more accessible greatly enriches our cultural heritage and expands the progress of human knowledge. Every day, older works in libraries are being taken off shelves and sent to storage facilities. Given the opportunity to revive access to these books for the public in a way that harms neither competition nor commerce, nor the chance of enacting future legislation, I would hope the choice is obvious.

The Settlement in Context – Congress Continues its Legislative Role

The settlement represents the resolution of a long and hard-fought litigation among multiple parties with divergent interests. The suggestion that the settlement usurps the role of Congress to set copyright policy because the suit took the form of a class action is flatly wrong. The

settlement does not establish new copyright law; it is not even a determination on the merits of copyright law. All the settlement represents is the means by which the class of rightsholders decided to resolve the lawsuit.

Critics may dislike the use of class actions in copyright, but Congress itself created class actions through Rule 23 of the Federal Rules of Civil Procedure and has not restricted their use in copyright cases. Copyright class actions are not uncommon, and have been settled through similar remedies. The class action process allows rightsholders to object to the settlement or opt out. Indeed, this settlement will let rightsholders control the use of their books even after the settlement takes effect. Moreover, as the means of redress for private litigation in the United States, the settlement is fully consistent with international treaty obligations – a view confirmed by Berne Convention scholar Sam Ricketson.

I've heard many suggestions for improving the settlement, some diametrically opposed. But the Judge's role is to approve or reject. If rejected, the parties likely return to their litigation stances, arguing over snippets and indexing, losing this opportunity to open up online access to information trapped in out-of-print books.

It would be unfortunate if this hearing devolved into hypothetical debates over class action law in the copyright context, postulation of the Platonic ideal of orphan works legislation, or simply a forum for competitors to argue over what is estimated to be less than three percent of the commercial market for books. Something far greater for human knowledge is at stake.

The very purpose of Article I, Section 8, Clause 8, the copyright clause, of the Constitution is to "promote the Progress of Science and useful Arts." As reading moves online, and new generations of students tap into centuries of learning from their laptops, users will find knowledge they greatly value but did not even know existed. While this may not generate significant commercial value, it will elevate the marketplace of ideas. The settlement represents the progress of science to tackle copyright challenges and help ensure millions of out-of-print books do not fade into oblivion. To oppose this settlement means depriving the public of learning, and punishing the parties to a lawsuit for resolving their private litigation in innovative and groundbreaking ways.

Mr. CONYERS. Thank you.

Now, sitting amicably next to Mr. Drummond is the vice president of Amazon.com's global public policy. And for nearly 10 years, he has been doing that work and is responsible for formulating and representing the company's public policy positions worldwide.

We are glad that you are here, Mr. Misener. You may proceed.

TESTIMONY OF PAUL MISENER, VICE PRESIDENT OF GLOBAL POLICY, AMAZON.com

Mr. MISENER. Thank you very much, Mr. Chairman. I am also very happy to be here. And I appreciate you and Mr. Smith holding this hearing and inviting me to testify.

I was going to read my written statement, but since that is already part of the record, I think it probably is more important that I take on one particular issue in my 5 minutes.

First of all, we fully appreciate the value of scanning books and making them more widely available. We began scanning books before Google did. And, to date, we have scanned 3 million books. Three million books we have scanned.

The difference is, and probably the only significant difference between their book-scanning project and ours, is we first sought permission from the rights holders. We went to the rights holders and, one by one, negotiated deals with the rights holders to be allowed legally to scan these books.

It has been said repeatedly that this is a nonexclusive arrangement, that the proposed settlement would somehow not be exclusive, would not give Google exclusive rights over competitors. That simply is not true. The proposed settlement, if approved, would give Google exclusive liability, free monopoly rights over millions of works—exclusive.

Now, this exclusivity has two principal components, and I thought it would be most helpful if I explained how this exclusivity arises.

One is the release from liability. Now, clearly, as any settlement of a class action would do, it releases Google for past actions. But this settlement goes much further. It releases Google prospectively for future infringement. It even, as Mr. Drummond outlined, releases Google for future infringement using business models that they haven't even used yet. This is remarkable for a class action settlement, to say the least.

The other aspect of exclusivity is the composition of the corpus, what body of works are available to Google with this exclusive release of infringement liability.

Well, first, the corpus initially available to Google is essentially everything, right? It is U.S. books in copyright published before January of this year. It is all that, everything minus a few opt-outs. There are opportunities for rights holders to either opt out of the proposed settlement, so they can pull their works out that way. And there are also exclusion and removal procedures where rights holders can opt out their works out of the Google corpus.

But what does a competitor get? Nothing, except what is opted in by rights holders.

Rights holders can opt in to have a competing distributor of digital books in two ways. One is the traditional, the time-honored way, going out, negotiating one on one with rights holders. This is what Amazon has done for its 3 million books. We have done this, and the rights holders clearly have opted in to this.

The other way arises within the proposed settlement, if approved. This other way would be through the registry that has been discussed by Mr. Drummond and others. The registry has its

own problems because it would combine erstwhile competitors in agreement, which would allow them to fix prices for books.

But setting aside that, we have to ask, what is the corpus available to the registry? The corpus available to the registry is, again, limited only to the rights holders who have opted in their works.

So what does this mean overall? Google gets everything, minus some opt-outs. Competitors get nothing, plus some opt-ins. Well, what do orphans do? By definition, orphans don't do any opting. They won't be opting out. They are not to be found. They are not potentially findable. They won't be opting in to the competitor. So, by this mechanism, Google has exclusive, liability-free monopoly rights over millions of works which are orphans.

They also have, in addition to the orphans, the same circumstance applies to rights holders who could be found with a diligent search, as would have been required by the orphan works legislation. But they are just not interested, they are busy with other things, they have moved on in their lives, whatever. But they don't out opt of the Google corpus, and they don't opt in to the competitor's corpus.

Again, the proposed settlement would set up a monopoly for Google for liability-free treatment of millions of works.

And I look forward to your questions. My time is out.

[The prepared statement of Mr. Misener follows:]

PREPARED STATEMENT OF PAUL MISENER

Statement of
Paul Misener
Vice President, Global Public Policy
Amazon.com

Before the
Committee on the Judiciary
United States House of Representatives

Hearing on
"Competition and Commerce in Digital Books"

September 10, 2009

Good morning, Chairman Conyers, Ranking Member Smith, and members of the Committee. My name is Paul Misener, and I am Amazon.com's Vice President for Global Public Policy. Thank you for inviting me to testify on this important topic.

On behalf of our customers and company, and in the interests of promoting competition and commerce in digital books, Amazon.com strongly objects to the proposed class action settlement among Google, the Authors Guild, and some book publishers. If approved, this proposal would create national copyright and competition policy with enduring adverse effects on consumers and Google's competitors.

Amazon has joined librarians, legal scholars, authors, publishers, and other technology companies in the Open Book Alliance to counter the proposed settlement.[*]

[*] The Alliance's membership includes the Special Libraries Association, the New York Library Association, the American Society of Journalists and Authors, the Council of Literary Magazines and Presses, Small Press Distribution, the Internet Archive, Microsoft, and Yahoo! *See* www.openbookalliance.org.

Our shared view is that we strongly support mass digitization and electronic distribution of books, but we insist that any such efforts be undertaken in the open, grounded in sound public policy, and mindful of the need to promote long-term benefits for consumers rather than those of a few commercial interests.

Mr. Chairman, Amazon takes no pleasure in opposing Google in the class action case or in today's hearing. As you may recall, we work closely with Google on other matters before your Committee, including net neutrality, where we both want rules to protect consumers in the absence of competition, and Google has often said they seek such rules to enable "the next Google."

Similarly for book scanning and distribution, Amazon seeks to preserve the competitive market so that we may continue to provide our customers the great selection they have come to expect from us. Unfortunately, however, under the threat of liability for what the Authors Guild called "massive copyright infringement," Google has taken another course. Rather than ask Congress to protect consumers and competition, Google instead has asked a trial court to approve a class action settlement that would establish national copyright and competition policy exclusively in favor of Google above all potential competitors.

Mr. Chairman, the proposed settlement is exceedingly complex, primarily because it is much more of a joint venture agreement and establishment of national policy, than a resolution of claims arising from past behavior. The proposal contains many flaws that run counter to consumers' interests but, in light of our limited time today, let me focus on two flaws, either of which is sufficient to condemn and reject the proposed settlement.

First, the proposal would create a cartel of rightsholders that, for sales of books to consumers, would set prices to maximize revenues to cartel members. This cartel, called the Book Rights Registry, could never have been established in the ordinary course of business. Currently, rightsholders may individually license their works for electronic distribution and, thus, compete against each other. But the proposed Registry is based on an agreement among erstwhile competitors to collectively set prices for their products. The Registry is a classic horizontal cartel and, with respect to electronic books sold to consumers (including those ultimately printed on paper using "print on demand" technology), the Registry cartel is novel mostly for the automation it applies to price setting. Instead of a cigar smoke-filled room, the Registry cartel would set book prices within the clean confines of a computer "Pricing Algorithm" designed by Google to "find the optimal such price for each Book and, accordingly, to maximize revenue for each Rightsholder." This algorithm could optimize the price for a certain set of books simply by increasing all prices of similar books at the same time – a nifty, smokeless feat of collusion for revenue maximization.

Making matters much worse, in the proposed settlement's second fatal flaw, Google would get a privileged, exclusive deal, despite lip service to non-exclusivity. Except for works of rightsholders who affirmatively opt out, the settlement would give Google – and only Google – a license to digitize and sell every U.S. book ever written. This means that Google alone would have a permanent and exclusive right to copy, display, or sell digital versions of the millions of orphan works. It is nonsense to claim that potential Google competitors would have access to the same deal, either directly, through the Registry, or by following Google's courtroom odyssey. For one thing, the

Registry cannot license competitors to scan orphan works because it can only license uses of books whose copyright owners have given their express approval. Moreover, it's not at all clear whether the Registry would be willing to license these registered works to compete with the Google deal. And, if a potential competitor to Google engaged in "massive copyright infringement" in the hopes of getting sued by the same plaintiffs in the Google litigation and making the same settlement deal, why would the rightsholders settle on the same terms when they already have a distribution partner and would stand a reasonable chance of obtaining massive statutory damages? In any case, the "MFN clause" of the proposed settlement would guarantee that a hopeful competitor to Google could not get a better deal.

As a result of these flaws, the proposed settlement would seriously harm individual book consumers and most libraries and schools because the rightsholders cartel and Google monopoly inevitably would set higher prices or provide worse service than would be available in a competitive market. The proposal also would harm existing and potential Google competitors, who would be denied a fair and reasonable opportunity to license a similar corpus of works under similar terms. Under the proposed settlement, "the next Google" wouldn't stand a chance, and customers of existing Google competitors would, instead of realizing the myriad benefits of market choices, find themselves at the mercy of a sole source provider. Under the proposed settlement, Google would become a consumer's nightmare: the only store in town.

Amazingly, the proposal also would exonerate Google of future claims based on future actions that would otherwise be prohibited by law. This is an impermissible result

of class action litigation and, again, makes the proposed settlement less about resolution of a legal dispute than about copyright policymaking and forming a joint venture.

Mr. Chairman, if you have not already, you undoubtedly will hear from Google and some others about the potential consumer benefits of the proposed settlement. Amazon has its own book scanning project, and clearly recognizes the benefits of digitization and distribution, and would welcome a statutory solution to the orphan works problem. But even if this matter were being evaluated purely on policy grounds, the costs of the proposed settlement far outweigh the potential benefits. A price-setting cartel and monopoly are means emphatically *not* justified by the ends, especially because legislation could produce the same benefits in a pro-consumer, pro-competitive manner.

Indeed, the novel copyright (and competition and class action litigation) policy matters at issue in the proposed settlement should be addressed in Congress, the appropriate venue for national policymaking. We hope that the court will not approve the proposed settlement when it acts, as expected, in the coming weeks. In the interim, we merely ask that this Committee carefully monitor developments in the case. If the court approves the proposal without fixing its serious anti-consumer, anti-competitive flaws, we respectfully request that Congress reestablish its public policy making authority and act quickly to supersede the settlement with appropriate legislation.

Thank you again for the opportunity to testify. I look forward to your questions.

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Mr. CONYERS. Thank you very much.

We now are pleased to hear from Dr. Marc Maurer, president of the National Federation of the Blind. As its president, he is leading the organization, I think boldly, in its expansion of the National Center of the Blind.

And, sir, we welcome you here this morning.

TESTIMONY OF MARC MAURER, JD, PRESIDENT, NATIONAL FEDERATION OF THE BLIND

Mr. MAURER. Thank you, Chairman Conyers and Members of the Committee. I am Marc Maurer, and I do serve as president of the National Federation of the Blind, which is the largest organization of the blind in the United States, with over 50,000 members.

Approximately 1.3 million blind people live in the United States. Thirty million people in the United States, approximately, have print disabilities. We favor the Google settlement because it provides electronic books in accessible formats to individuals with print disabilities.

Electronic books are the trend in education and reading. A number of State governments are seeking to change from print textbooks in the public schools to electronic books. Many universities are using an increasing number of electronic books. And several large companies are distributing these books. So far, Google is the only company that has planned to make millions of these books available to the public in ways that can be used by individuals with print disabilities.

In the National Federation of the Blind, we have urged governments, universities, and commercial entities to make electronic information accessible to the blind. The technology exists to do this with only a minimum of difficulty. Most of the time, the response we get is either a delaying tactic, a refusal to accept the importance of our proposals, or an ignorant assertion that access to information for these disenfranchised individuals is of minimal importance.

We spend our lives trying to get at information that others take for granted. One of the real disadvantages of blindness is that access to readily available information is either frequently denied or made more difficult than it needs to be. Google is trying to change part of this, and I applaud them for it.

Some of their competitors have stiff-armed us. We have talked to them, but they have ignored the reality that we represent a market for their products. We want the right to buy books, to pay for intellectual property. We understand that some people think of the blind as objects of charity who should be given only what they think we need. However, we want access to the commercial marketplace, and we want to pay for the access by buying the books we need. We want to spend the same number of dollars to get the same books at the same time and at the same price that other people pay to get them.

Now the opponents of this settlement would like to close the market for us that Google is planning to make available. We regard this as reprehensible. We wholeheartedly support the Google settlement, and we urge you to join in this support.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Maurer follows:]

PREPARED STATEMENT OF MARC MAURER

Marc Maurer, *President*

1800 Johnson Street Baltimore, MD 21230
Phone 410 659 9314 ***Fax*** 410 685 5653
www.nfb.org

STATEMENT OF THE NATIONAL FEDERATION OF THE BLIND

United States House of Representatives
Committee on the Judiciary

Competition and Commerce in Digital Books

September 10, 2009

Mr. Chairman: My name is Marc Maurer, and I serve as President of the National Federation of the Blind. The National Federation of the Blind is the oldest and largest organization of blind people in the United States. Through our affiliates in each of the fifty states, the District of Columbia, and Puerto Rico, and our 700 local chapters, we seek to advance the rights of blind people by helping both the blind and the sighted to understand that blindness, in and of itself, need not be a tragedy. The real problem of blindness is not loss of eyesight, but misunderstandings and misconceptions about it that are prevalent in society. With proper training and opportunity, blindness can be reduced to the level of a mere physical nuisance.

The "proper training and opportunity" part of this equation cannot be overemphasized. Among the keys to opportunity are a good education and access to information. This is particularly true in the twenty-first century, when information is the coin of the realm. In order to succeed, blind people must have full and equal access to all forms of information, including the written word. But historically, access to written knowledge has been one of the greatest challenges faced by the blind. For most of human history, the vast majority of blind people did not have access to books at all. With the invention of Braille, and then of audio recording and playback technology, more books became available to us, but still the selection of titles to which we have access is extremely limited.

The Google settlement, if approved, will change all that. The agreement promises to make millions of titles available to a wide audience, including those who are blind or who cannot read print for other reasons. The terms of the settlement allow Google to provide the material it offers users "in a manner that accommodates users with print disabilities so that such users have a substantially similar user experience as users without print disabilities." A user with a print disability under the agreement is one who is "unable to read or use standard printed material due to blindness, visual disability, physical limitations, organic dysfunction, or dyslexia." The settlement, if approved, will therefore bring the printed word to as many as thirty million people who currently have limited access to it. Blind people will be able to search for books through

the Google Books interface and purchase, borrow, or read at a public library any of the books that are available to the general public, in a format that is compatible with text enlargement software, text-to-speech screen access software, and refreshable Braille devices. If this settlement is approved, blind people will have greater access to books than we have ever had in human history.

Currently, the blind have access to a relatively sparse selection of titles produced by government and nonprofit organizations dedicated to serving our needs. The primary source of reading material for most blind Americans is the National Library Service for the Blind and Physically Handicapped of the Library of Congress. While this service has done an outstanding job of providing books to the blind within budgetary constraints, it has, at most, perhaps 70,000 circulating titles in its collection. Furthermore, even if all methods of providing content in a format accessible to the blind, including commercial audio books, are taken into consideration, it is estimated that only 5 percent of the books published each year are ever produced in a format that can be used by the blind or others with print disabilities.

While the blind have for years been tantalized by the promise of greater access through e-books, which are inherently accessible, the sad fact is that no other provider of e-books has yet made its offerings accessible to the blind. Instead, publishers distribute their e-books through inaccessible devices and platforms, use digital rights management schemes to prevent screen access technology and other methods used by the blind from accessing these books, or both. Prior to this landmark settlement agreement, neither authors and publishers, nor any entity promoting e-book technology had ever consented to any system that would make such a large number of books immediately accessible to the blind and other Americans with print disabilities. The Google settlement therefore represents the only present prospect for blind people to access electronic texts. It is our hope and belief that the settlement will also represent a paradigm shift that will encourage other publishers and e-book distributors to make accessibility a priority.

Libraries are currently distributing e-books to borrowers. An increasing number of universities require students to use e-texts. Some state governments are contemplating replacing printed books with e-texts. A number of companies are distributing e-texts. The e-text market is expanding rapidly, and the Google settlement represents the only substantial effort to make this form of information usable by the blind. The technology exists to make all of this distributed information readily accessible to the blind. Unless an immediate effort to implement such a system is pursued, the result for employment for blind people will be devastating. Already the lack of information has meant that fewer than 50 percent of blind people in their school years will graduate from high school. Already the lack of information has contributed to an unemployment rate for the blind in excess of 70 percent. Already the lack of information

has prevented blind students from being able to matriculate in college courses of their choosing. Blind people are willing to pay for books, but they must be books we can read. The proposed Google settlement is a promise that this magnificent notion may become real.

It has been said that the proposed Google settlement is an effort to give judicial sanction to theft of intellectual property. This argument ignores the provisions of the settlement itself. Any author wishing to avoid the terms of the settlement may opt out. Those who do not opt out receive a very substantial portion of the revenue generated.

Some opponents of the settlement have propounded the argument that by including accessible provisions for the blind in the agreement Google has taken a position akin to that of "Robin Hood." Apparently, these opponents are saying that Google is taking what doesn't belong to it and justifying the theft by giving access to the blind. This is an argument without foundation. The blind are prepared to pay for books at the same rate and to the same extent that the sighted must do so. The settlement has no provisions to give intellectual property to the blind that is not already available to the sighted. The blind must pay as much for intellectual property as the sighted must. No different terms apply to blind people from those which apply to the sighted. The "Robin Hood" analogy fails because the blind don't get anything for free that the sighted don't get for free and because a "Robin Hood" must first steal the material. If the theft hasn't occurred, the transaction has to be characterized in some other way.

The Google settlement is, for the blind and many others, the next step in the democratization of knowledge. That process began with the introduction of the printing press and then, for the blind, with the invention of Braille. Now technology has arisen which transcends the traditional limitations of both print and Braille, promising to make millions of titles available to the blind in Braille or any other format of our choice. The narrow business interests of Google's competitors must not be allowed to block Americans who cannot read print from all of the opportunities that greater access to written knowledge will make available to them. It is time for the doors of the world's great libraries to be opened in welcome to everyone.

Thank you for the opportunity to present this testimony. If you have any further questions, please do not hesitate to contact the National Federation of the Blind.

Voice of the Nation's Blind

Mr. CONYERS. Thank you very much, Mr. President.

Well, in every hearing, there has got to be a consumer watchdog. And, in this case, the consumer watchdog is a group called "Consumer Watchdog," in the person of Mr. John Simpson. He started off as a nice fellow a long time ago as a journalist. Then he became a veteran journalist and held top editing positions at newspapers, international and national. And now he is where he is today.

So we welcome you for your testimony, sir.

TESTIMONY OF JOHN M. SIMPSON, CONSUMER ADVOCATE, CONSUMER WATCHDOG

Mr. SIMPSON. Thank you, Mr. Chairman. I am delighted to be where I am today, which is here in front of your Committee. Good morning to you, sir, and to the Ranking Committee Member Smith and other Committee Members. Thank you for considering my testimony.

Established in 1985, Consumer Watchdog is a nationally recognized, nonpartisan, nonprofit organization representing the interests of taxpayers and consumers. Over the past year, our Privacy Project focused on Google, funded by the Rose Foundation, a charitable, nonprofit organization. During that project, we became aware of the proposed book settlement. In April, we called upon the Department of Justice to intervene in the proposed settlement because of its antitrust concerns. And Justice has since announced it is investigating.

Let me be absolutely clear: We do not oppose the concept of digital libraries. Done correctly, they would greatly enhance public access to books. Everyone should be in favor of that.

The problem is Google's monopolistic digital library and how it would be implemented. The proposed class action settlement is monumentally overbroad and invites the court to overstep its legal jurisdiction to the detriment of consumers, the public. The proposed settlement would strip rights from millions of absent class members worldwide in violation of national and international copyright law for the sole benefit of Google. The deal simply furthers the relatively narrow agenda of Google, the Authors Guild, and the Association of American Publishers.

The settlement provides a mechanism for Google to deal with orphan works. It protects Google from such potentially damaging exposure but provides no protection for others. This effectively is an insurmountable barrier for potential competitors who wish to enter the digital book business.

In our brief, filed on our behalf by Kasowitz and Benson in U.S. District Court, we made four specific arguments against the settlement. It is not fair, adequate, or reasonable because it far exceeds the actual controversy before the court and abuses the class action process. It is an unauthorized attempt to revise the rights and remedies of U.S. copyright law, which are exclusively left to Congress. I would expect that this body would be very concerned about that usurpation. It conflicts with international law, specifically the Berne Convention for the Protection of Literary and Artistic Works. And finally, as I mentioned, it is an unlawful and anticompetitive monopoly. We are also very concerned about the privacy aspects.

So, what is to be done? The unfair competitive advantage Google receives under the settlement comes from its attempt to pull an end-run around the appropriate legislative solution to the orphan books problem. This is not an issue for a court and certainly one that cannot be settled by solving the problem for one large corporation and no one else. Congress must resolve the orphan rights issue. It could also step in with legislation about what exactly constitutes fair use in the digital age. Privacy guarantees are another area appropriate for legislative action.

Finally, Consumer Watchdog supports digitization and digital libraries in a robust, competitive market open to all organizations, both for-profit and nonprofit, that offer fundamental privacy guarantees to users. But a single entity cannot be allowed to build a digital library based on an unprecedented monopolistic advantage when its answer to serious questions from responsible critics boils down to, "Trust us. Our motto is 'Don't be evil.'"

Thank you very much. I look forward to your questions.

[The prepared statement of Mr. Simpson follows:]

PREPARED STATEMENT OF JOHN M. SIMPSON

Testimony
of
JOHN M. SIMPSON
Consumer Advocate
with
CONSUMER WATCHDOG

Hearing on
"COMPETION AND COMMERCE IN DIGITAL BOOKS"
Before the
Committee on the Judiciary
of the
United States House of Representatives
Sept. 10, 2009

Good morning Chairman Conyers, Ranking Member Smith, and members of the committee. My name is John M. Simpson and I am a consumer advocate with the nonprofit, nonpartisan Consumer Watchdog, formerly the Foundation for Taxpayer and Consumer Rights. Thank you for considering my testimony.

Established in 1985, Consumer Watchdog is a nationally recognized non-partisan, non-profit organization representing the interests of taxpayers and consumers. Our mission is to provide an effective voice for the public interest. Consumer Watchdog's programs include health care reform, oversight of insurance rates, energy policy, protecting civil justice, corporate reform, and political accountability. Over the past year our Google Privacy Project, funded by The Rose Foundation, a charitable nonprofit organization, has focused on Google's privacy policies and sought better privacy guarantees from the company for users of its services.

During this project we became aware of the proposed Google Books settlement and were concerned about its impact on consumer privacy and anticompetitive aspects. In April we called upon the Department of Justice to intervene in the proposed settlement because of antitrust concerns and Justice has since announced it is investigating.

Let me absolutely clear. We do not oppose the concept of digital libraries. Done correctly, they would greatly enhance public access to books. Everyone should be in favor of that. I also personally believe, like Google, that in the digital age scanning books to convert them to a digital database and then displaying "snippets" in a search of that database is appropriate fair use. However, that understanding has not been

1750 Ocean Park Boulevard, #200
Santa Monica, CA 90405-4938
Tel. 310-392-0522 • Fax: 310-392-8874

EXPOSE. CONFRONT. CHANGE.

www.ConsumerWatchdog.org

413 E. Capitol St., SE, First Floor
Washington, D.C. 20003
Tel. 202-629-3064 • Fax: 3202-629-3066

substantiated by a court and was the initial activity that prompted the suit against Google resulting in the proposed settlement.

The problem is Google's monopolistic digital library and how it would be implemented. As we said in our friend-of-the-court brief in the Google Books case, "The proposed class-action settlement is monumentally overbroad and invites the Court to overstep its legal jurisdiction, to the detriment of consumers and the public…The proposed Settlement Agreement would strip rights from millions of absent class members, worldwide, in violation of national and international copyright law, for the sole benefit of Google."

The parties in the suit negotiated the Google Books settlement in secret and there was no opportunity to represent and protect the broad interests of all consumers. This deal simply furthers the relatively narrow agenda of Google, The Authors Guild and the Association of American Publishers.

The settlement provides a mechanism for Google to deal with "orphan works." Orphan works are works under copyright, but with the rights holders unknown or not found. The danger of using such works is that a rights holder will emerge after the book has been exploited and demand substantial infringement penalties. The proposed settlement protects Google from such potentially damaging exposure, but provides no protection for others. This effectively is an insurmountable barrier for potential competitors who wish to enter the digital book business.

Consumer Watchdog asked U.S. District Court Judge Denny Chin to reject the proposed settlement for four reasons:

- **It is not fair, adequate or reasonable because it far exceeds the actual controversy before the court and abuses the class action process:** "The proposed class action settlement claims to resolve the actual dispute between the parties, but it also goes much, much farther, and purports to enroll millions of absent class members in a series of new business 'opportunities.' For those absent class members who fail to step forward and claim their share, however, this 'opportunity' operates as a theft—essentially the parties propose to sell the copyrighted works of absent class members, and then split the proceeds among themselves.

- **It is an unauthorized attempt to revise the rights and remedies of U.S. Copyright law.** "The proposed Settlement Agreement, if approved, would so massively reallocate the existing rights and remedies under copyright law that it would effectively rewrite the existing statutory regime for the benefit of a single player — Google. But Supreme Court precedent is clear: courts may not modify copyright law. Only Congress has 'the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests' that must be balanced when amending the Copyright Act.'"

- **It conflicts with international law, specifically The Berne Convention for the Protection of Literary and Artistic Works, an international copyright treaty.** "Not only does the proposed Settlement Agreement attempt to do an end-run around the legislative process, but it also proposes a scheme that Congress could not have adopted because of its clear violation of the United States' international obligations under the Berne Convention for the Protection of Literary and Artistic Works. As Congress has noted, '[a]dherence to [Berne] is in the national interest because it will ensure a strong, credible U.S. presence in the global marketplace...' The Court should not approve what is tantamount to private legislation for the benefit of Google

that would violate an international agreement and jeopardize the public's interest in international copyright relations."

- **It gives Google an unlawful and anti-competitive monopoly.** "Finally, because the settlement effectively suspends existing copyright law just for Google, it opens the door for Google to become the dominant player in new markets for online book search engines and book Subscription programs. Accordingly, the settlement should be further rejected because it would violate Section 2 of the Sherman Act, which makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

Consumer Watchdog did not bother to raise privacy concerns in the context of the Google Books settlement because we felt the objections just cited were substantial and well enough grounded in law so as to preclude the settlement. Nonetheless other organizations including the Electronic Frontier Foundation, the American Civil Liberties Foundation and the Samuelson Law, Technology & Public Policy Clinic, and a group of privacy authors and publishers have objected on privacy grounds. They said:

> *"Courts, libraries and legislatures have fiercely protected the right to read without fear of being watched or reported upon. The settlement, if approved, may enable Google Book Search to become the world's largest public library, institutional library, book 'purchasing' and ongoing access system combined. It is no understatement to say that this settlement may create the central way that books are accessed in the future, and the only way to access certain books. Because of its potential to greatly expand book access, Google Book Search is extremely exciting.*
>
> *"Yet that future potential will be undermined if this Court allows Google to collect intimate, invasive and previously unavailable information on readers, aggregate that sensitive information with information about them collected by and through other Google products, and by doing so create the real risk of disclosure of that sensitive information to prying governmental entities and private litigants. This chilling effect will hurt authors and publishers, but especially those who write about sensitive or controversial topics. It will also hurt the public interest, as the advance of digitization would come at the cost of reader privacy.*
>
> *"The privacy authors and publishers were not adequately represented in the settlement negotiations. They would not have agreed to a settlement so bereft of privacy protections. Without additional protections, the settlement is not fair, reasonable or adequate to the class members or to the public. It should not be approved until sufficient privacy protections are put into place."*

Consumer Watchdog shares those concerns about privacy if a settlement without privacy guarantees is implemented.

So what is to be done? The unique and unfair competitive advantage Google receives under the settlement comes from its attempt to pull an end-run around the appropriate legislative solution to the orphan books problem. This is not an issue for court and certainly one that cannot be settled by solving the problem for one large corporation and no one else.

Congress must resolve the "orphan rights" issue. It could also step in with legislation about what exactly constitutes fair use in the digital age, though that matter could be fairly adjudicated by the courts. Privacy guarantees are another area appropriate for legislative action.

Consumer Watchdog supports digitization and digital libraries in a robust competitive market open to all organizations, both for-profit and non-profit, that offer fundamental privacy guarantees to users. But a single entity cannot be allowed to build a digital library based on a unique monopolistic advantage when its answer to serious questions from responsible critics boils down to: "Trust us. Our motto is 'Don't be evil.'"

Mr. CONYERS. Thank you very much, sir. You didn't disappoint me.

Mr. SIMPSON. Thank you.

Mr. CONYERS. Mr. Paul Aiken is the executive director of the Authors Guild, the largest society of published book authors and freelance journalists in the United States. He has testified before the White House Task Force on Copyright and the Internet and has testified before Congress.

We are pleased to welcome you again to the Judiciary Committee.

TESTIMONY OF PAUL AIKEN, EXECUTIVE DIRECTOR, AUTHORS GUILD

Mr. AIKEN. Good morning, Chairman Conyers, Ranking Member Smith, and the other distinguished Members of this Committee.

Today we stand at the threshold of a landmark achievement, an achievement that promises to have a profound effect on the educational and cultural life of our country. I am deeply proud that the Authors Guild played a role in bringing us to this threshold.

The point of copyright is to create markets for creative works. It has worked brilliantly. It has filled our homes and classrooms with countless informative and entertaining works. It has helped turn our great academic and public libraries into vast and valuable storehouses of intellectual and cultural capital.

But in spite of the best efforts of our librarians and the fondest hopes of our Nation's authors, only a small part of that value is being realized. Books aren't getting to all the people who would like to read them because they have disappeared from the market. Those tens of millions of out-of-print books represent a market failure, one of the oldest market failures in our economy.

It is a market failure that my organization has tried to address in a small way for years, going back a quarter of a century to the initiative of our member, the late William F. Buckley. Mr. Buckley worked with us to develop a catalog of out-of-print books that authors were making available by mail order. That effort evolved into backinprint.com, which now offers more than 1,400 books in on-demand form, generating a modest but respectable $100,000 in annual royalties. Backinprint.com demonstrates on a small scale that out-of-print books have ongoing commercial value.

In the course of negotiating a settlement with Google, we found a way to address that same market failure on a much larger scale, in a manner similar to the way copyright systems around the world have addressed other market failures. In Germany, for example, at this moment, works by U.S. and other authors are being copied without the authors' permission. Everything can be photocopied—in-print, out-of-print, even orphaned or unclaimed works. There is no getting out of it, I am told; there is no way to exclude your work from the system.

Nearly every advanced economy has such a system, a license by default for photocopying. It is a practical solution to a knotty problem. The transaction costs of clearing photocopy rights often exceed the value of the copy itself. These systems address a market failure, and they abide by international copyright law.

In our settlement, we are creating commercial markets where there are none. To get the necessary scale to create a viable market, out-of-print works will automatically be in the system, but, as in the photocopy systems of the U.K. and in Canada, rights holders will be able to exclude them.

Our settlement, besides creating new markets, provides another important benefit: It will shrink the orphan works problem. The new Book Rights Registry will have as a duty the duty of finding authors for whom it has money.

This is not nearly as daunting as many assume. The Authors' Licensing and Collecting Society in the U.K., for example, reports a success rate of upwards of 90 percent in finding authors of out-of-print books. We would still like to address the orphan work problem in the U.S., but we would like to cut it down to size, at least for books.

In Brussels this week, there were hearings on this settlement. The copyright wars are playing out over there as they are here, so we heard the usual debating points. We also detected something new: a subplot of envy. Europeans are starting to size up what we have achieved, and they like it. They think we are getting a significant advantage, that we have found a way to more fully deploy the intellectual and cultural capital stored in our great libraries. They are right. No doubt they will be working hard to catch up.

In the meantime, here, we are at the threshold. We can recognize what we have, the transformational result of a rare and productive truce in the copyright wars, negotiated by pragmatic representatives of the author, publisher, and library communities and a sophisticated technology partner, and we can cross the threshold. Or we can let the fight consume us. If that should happen, then perhaps someday when everyone is worn out we will arrive at another solution. I fear, however, that it may not be nearly as good for everyone as the deal before us and that it almost certainly won't be worth the wait.

Thank you for inviting me to testify today. I look forward to your questions.

[The prepared statement of Mr. Aiken follows:]

Statement of Paul Aiken
On the Google Book Settlement

Committee on the Judiciary
House of Representatives

September 10, 2009

I. EXECUTIVE SUMMARY

Overview

My name is Paul Aiken. I'm the executive director of the Authors Guild, the largest society of published authors in the U.S., representing more than 8,500 book authors and freelance writers. Our members represent the broad sweep of American authorship, including literary and genre fiction, nonfiction, trade, academic, and children's book authors, textbook authors, freelance journalists and poets.[1] Guild members have won countless honors and all major literary awards, including the Nobel Prize for Literature.[2]

The Authors Guild promotes the professional interests of authors: we're advocates for effective copyright protection, fair contracts, and free expression.

The Challenges Facing Print Media

It's a pleasure to be here before this committee, at this moment in book publishing history. Never in the Authors Guild's long history has its straightforward mission – to maintain writing as a viable livelihood – been so daunting. The digital environment is brutal for print media. As we meet here today, the newspaper industry is dying. Credible estimates say that one newspaper is closing each week in America. The magazine industry isn't much better off, as week by week we see venerable publications shrink in size and ambition. The loss to our society from the collapse of these industries is

[1] The Guild had its beginnings as the Authors League of America, which was founded in 1912 by a group of book authors (including Theodore Roosevelt, who served as the League's founding vice president), short story writers, freelance journalists and a smattering of dramatists. In the 1920s, the Authors League broke into two groups: the Authors Guild and the Dramatists Guild of America.

[2] Pearl S. Buck (1938) (who served as Authors Guild president), William Faulkner (1949), John Steinbeck (1962), and Isaac Bashevis Singer (1978). One Guild member, Elie Wiesel (1986), has won the Nobel Peace Prize.

immeasurable.

The book industry, happily, has to date fared better than our colleagues in the print media. This is, no doubt, partly due to our medium: print books are still superior in almost every way to their electronic counterparts. That advantage is rapidly fading, however; our transition to digital form is underway, and things change quickly in a digital environment.

The portents are not encouraging. Finding a sustainable business model for creative work in digital form seems nearly impossible on the Internet: if piracy doesn't get you, the aggregators will.

We'll likely need many things to go right to avoid the fate of our colleagues in the print industries.

The Opportunity

Yet, there are reasons for optimism. One of those reasons is our settlement with Google, which brings us here today. That settlement promises to address one of the oldest and most vexing of market failures: the loss to the commercial market of out-of-print books.

If you had asked knowledgeable people a couple of years ago whether we were close to delivering a near universal library to public libraries, colleges, and universities across the country, they would have scoffed. The technical challenges seemed too daunting, the rights clearance issues insurmountable, the passions stirred by the ongoing copyright wars far too intense for such a result to be achieved in the foreseeable future.

But here we are, on the cusp of that extraordinary achievement: the marriage of

much of our collective library with the Internet. The benefits to readers, students, and scholars would be profound. Here are a few:

1. The settlement would turn every library into a world-class research facility, by offering every public library building in the U.S. – all 16,500 of them – a free portal to millions of out-of-print books. The settlement would also offer a free portal to that same vast database of out-of-print books to more than 4,000 higher education institutions, from community colleges to our most elite universities.

2. Students and professors at colleges with the most modest of endowments would find an important part of the academic playing field had come to level, as they gain full access from every computer on campus to a library exceeding that of the finest Ivy League schools.

3. The visually and reading impaired would find the stacks of libraries open up to them as never before, gaining access to orders of magnitude more books than they currently have.

4. The settlement would offer anyone online in the U.S. free "preview" access to hundreds of millions of pages of text (up to 20% of each book).[3] Readers from their own home computers would be able to review hundreds of accounts of the Battle of Vicksburg, or of the beginnings of the Industrial Revolution, or of the sources and interpretation of Moby Dick, at no charge.

[3] Here's the math: we expect the settlement to make at least 10 million out-of-print books available, which, at an average of 300 pages per book, represents at least 3 billion pages of professionally written, professionally edited text. 20% of that is 600 million pages of text available at every desktop computer in the U.S. as a free preview. (For comparison, Encyclopedia Britannica is about 44,000 pages in print form; Wikipedia's featured articles total about 5,000 pages. All English Wikipedia articles, including stubs, total perhaps 3 million pages.)

Should a reader find one book particularly compelling, she could buy access to the entire book. Access to public domain books is free, of course, and authors controlling the rights to their books can choose to give away access for free.

Authors and publishers are willing to make this deal for several reasons. We of course hope to profit from the market that's created. We would like to have the Internet work for us, creating a market of the previously unmarketable. We also have a vital interest in keeping books central to our students, scholars, and culture. We're confident that making this vast library available online will help do just that.

Authors have another strong interest in making this deal work: authors need libraries. Libraries fuel their work. Authors of every type read, reinterpret and rely on their fellow authors, and those who have come before them. This is true of the scholarly writer and of the author of popular nonfiction. It's as true for authors of books for children as it is for authors of books for adults. Authors of literary fiction also rely heavily on those who've come before them. The creative expressions are new, but many of the ideas underlying literary works are eternal. Writers of genre fiction are no exception. Romance writers read romance novels and other works and offer their own interpretation and variations on the romance theme.

Authors, in short, want not only to realize the untapped value of their out-of-print works, they want access to this new, vast online library so that they can more easily create new works that readers will value.

The Opposition

Opposition to the settlement falls into several broad categories. We'll address two important objections in this Executive Summary.

Objection #1: Copyright doesn't permit a system that asks authors and publishers to specifically exclude their out-of-print works from uses negotiated on their behalf.

This simply isn't so. There is ample precedent around the world for dealing with market failures in copyright in precisely this way. For example, Germany today operates a system that nearly parallels the one the settlement would put in place. The German system allows for

(a) routine copying of out-of-print works written by foreign and domestic authors,

(b) including routine copying of "orphan" (unclaimed) works, and

(c) without regard to whether those authors and publishers have expressly approved those uses.

The German system, however, actually denies authors and publishers any ability to exclude their works.

The German system goes even further, allowing the copying of in-print works without the permission of the author or publisher (in our settlement, the author and publisher must both approve of any displays of in-print works). Germany's photocopy licensing system is perfectly legal, and meets with the norms of international copyright law.

In fact, this is the typical way for countries to deal with the market failure represented by the unlicensed photocopying of copyrighted materials, although many countries allow authors and publishers to exclude their works from such licensing. Other countries with similar photocopy licensing systems include Australia, Canada, the United Kingdom and the Nordic countries, among many others. The market for photocopy licensing often fails without intervention, because the transaction costs of the license,

including the labor costs of the licensee, are simply too high relative to the value of the individual copy.

The inability to license out of print works to colleges, libraries and individual users presents a market failure on an epic scale. Here, as with photocopy licensing, a major component of the transaction costs involve rights clearance issues. Another impediment is the sheer scope of the project, and the capital and technological resources it demands. This settlement, with a financially strong and sophisticated technology partner, addresses the market failure. The societal value in bringing these works back to the market is incalculable, but until our settlement there was no practical way to do so.[4]

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[4] The impediments to making systematic use of the digital rights in out-of-print books are many, but they fall into two broad categories:

A. Rights clearance issues. Here, there are three different obstacles. First, it may be unclear who controls the rights because no one knows whether rights to a particular out-of-print book have reverted to the author or not (most standard trade book contracts ask an author to demand a reversion of rights before the contract formally terminates and the rights revert to the author). Second, it may be unclear who controls the digital rights for a particular out-of-print book, since many (but not all) older contracts make no mention of digital or analogous rights. Third, it may be difficult to find the author or publisher who controls the rights, particularly for older works. This is the so-called orphan works problem. (More on this later.)

B. Digitization and presentation issues. Here, the obstacles are capital and technological sophistication.

The rights clearance issues are largely addressed in Attachment A to the settlement, which deals with author-publisher issues and was the result of laborious negotiations between author and publisher representatives, and through the operation of class-action law.

The digitization and presentation issues have been handled with money and clever technology. Estimates of Google's costs in scanning, digitizing and building the technical infrastructure to support the display of millions of out-of-print books run to about a billion dollars. (We have no special knowledge of Google's costs.) Part of the challenge for Google was to find an efficient way to scan library books without damaging them by flattening them onto the scanner's surface. It solved this through a patented technology that corrects for the distortions caused by the scanning of a book page that curves away from the scanner's surface towards the book's binding.

Objection #2. The settlement inappropriately permits the use of unclaimed (orphan) works.

No issue has been more misunderstood or misreported regarding this settlement than the unclaimed or "orphan" works issue.

The primary misconception is the size of the problem: it's much smaller than has commonly been reported, for several reasons. First, finding the rights owner of a book is not as daunting as many seem to believe. Books do not present the classic orphan works problem, photographs do. Photographs, both in the physical world and online, often become separated from their identifying information. This makes finding the rights owner a near impossibility. Books, however, always contain author and publisher information, and there's often a copyright registration record to help locate the rights owner. Second, although a copyright-protected book may have been published as long ago as 1923, the vast majority copyright-protected books in our libraries are far more recent.[5]

Another major misconception is the failure to recognize that countries around the globe are already dealing with the orphan works issue in a productive way. The photocopy-licensing systems in other English-speaking countries permit the use of orphan works. This, as previously discussed, is a natural result of those nations' attempts to cope with the market failure represented by unlicensed photocopying of copyrighted works. As the licensing societies collect photocopy royalties and start to cut checks to

[5] This is because, for books published between 1923 and 1963, authors had to file renewal registrations to prevent their works from falling into the public domain. More importantly, the number of titles produced by the book publishing industry was far lower through most of the 20th Century than it was in its concluding decades. The median age of a copyright-protected book in a U.S. library is far younger than many commentators assume.

authors, word spreads, quickly, and authors step forward to register themselves. The pool of unlicensed works shrinks. The licensing societies are duty-bound to actively seek out authors[6] for whom they have money. Year by year, they locate more and more authors, and the orphan works problem diminishes further.

We have some experience with this, since we helped found and long provided financial support to the Authors Registry, an independent, non-profit, rights-payment agency. The Authors Registry collects photocopy and other use fees from overseas, particularly from photocopy uses in the U.K., and pays authors in the U.S. the amounts due them. A sample of our success in paying authors of out-of-print works last year suggests that we reach 85% of such authors. The success rate of larger, more developed systems – such as that of the Authors' Licensing and Collecting Society (ALCS) in the U.K. – demonstrates that even higher success rates are possible. (The ALCS, representing more than 30,000 published writers, is an enthusiastic supporter of the settlement, for good reason. They know it can work, because they've achieved great success finding and paying photocopy revenues to authors of out of print books.)

Thus, this settlement presents a practical solution for the problem of orphan works for books. When an author is identified, then requests for all kinds of other uses – for permission to use an excerpt from the author's work, reprint it, or to translate it into a foreign language – can be relayed to the author or the author's agent and acted upon.

The orphan works issue is far smaller, and far more tractable, than some objectors would have you believe. The settlement itself is a big part of the solution.

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[6] Publishers are sought out too, of course. In some systems, such as in the U.K., different societies represent authors and publishers. In others, such as in Australia and Canada, the same society represents both authors and publishers.

Conclusion

We urge this committee to recognize this settlement for what it is: the outstanding result of a rare and productive truce in the copyright wars, negotiated by strong-willed and pragmatic representatives of the author, publisher, and library communities and a sophisticated technology partner.

To a dispassionate observer, we believe the solution presented by this settlement is how a rational, useful market for out-of-print books should operate in the digital age. The means of getting there, a class-action settlement, may be novel, but that shouldn't distract us from the great good – for readers, students, scholars, authors and publishers – that this settlement accomplishes. Similar systems, inevitably, will develop around the world.

This settlement doesn't pre-empt congressional action, but there's no need to act now, before we see how well this solution works in the real world. We suspect many of the concerns – including all of the major objections – will prove unwarranted as this settlement goes into operation. There's no need to fix that which likely isn't broken at all.

Allowing this opportunity to slip through our grasp would be a tragic loss to all those who value the riches stored in our nation's libraries.

II. INTRODUCTION TO THE SETTLEMENT

In 2004, Google Inc. ("Google") announced that, as part of its Google Library Project (or "GLP"), it would reproduce millions of copyrighted books located in U.S. libraries and display "snippets" of those books on its website. These books had been published within and outside the United States and their copyright owners included

publishers and authors domiciled in both the United States and around the world. In copying and displaying content from books as part of the GLP, Google did not seek the permission of the copyright owners of those books.

The Settlement resolves two copyright infringement actions brought against Google by authors and publishers that alleged that Google's unauthorized copying of books and display of snippets without permission constituted copyright infringement under the U.S. copyright laws. Google defended its actions as non-infringing fair uses, as authorized by 17 U.S.C. § 107.

At the end of October 2008, after a negotiation that lasted more than two years, the author and publisher plaintiffs and Google announced that they had reached a comprehensive settlement of the litigation. The Settlement avoids further discovery and litigation, which could have been protracted.

The Settlement was carefully negotiated to protect the copyright interests of, and to provide meaningful benefits to a class of authors (and their heirs) and publishers of books covered by the Settlement (essentially, books published on or before January 5, 2009). One of the Settlement's crowning achievements for the class -- and for the United States public -- is that it breathes new life into millions of out-of-print books, which until now have been relegated to the dusty stacks of university libraries. The Settlement also provides new marketing and revenue opportunities for rightsholders of in-print books (should they choose to take advantage of them), in a way that does not harm the existing markets for those books.

If approved, the Settlement will provide the following material benefits to authors and publishers:

- Payment to Rightsholders: Google will be authorized to use class members' works in several revenue models, and will pay 63% of the revenues earned from its exploitation to a Book Rights Registry (the "Registry"), for disbursement (after an administrative charge) to the Rightsholders of those works;

- Rightsholders Retain Control: The Settlement is non-exclusive and does not involve any transfer of copyright ownership interests or any other property interests to Google. Additionally, Rightsholders at all times will retain control over their works, with the ability to determine the extent to which their works are to be included in or excluded from Google's uses, and to license their works to others;

- Compensation to Rightsholders for Past Alleged Infringement: Google will pay at least $45 million to compensate class members whose works Google digitized without permission before May 6, 2009.

- Establishment of Registry: Google will pay $34.5 million both for notice and settlement administration costs and to fund the Registry, a non-profit organization that will be managed by a Board representing authors and publishers, that will locate rightsholders, maintain a database of their contact information, collect and pay revenues to the class for Google's use of copyrighted works through this Settlement, and otherwise protect and represent the interests of the class.

As explained in more detail below, the Settlement provides extraordinary and previously unattainable benefits to authors and publishers in the United States and all over the world, along with remarkable benefits to the reading public, students, scholars and researchers in the United States.

III. THE MATERIAL TERMS OF THE SETTLEMENT

A. The Settlement Class and Sub-Classes.[7]

The Settlement Class is defined as follows:

> All persons or entities that, as of January 5, 2009, have a Copyright Interest in one or more Books or Inserts. All Settlement Class members are either members of the Author Sub-Class or the Publisher Sub-Class, or both. Settlement Agreement ("SA") § 1.142.

[7] Capitalized terms used have the same meaning as in the Settlement Agreement.

- **Author Sub-Class**

All members of the Settlement Class who are authors, and their heirs, successors, and assigns, and any other members of the Settlement Class who are not members of the Publisher Sub-Class. SA § 1.14.

- **Publisher Sub-Class**

All members of the Settlement Class that are (a) companies that publish books, and their exclusive licensees, successors, and assignees, and (b) companies that publish periodicals and have a Copyright Interest in one or more Inserts, and their exclusive licensees, successors, and assignees. SA § 1.120.[8]

B. The Parties.

The Representative Plaintiffs for the Author Sub-Class are authors Paul Dickson, Joseph Goulden, Daniel Hoffman, Betty Miles, and Herbert Mitgang. SA § 1.125. The Representative Plaintiffs for the Publisher Sub-Class are The McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc. *Id.* The Authors Guild and the AAP are "Associational Plaintiffs." SA § 1.12. The Associational Plaintiffs participated in the litigation to advance the rights and interests of the Author Sub-Class and Publisher Sub-Class, respectively, and served as consultants to counsel for the respective sub-classes.

[8] A "Copyright Interest" refers to a United States copyright interest to the extent implicated by a use covered by the Settlement Agreement, i.e., reproduction of a Book and the Display Uses and Non-Display Uses (described below). SA § 1.38. A "Book" refers to a written or printed, bound work that was published or distributed prior to January 6, 2009 and, if a "United States work" under 17 U.S.C. § 101, registered with the United States Copyright Office. The Settlement excludes from the definition of Book works that are Periodicals, unbound personal papers, and works in the public domain (including government works). SA § 1.16. An "Insert" refers to copyrighted textual (but not pictorial) content in a book whose rightsholder is different from the book's rightsholder. SA § 1.72. *See* the sections of the SA cited in this footnote for more details concerning these definitions.

Google was the sole defendant in the cases. In addition, though not parties to the litigation, the libraries of the University of Michigan, Stanford University, and the University of California took part in the settlement negotiations. They, along with a large number of other libraries, have entered into digitization agreements with Google, to allow their collections to be digitized. Numerous university libraries plan to participate in the GLP as well. A list of libraries that are authorized to provide books to Google for copying, and to receive digital copies, can be found at Attachment G of the SA.

C. Benefits To Authors and Publishers.

1. Revenues From Google's Use Of Books And Inserts

The Settlement authorizes Google, on a non-exclusive basis, to digitize Books and Inserts, to develop a searchable electronic books database, and to display and make commercial use of Books and Inserts, including the following "Display Uses":

- sell institutional subscriptions to schools, corporations, and government offices ("Institutional Subscriptions") (SA § 4.1);
- sell online access to Books to consumers ("Consumer Purchases") (SA § 4.2);
- display "previews" (up to 20% of a Book (SA § 4.3)) and "snippets" (several lines of a Book (SA § 1.147)) in order to spur Book sales and earn advertising revenues;
- place advertisements next to Book text (SA § 4.4); and
- provide free Public Access Services to all public and school libraries, with any printing from these services subject to a per-page fee (SA § 4.8).[9]

[9] Also, subject to agreement with the Registry, Google may, in the future, be authorized to exploit works in other revenue models, such as consumer subscriptions, print on demand, custom publishing, .pdf downloads, and summaries, abstracts and compilations. SA § 4.7.

Note that all authorizations, including the right to digitize books and to display and make commercial uses of Books and Inserts, are confined to the United States and Google obtains no rights under the Settlement under any law other than United States law.

Revenues earned from Display Uses will be split 63/37 in favor of the Rightsholders. SA § 4.5. ("Rightsholders" are members of the Settlement Class that do not opt out of the Settlement.) Google will pay 63% of these revenues to the Registry, for disbursements to the Rightsholders.

2. Classification of Books.

The Settlement differentiates between Commercially Available (generally, in-print) and not Commercially Available (generally, out of print) Books. The purpose of this distinction is to ensure that Google's Display Uses do not cannibalize the existing markets for Commercially Available books. Thus, the Settlement treats Commercially Available Books differently from Books that are not Commercially Available (i.e., Books that are not being marketed or sold by the publishers of the Books). SA §§ 3.2-3.3. Specifically, Google may not make any Display Uses of Commercially Available Books – both the revenue models described above and "snippet display" – unless both the author and publisher authorize Google to do so. *Id.* In contrast, Books that are not classified as Commercially Available will, by default, be included automatically in all Display Uses. At any time, however, the Rightsholder of a Book can change the default and instruct Google to exclude any Book from any one or more Display Uses. *Id.*

Google will initially determine whether or not a Book is Commercially Available as of January 5, 2009 (the Notice Commencement Date). SA § 3.2(d) (referred to in the SA as the "Commercially Available" classification). Google and the Registry will

continue to be assessing whether Books are Commercially Available using multiple sources of information. Rightsholders who claim their Books will be informed if a change is made in the Commercially Available classification of those Books.

Rightsholders can challenge the determination of whether a Book is Commercially Available, and any disputes with Google will be resolved through the Settlement's arbitration procedures (*see* SA Article IX). SA § 3.2(d)(iv).

3. Rightsholders' Do-Not-Digitize/Removal Rights.

Rightsholders can tell Google not to digitize their Books, or if already digitized, to remove their Books from Google's database and from the digital copies provided by Google to participating libraries. SA §§ 1.124, 3.5(a)(i). Google and the libraries must honor all do-not-digitize/removal requests made by April 5, 2011; thereafter requests will be honored only if the Books have not already been digitized. SA § 3.5(a)(iii).[10]

4. Rightsholders' Exclusion Rights.

Even if they do not remove a Book from Google's and the libraries' databases, Rightsholders at any time can exclude their Books (or portions thereof) from any or all Display Uses. SA § 3.5(b). Insert Rightsholders at any time can exclude Inserts (or portions thereof) from all (but not less than all) Display Uses. *Id.* Rightsholders can change their mind at any time and turn Display Uses back on for some or all of their Books and Inserts. *Id.*

5. Rightsholders' Pricing Rights for Consumer Purchase

Rightsholders have two options under the Settlement for setting the sale price of their Books made available in the Consumer Purchase revenue model: they can set the

[10] Exercise of the removal right does not vitiate Rightsholders' eligibility for the Cash Payment, described below.

price themselves (Specified Pricing) (SA § 4.2(b)(i)(1)) or they can rely on the "Settlement-Controlled Price" developed by Google. (SA § 4.2(b)(i)(2)). Settlement-Controlled Prices will be algorithmically designed by Google to find the optimal revenue-maximizing price for each Book. (SA §§ 4.2(b)(i)(2) & (c)).

Plaintiffs have heard from a number of academic and other authors (e.g., university professors) who are interested in making their books freely available to others through the Settlement. The Settlement Agreement enables Rightsholders to do so. The Settlement Agreement will support Creative Commons licenses. In addition, Rightsholders can set the sale price for their Books at zero. In those situations neither Google nor the Registry will receive revenues from any Consumer Purchase of those Books.

6. Establishment of The Book Rights Registry, and Payment for Notice and Claims Administration.

Google has agreed to pay $34.5 million to fund the newly formed Book Rights Registry, to pay for notice to the Settlement Class and to pay for claims administration services. SA § 2.1(c). The Registry will be an independent not-for-profit entity, and all funds received by the Registry will be for the benefit of Rightsholders. SA § 6.2(a). The Registry will have a Board of Directors composed at all times of an equal number of Author Sub-Class and Publisher Sub-Class representatives. SA § 6.2(b). Thus, the Registry will not, as some have suggested, by controlled by Google. The Registry will establish and maintain a database of Rightsholders' contact information and information regarding Rightsholders' Books and Inserts. SA § 6.1(b). The Registry will locate Rightsholders, identify and coordinate payments to Rightsholders, and otherwise represent the interests of Rightsholders under the Settlement Agreement. *Id.* The

Registry will able, with express rightsholder approval, to do deals with anyone, including competitors of Google.

The Registry will be funded at first by Google's $34.5 million payment (net of notice and claims administration expenses). SA §§ 1.6, 2.1(c), 5.2. Thereafter, the Registry will also be funded by an administrative fee taken as a percentage of Rightsholders' revenues. SA, Attachment C (Plan of Allocation) § 4.2.

7. Payment For Already Digitized Books.

To settle plaintiffs' claims for actual infringement, Google has agreed to pay Rightsholders a minimum of $45 million for Books and Inserts digitized without permission as of May 5, 2009 (i.e., the original opt-out deadline). SA §§ 2.1(b), 5.1. For every such work that is claimed by January 5, 2010, Google will make a "Cash Payment" of at least $60 per Principal Work, $15 per Entire Insert, and $5 per Partial Insert.[11]

If more than $45 million is required to pay all of the eligible claims for Cash Payments, then Google will pay the additional funds necessary to make all such Cash Payments, with no cap on such additional payments. SA § 5.1(b). If the total amount of all eligible claims is less than $45 million, the claiming Rightsholders can receive up to $300 per Principal Work, $75 per Entire Insert, and $25 per Partial Insert. Any remaining funds thereafter from the $45 million will go to the Registry for operations. SA, Attachment C (Plan of Allocation) § 3.2.

[11] "Principal Work" refers to a book's principal written work (such as a novel, or a collection of short stories). SA §1.111. "Entire Inserts" are complete works, such as short stories, forewords and poems. "Partial Inserts" are all other content that meet the definition of an Insert, such as quotes from other works. SA §§ 1.50, 1.100.

D. Author-Publisher Procedures.

Because, for most Books, authors and their publishers each have copyright interests, the authors' and publishers' respective interests are addressed in the Author-Publisher Procedures (SA, Attachment A). Among other things, the Author-Publisher Procedures set forth the authors' and the publishers' respective rights concerning in-print and out-of-print Books under the Settlement.

1. In-Print Books.

With respect to in-print books (other than works-for-hire), both the author and the publisher must agree to include the Book in the GLP; if they do not agree, it will not be included. Author-Publisher Procedures ("A-P") § 5.1. Cash Payments for in-print Books, as well as all revenues earned from Google's future uses of in-print Books, will be paid to the publishers of the Books, who will then pay the authors under the book publishing contract between the author and the publisher. A-P § 5.5. If an author wishes to challenge the revenue split offered by the publisher under that contract, the dispute may (except for Educational Books) be resolved in the Settlement's arbitration process. *Id.* The A-P also sets forth the respective rights of authors and publishers as to exclusion, removal, pricing, and changes in Display Uses of in-print Books. A-P §§ 5.2-5.4.

2. Out-Of-Print Books.

The A-P includes provisions concerning exclusion, removal, control of pricing, and changes in Display Uses of out-of-print Books, which vary depending on whether the Book is (1) a work-for-hire under United States copyright law (100% of Cash Payments and revenues paid by the Registry directly to the publisher), or (2) reverted (100% of Cash Payments and revenues paid by the Registry directly to the author). A-P § 6.1.

Cash Payments and future revenues earned for unreverted out-of-print Books will be split between the author and publisher of the Book as follows: (a) for Books first published prior to 1987, the Registry will pay 65% to the author and 35% to the publisher; and (b) for Books first published during or after 1987, the Registry will pay each of the author and the publisher 50%. A-P § 6.2(c).[12] In addition, for Books that are not reverted and are not works-for-hire, in general, both the author and the publisher have the right to manage the Books. (*See* A-P for further details concerning the A-P.)

E. Other Provisions.

1. Public Access Service.

The Parties have agreed to provide, upon request, free access to the entire subscription database at a computer terminal in every public library building in the United States that requests one and at least one computer terminal at each not-for-profit higher educational institution. SA §§ 1.66, 1.119, 4.8. Anyone in any urban or small town library building in the U.S. could have free, full access to the entire database of Books.

2. Non-Display Uses.

In addition to the Display Uses, Google will be permitted to make "Non-Display Uses" of Books, including full-text indexing (without displaying the text), geographic indexing, algorithmic listings of key terms for chapters of Books, and other internal research. SA §§ 1.91, 3.4.

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[12] Based on discovery taken by the author plaintiffs, most form book publishing contracts in the late 1980s began to include express electronic rights grants to the publisher. Counsel for the authors and publishers thus agreed that authors would receive a greater revenue split for out of print Books published prior to 1987 than those published thereafter.

3. Security Provisions.

Google and plaintiffs developed security standards to prevent security breaches and unauthorized use of Google's books database. SA §§ 8.1-8.2 and Attachment D. The SA provides remedies to Rightsholders for security breaches and unauthorized access. SA §§ 8.3-8.7.

4. Dispute Resolution Mechanism.

If disputes concerning the Settlement arise among Rightsholders and Google or the libraries, they will be subject to arbitration. Examples are disputes (1) between authors and publishers of the same Books; (2) over claimed security breaches; (3) over whether a Book is in-print, out-of-print, or in the public domain; and (4) over whether Google or a participating library has made a use of a Book that is not authorized under the Settlement. *See generally* SA Article IX. The Settlement Agreement also provides that the court will have continuing jurisdiction over other disputes concerning the parties' obligations under the Settlement Agreement. SA § 17.23. Disputes between publishers are not subject to arbitration.

5. Non-Exclusive Rights.

The authorizations granted to Google under the Settlement Agreement are non-exclusive only. Rightsholders retain all their rights to use and license their Books in any way, including ways identical to those authorized to Google. No authorization under the Settlement constitutes a transfer of any copyright ownership interest in any Book or Insert. SA §§ 2.4, 3.1(a).

IV. COPYRIGHT ISSUES

The Settlement has been the subject of substantial discussion. I would like to

elaborate on my remarks in the Executive Summary regarding the Settlement's treatment of so-called "orphan works," and I will then address the potential effect of including foreign rightsholders in the Settlement Class on U.S. foreign relations.

A. The Question of "Orphan Works"

A number of critics of the Google Book Search Settlement have complained that the Settlement will confer on Google a monopoly over "orphan works." These critics have stated – without any evidence – that "orphan works" will include millions of books, comprising anywhere from 50% to 70% of the books covered by the Settlement. These percentages are over-inflated, principally because at least some of the critics appear to have equated the term "out-of-print books" with "orphan works," which is erroneous, and, further, because they incorrectly assume that the rightsholders of out-of-print books are either unknown or cannot be found.

The term "orphan works," however, has no meaning under the Copyright Act; the Act only recognizes works only as in-copyright or not in-copyright. That term, however, has been typically understood and used – both in the context of legislative proposals considered by the Congress, including this Committee, over the last several years, as well as by the Copyright Office – to refer to a work for which the copyright owner cannot be identified or found (such as a photograph with no attributed photographer).

Contrary to the use of that term by the Settlement's critics, we start with the principle that published books found in U.S. libraries – unlike many other types of copyrighted works – are generally quite unlikely to be orphan works. They are published works. They have identifiable authors and publishers. Published books include readily accessible information as to their author, publisher and date of publication.

Moreover, as to all United States works, the Settlement only covers those that are "registered" with the United States Copyright Office. So, at least with respect to United States works, the Copyright Office registration is available as an important starting point in attempting to identify and locate the current copyright owner. There is no reason to believe that a significant number of the copyright owners of books covered by the Settlement cannot be identified and found – by anyone, including would-be competitors of Google – if due diligence efforts are made to do so.

Prior to the Settlement, at least for purposes of large scale commercial exploitation, few such efforts have been made. That is because there has been no commercial market for a collection of out-of-print books, and thus no incentives to identify rightsholders of out-of-print books or for them to come forward to associate themselves with their works for purposes of licensing others to use them. Now, for the first time, the settlement provides just such a product, and brand new incentives for rightsholders of out-of-print books to participate. Not only have meaningful, ambitious efforts been made to locate these rightsholders, those efforts will be continued into the future by the Registry. In addition and importantly, the prospect of earning money under the Settlement – and the very availability of revenues generated by the Settlement – will provide powerful incentives for rightsholders to come forward to claim their works. Once they do so, of course, such works would have identifiable copyright owners and could not be considered to be "orphans."

First, approval of the Settlement required the parties to undertake an unprecedented, worldwide Notice Program that was designed to reach as many members of the Settlement Class as possible. As a result of the Notice Program, many

rightsholders of out-of-print books have already claimed their books. Because there is no deadline to claim one's books through the Settlement, it is reasonable to expect that the numbers of claimed out-of-print books will grow exponentially.

Second, one of the Registry's core missions will be to locate rightsholders of out-of-print books that have not yet been claimed. This is for the purpose of having the Registry assist them in claiming their works and, ultimately, to pay to them the revenues they are owed under the Settlement's revenue models.

Also, as noted above, the Registry will want to enter into licensing arrangements with others, not just Google. For this purpose, the Registry and claiming rightsholders will want as many rightsholders as possible to come forward and authorize the Registry to include their books in those arrangements. In this way, there will be a more robust set of books available for license, which will redound to the benefit of all rightsholders..

The goals of the Notice Program and the Registry are achievable precisely because the settlement creates meaningful incentives for copyright owners of out-of-print works to claim their books. The new services authorized by the Registry (which include the subscriptions and consumer purchase options offered by Google, as well as alternative, even competing products that others may establish) will begin earning rightsholders new revenue.

Most authors write for two reasons, for their books to be read, and to be compensated. Because the Settlement has given new exposure and commercial life to out-of-print books, authors are more likely to claim their books and the Registry will have a greater chance of finding them.

What does that mean for the so-called "orphan books?" We've already learned

through the Settlement's claiming process that many out-of-print books' "parents" are alive and claiming their books. And, as "parent" rightsholders claim their books, the number of books that might arguably be considered "orphans" will be dramatically reduced.

Significantly, the Registry will maintain a publicly accessible database of which books are claimed. The database will also make public who has claimed those books (except where the claimant has asked that his or her name not be disclosed). This database will make it far, far easier than at present for anyone to identify rightsholders of books and obtain permission to use them. The experiences of the Authors Registry and the ALCS, reported in the Executive Summary, bear this out. Thus, where it might once have been difficult to find the copyright owners of books it will now become much more feasible to license out-of-print books, either through the Registry or directly from their copyright owners.

Of course, there may still be books whose rightsholders prove difficult to find. The Settlement is not a panacea. But the facts suggest, contrary to the gloomy scenarios painted by the critics, that the number of such books ultimately will be quite low.

B. The Settlement is Wholly Consistent with the International Obligations of the United States

Questions also have been asked as to whether the Settlement complies with the international treaty obligations of the United States. These issues have been raised under two provisions of the 1971 Berne Convention for the Protection of Literary & Artistic Works (the "Berne Convention"), to which the United States adhered effective March 1,

1989.[13] The first provision is that of national treatment, found in Article 5(1) of the Berne Convention. The second provision is Article 5(2) of the Berne Convention, which bans the imposition of certain "formalities." Examining both provisions, we believe that the Settlement is fully consistent with our country's treaty obligations.

To begin, the Berne Convention is not itself self-executing in the United States. In the Berne Convention Implementation Act of 1988 (BCIA), which implemented the Berne Convention,[14] Congress was crystal clear that the Berne Convention itself does not create any rights or obligations under U.S. law.[15] Thus, if any provision of the enacted laws of the United States is inconsistent with our country's Berne Convention obligations, the only remedy is for another *country* to take the United States to the International Court of Justice, or to invoke the dispute resolution provisions set forth in

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[13] The United States has entered into other international agreements that incorporate the United States' Berne Convention obligations by reference, such as the 1994 GATT TRIPS agreement. However, because these other agreements are derivative of the Berne obligations, we do not discuss them separately.

[14] 102 Stat. 2853-2861.

[15] Section 2 of the BCIA provides:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Section 3(a) declares:

(a) Relationship with Domestic Law.--The provisions of the Berne Convention--

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

the GATT, leading possibly to a WTO panel. With respect to the pending approval of the Settlement, the District Court must follow the Copyright Act, and it has no authority to deviate from it in an effort to comply with its understanding of the United States' treaty obligations.

1. National Treatment

The Settlement is fully consistent with the national treatment principle of Article 5(1) of the Berne Convention,[16] which Congress implemented in the BCIA, and is now enshrined in Section 104 of the Copyright Act, as amended. In the United States, that principle "simply assures that if the law of the country of infringement applies to the scope of substantive copyright protection, that law will be applied uniformly to foreign and domestic authors." *See Itar-Tass Russian Newspaper Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 89 (2d Cir. 1998). Thus, Article 5(1) applies only to national *laws* granting *substantive* rights. A private settlement agreement is, by definition, not a law nor can it grant substantive statutory rights. As Congress made clear, only Congress can grant such rights. The Settlement does not provide or grant any substantive copyright rights; only Congress can do so. Instead, it is the settlement of copyright litigation between private parties that provides extensive remedies to members of the class.

Most importantly, the Settlement is careful to treat all covered books identically, without regard to whether their rightsholders are United States or foreign publishers or authors. Consistent with Section 104 of the Copyright Act, all copyright owners of books

[16] Article 5(1) of the Berne Convention provides:

> (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

covered by the Settlement, regardless of their nationality, are entitled to exactly the same rights and receive exactly the same remedies under the Settlement.

2. Formalities and the Means of Redress

The Settlement and the class action opt-out procedure do not constitute a prohibited formality within the meaning of Article 5(2) of the Berne Convention.[17] The term "formality" is not defined in the Article. The World Intellectual Property Organization's guide to the Berne Convention provides some guidance. It states: "The word 'formality' must be understood in the sense of a condition which is necessary for the right to exist -- administrative obligations laid down by national law, which is not fulfilled, lead to loss of copyright." *See WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1971) at 33 (1978). As the WIPO drafted the Berne Convention and is charged by the United Nations with administering it, its views should be entitled to great deference.

The process for reviewing and approving class action settlements under Rule 23(b)(3) of the Federal Rules of Civil Procedure necessarily includes a mechanism to allow class members to opt out. That requirement of federal law is not a formality. It cannot lead to a loss of statutory copyright protection under the Copyright Act. Nor is the Settlement itself or the opt-out procedure of Rule 23(b)(3) an administrative obligation laid down by national law that is necessary for the copyright right to exist.

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[17] Article 5(1) of the Berne Convention provides:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

The Rule constitutes, instead, a *procedural* device.

The language of Article 5(2) makes clear that such procedural mechanisms – which are the means by which copyright infringement suits may be brought and resolved – fall exclusively within the province of national law and, as such, can be adopted by Congress and applied by federal courts consistently with the United States' obligations. *See* Article 5(2) (providing that "the extent of protection, as well as the *means of redress* afforded to the author to protect his rights, shall be governed *exclusively* by the laws of the country where protection is claimed [emphasis supplied]).

C. The Settlement is not "Legislating"

Some have expressed concern that the Settlement constitutes "judicial legislating" or that approval of this particular class action settlement is not otherwise properly within the province of the federal courts. That is not the case. Whatever one's view of judicial activism, a class action settlement negotiated by parties to a lawsuit and approved by a federal court only binds members of the class who have chosen not to opt out. It does not bind – or supplant the role of – Congress.

Moreover, settlements of litigation do not establish rights or obligations of general applicability, which is, by contrast, in the very nature of statutes. In this case, the Settlement only pertains to the rights of class members vis-à-vis Google, which is obtaining a non-exclusive license from rightsholders who have chosen to remain in the Settlement.

Furthermore, the class action device is widely used in all manner of state and federal common law and statutory claims. It has also been used in the context of federal copyright claims. Such actions have been settled, and those settlements are subject to the

requirements of the Federal Rules and to judicial decisions interpreting such Rules. Congress has not chosen to exempt copyright infringement actions from the Federal Rules that authorize the use of the class action device in appropriate circumstances. Parties utilizing a congressionally created procedural device, and courts approving class action settlements, are, therefore, fully adhering to federal law.

Finally, nothing in the Settlement prevents Congress from legislating in the future as broadly as it wishes. Congress could, for example, pass orphan works legislation, to enable users to make use of a work after a due diligence effort to identify and locate the copyright owner.

Mr. CONYERS. Thank you so very much.

We are now happy to have with us again the leader of the United States Copyright Office, Ms. Marybeth Peters. She has been a frequent speaker and writer on this and other related subjects and is the author of the "General Guide to the Copyright Act of 1976."

And we welcome you at this time, ma'am.

TESTIMONY OF MARYBETH PETERS, REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE

Ms. PETERS. Thank you. Chairman Conyers, Ranking Member Smith, and Members of the Committee, I appreciate the opportunity to testify before you today about the potential impact of the proposed Google Books settlement on United States copyright law and policy.

I am familiar with the terms of the settlement. Indeed, my office has thoroughly reviewed the entire settlement agreement. While aspects of the settlement have merit—for example, the creation of a registry which facilitates licensing of books for online uses and certain provisions to benefit the blind and visually impaired—key parts of the settlement are fundamentally at odds with the law. They impinge on exclusive rights granted to authors and other rights holders.

My written testimony fully describes my concerns. And I apologize for not submitting the testimony within the time limits provided by the Committee, thereby basically making it not available for Members to read before this hearing.

In my oral testimony I am going to focus on only two points. One is, the settlement agreement creates what is, in effect, a compulsory license that allows Google to continue to scan millions of books into the future and permits Google to engage in a number of activities that were not actually part of the lawsuit and that are indisputably acts of copyright infringement: for example, offering full-text displays and the sale of downloads.

Compulsory licenses are the domain of Congress, not the courts. When such licenses are created, it is usually the result of marketplace failure. You have heard that there is marketplace failure from some today. But it is after full public debate. Moreover, they are narrowly tailored and apply to all users who meet the terms and conditions of the license.

By permitting Google to engage in a wide array of new uses of most books in existence, the settlement would alter the landscape of copyright law—which is also the role of Congress and not the courts—for millions and millions of rights holders of out-of-print books. The out-of-print default rules would flip copyright on its head by allowing Google to engage in extensive new uses without the consent of the copyright owner, in my view making a mockery of Article 1 of the Constitution that anticipates that authors shall be granted exclusive rights.

Moreover, the settlement would jeopardize the efforts of Congress to enact comprehensive orphan works legislation that would benefit all users. Courts have acknowledged that, when dealing with new technology, only Congress has the authority and the institutional ability to accommodate the competing interests that are implicated. This Committee has spent considerable time and given consider-

able thought as to how to resolve the orphan works problem. The settlement undermines Congress's ability to determine how to address this issue and is at odds with the approach that you have been considering up to now.

The agreement also has serious international implications. Foreign governments, as well as many foreign authors and publishers, have objected to the settlement and suggested that the settlement may violate certain international obligations of the United States. It is troubling that many foreign works that have never been made available by their authors or publishers in the United States would be swept into a class action simply because one copy was located in a library and that library permitted Google to scan its books.

In conclusion, Congress frames and defines the scope of the rights and the remedies of copyright owners. I do believe that the proposed settlement agreement seeks to usurp that role by addressing policy issues that go well beyond the case or controversy identified by the plaintiffs in litigation.

I look forward to your questions. And, as always, the office stands ready to assist the Committee as it considers the issues posed by the settlement agreement. Thank you.

[The prepared statement of Ms. Peters follows:]

Statement of Marybeth Peters
The Register of Copyrights
before the Committee on the Judiciary

United States House of Representatives
111th Congress 1st Session

September 10, 2009

Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement

Chairman Conyers, Ranking Member Smith, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to testify about the impact of the proposed Google Book Settlement Agreement on U.S. copyright law and policy as part of this hearing on Competition and Commerce in Digital Books.

Summary

The Copyright Office has been following the Google Library Project since 2003 with great interest. We first learned about it when Google approached the Library of Congress, seeking to scan all of the Library's books. At that time, we advised the Library on the copyright issues relevant to mass scanning, and the Library offered Google the more limited ability to scan books that are in the public domain. An agreement did not come to fruition because Google could not accept the terms.

In 2005, we followed very closely the class action filed by The Authors Guild and its members and the infringement suit filed by book publishers shortly thereafter. The facts of the underlying lawsuits are simple. Google was reproducing millions of protected books in their entirety, without permission of the copyright owners, through systematic scanning operations set up with large research libraries. Once scanned, the books were indexed electronically, allowing end-users to search by title and other bibliographic information. Google returned hits to its customers that included the option of browsing "snippets" (e.g. several lines of the book), except for public domain books, which could be viewed and downloaded in their entirety. Google's search engine is free to users, but the company collects substantial revenue from the advertising that appears on web pages, including those pages on which images of, and information from, copyrighted books appear. The lawsuits raised complex and sometimes competing legal questions, including questions about intermediate copying, future markets, book digitization goals and fair use. Members of the legal community and the public debated the issues vigorously and anticipated what a Court decision on the merits might look like.

When the parties announced last fall that they had reached a settlement in what was becoming a long and protracted litigation, our initial reaction was that this was a positive development. But as we met with the parties, conversed with lawyers, scholars and other experts, and began to absorb the many terms and conditions of the settlement—

a process that took several months due to the length and complexity of the documents—we grew increasingly concerned. We realized that the settlement was not really a settlement at all, in as much as settlements resolve acts that have happened in the past and were at issue in the underlying infringement suits. Instead, the so-called settlement would create mechanisms by which Google could continue to scan with impunity, well into the future, and to our great surprise, create yet additional commercial products without the prior consent of rights holders. For example, the settlement allows Google to reproduce, display and distribute the books of copyright owners without prior consent, provided Google and the plaintiffs deem the works to be "out-of-print" through a definition negotiated by them for purposes of the settlement documents. Although Google is a commercial entity, acting for a primary purpose of commercial gain, the settlement absolves Google of the need to search for the rights holders or obtain their prior consent and provides a complete release from liability. In contrast to the scanning and snippets originally at issue, none of these new acts could be reasonably alleged to be fair use.

In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress. The settlement is not merely a compromise of existing claims, or an agreement to compensate past copying and snippet display. Rather, it could affect the exclusive rights of millions of copyright owners, in the United States and abroad, with respect to their abilities to control new products and new markets, for years and years to come. We are greatly concerned by the parties' end run around legislative process and prerogatives, and we submit that this Committee should be equally concerned.

As outlined below, the Copyright Office also believes that some of the settlement terms have merit and should be encouraged under separate circumstances. For example, the creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner. Likewise, the promise to offer millions of titles through libraries in formats accessible by persons who are blind and print disabled is not only responsible and laudable, but should be the baseline practice for those who venture into digital publishing. The ability of copyright owners and technology companies to share advertising revenue and other potential income streams is a worthy and symbiotic business goal that makes a lot of sense when the terms are mutually determined. And the increased abilities of libraries to offer on-line access to books and other copyrighted works is a development that is both necessary and possible in the digital age. However, none of these possibilities should require Google to have immediate, unfettered, and risk-free access to the copyrighted works of other people. They are not a reason to throw out fundamental copyright principles; they are a pretext to do so.

In the testimony below, we will address three specific points. First, we will explain why allowing Google to continue to scan millions of books into the future, on a rolling schedule with no deadline, is tantamount to creating a private compulsory license

through the judiciary. This is not to say that a compulsory license or collective license for book digitization projects may or may not be an interesting idea. Rather, our point is that 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.

Second, we will explain why certain provisions of the proposed settlement dramatically compromise the legal rights of authors, publishers and other persons who own out-of-print books. Under copyright law, out-of-print works enjoy the same legal protection as in-print works.[1] To allow a commercial entity to sell such works without consent is an end-run around copyright law as we know it. Moreover, the settlement would inappropriately interfere with the on-going efforts of Congress to enact orphan works legislation in a manner that takes into account the concerns of all stakeholders as well as the United States' international obligations.

Finally, we will explain that foreign rights holders and foreign governments have raised concerns about the potential impact of the proposed settlement on their exclusive rights and national, digitization projects. The settlement, in its present form, presents a possibility that the United States will be subjected to diplomatic stress.

Factual and Procedural Background

The proposed settlement, announced by the parties on October 28, 2008, would resolve claims that stem from Google's highly publicized Google Library Project. It is currently pending before the Honorable Denny Chin, United States District Court, Southern District of New York. Settlement Agreement, *The Authors Guild, Inc. et al. v. Google Inc.*, No. 06-CV-8136 (S.D.N.Y. Oct. 28, 2008). The proceeding combines the unresolved claims of authors and book publishers as initially filed in two underlying actions: *The Authors Guild, Inc. v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y Sep. 20, 2005) (a class action filed by representative authors and the Guild) and *The McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05 Civ. 8881 (S.D.N.Y Oct. 19, 2005) (an action filed on behalf of five publishing companies).

By way of background, as of 2008 Google had digitized about 7 million books and other materials obtained through agreements with library collections at the University of Michigan, Stanford University, Oxford University, Harvard University and the New York Public Library, among others.[2] At a hearing convened by the European Commission in Brussels on September 7, 2009, Google announced that it has now scanned approximately 10 million books. Of these, Google estimates that about 1.5

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[1] Under certain narrow circumstances, libraries and archives may make use of works that are in their last 20 years of copyright protection, provided that the use is for purposes of preservation, scholarship, or research and that the library or archives has first determined, on the basis of a reasonable investigation that certain conditions apply. *See* 17 U.S.C. §108(h)(i).

[2] Google Books Settlement Agreement, http://books.google.com/googlebooks/agreement (last visited Sept. 4, 2009).

million of these works are in the public domain. Many more may be works that are protected by copyright but have no identifiable or locatable copyright owner.[3]

1. Judicial Compulsory License

Class action lawsuits typically seek compensation for a class of similarly-situated persons who have suffered harm, or will suffer harm imminently, due to the defendant's past acts. The proposed settlement in fact resolves Google's past conduct by requiring Google to pay at least $60 for each book and $15 for each insert that was digitized prior to the opt-out deadline.[4] Proposed Settlement Agreement at 61, ¶ 5.1(a). But the class is overbroad and the settlement terms do not stop here.

Under the proposed settlement, the parties have crafted a class that is not anchored to past or imminent scanning, but instead turns on the much broader question of whether a work was *published* by January 5, 2009. As defined, the class would allow Google to continue to scan entire libraries, for commercial gain, into the indefinite future. The settlement would bind authors, publishers, their heirs and successors to these rules, even though Google has not yet scanned, and may never scan, their works.

We do not know the parties' reasons for defining the class according to whether a book was or was not published by January 5, 2009, but the result is to give Google control of a body of works that is many times larger than the 7 million works that were originally at issue. As defined, the class would bring into the settlement tent not only works that were published in the United States, and are therefore directly subject to U.S. law, but works published in most other countries in the world that have treaty relations with the United States.[5] While no one really knows how many works would be affected, Dan Clancy, the Engineering Director for the Google Book Search project, has been quoted as estimating that there are between 80 and 100 million books in the world.[6] As a practical matter, this means that the settlement would create for Google a private

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[3] Google Books Settlement, orphan works, and foreign works, http://blog.librarylaw.com/librarylaw/2009/04/google-book-settlement-orphan-works-and-foreign-works.html (last visited Sept. 4, 2009).

[4] The settlement also addresses and resolves other issues such as the conduct of libraries, but the Office will not address those provisions for purposes of this preliminary assessment of issues with the Proposed Settlement Agreement.

[5] The United States enjoys international copyright relations with all but a small number of countries. *See* U.S. Copyright Office, Circular 38a: International Copyright Relations of the United States (rev. July 2009) (available at http://www.copyright.gov/circs/circ38a.pdf (last visited Aug. 25, 2009)).

[6] *See* "The Audacity of the Google Book Search Settlement," Pamela Samuelson, http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl_b_255490.html (last visited Aug. 12, 2009).

structure that is very similar to a compulsory license, allowing it to continuously scan copyrighted books and "inserts."[7]

Compulsory licenses in the context of copyright law have traditionally been the domain of Congress.[8] They are scrutinized very strictly because by their nature they impinge upon the exclusive rights of copyright holders. A compulsory license (also known as a "statutory license") is "a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions." Satellite Home Viewer Extension Act: Hearing Before the S. Committee on the Judiciary,108th Cong. (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office) (May 12, 2004). "[C]ompulsory licensing . . . break[s] from the traditional copyright regime of individual contracts enforced in individual lawsuits." *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988) (describing limited license for cable operators under 17 U.S.C. § 111). By its nature, a compulsory license "is a limited exception to the copyright holder's exclusive right . . . As such, it must be construed narrowly. . . ." *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909). Congress is the proper forum to legislate compulsory licenses when they are found necessary. *See* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.07 (2009) (Congress has authority to grant exclusivity and "may properly invoke . . . [n]onexclusivity under a compulsory license"); *cf. Cablevision* at 602 (citing *Teleprompter Corp. v. Columbia Broadcasting Sys.*, 415 U.S. 394, 414 (1974) (stating that it was Congress's role to address the issue of secondary transmissions if the Copyright Act of 1909 was inadequate). Compulsory licenses are generally adopted by Congress only reluctantly, in the face of a marketplace failure. For example, Congress adopted the Section 111 cable compulsory license "to address a market imperfection" due to "transaction costs accompanying the usual scheme of private negotiation. . . ." *Cablevision at 602.* "Congress' broad purpose was thus to approximate ideal market conditions more closely . . . the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of high transaction costs." *Id.* at 603.

As a matter of copyright policy, courts should be reluctant to create or endorse settlements that come so close to encroaching on the legislative function. Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored. Here, no factors have been demonstrated that would justify creating a system akin to a compulsory license for Google – and only Google – to digitize books for an indefinite period of time.

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[7] The term "insert" is broad. It includes (i) text, such as forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other Books, Periodicals or other works; (ii) children's Book illustrations; (iii) music notation (*i.e.*, notes on a staff or tablature); and (iv) tables, charts and graphs. Proposed Settlement Agreement at 9, ¶ 1.72.

[8] *See, e.g.*, 17 U.S.C §§ 111, 112, 114, 115, 118 and 119.

At very least, a compulsory license for the systematic scanning of books on a mass scale is an interesting proposition that might merit Congressional consideration. As stated above, various compulsory licenses have been carefully crafted over the years after extensive deliberation and consideration of the viewpoints of all affected stakeholders, though none apply to books or text. Among the issues Congress would want to consider are the pros and cons of allowing copyright users, rather than copyright owners, to initiate the digitization of copyrighted works; the rate of compensation that should be paid to copyright owners; and whether the same license terms should apply to mass digitization activities undertaken for the public interest by non profit organizations such as libraries, and for profit purposes by commercial actors. Congress also would want to consider whether all books merit the same attention, or whether differences can be drawn from the date of publication, the type of publication, or such facts as whether the rights holder is likely to be alive or deceased. Congress would need to consider the treaty obligations that may apply.

***2.* The Sale of Copyrighted Books without Consent of Rights Holders**

The Copyright Office strongly objects to the treatment of out-of-print works under the proposed settlement. The question of whether a work is in-print (generally, in circulation commercially) or out-of-print (generally, no longer commercially available) is completely inconsequential as to whether the work is entitled to copyright protection under the law.

The Google Book Settlement gives Google *carte blanche* permission to use out-of-print works by operation of the default rules. If a work is out-of-print, Google need not obtain permission before incorporating it into new "book store" products. These include on-line displays (up to 20% of a work), full-text purchases, and subscription products for institutional subscribers and library patrons. There are mechanisms by which the rights holder may stop Google after the fact and prospectively collect royalties that are predetermined by the Book Rights Registry ("BRR"). In summary, the out-of-print default rules would allow Google to operate under reverse principles of copyright law, and enjoy immunity from lawsuits, statutory damages, and actual damages.

The activities that prompted the plaintiffs to file suit against Google – the wholesale scanning of books, electronic indexing and snippet display – are activities as to which reasonable minds might differ when considering whether such activities are acts of infringement or are, for example, fair use. However, the same cannot be said of the new uses that the settlement agreement permits Google to make of out-of-print works. We do not believe that even Google has asserted that, in the absence of this class action settlement, it would be fair use to undertake the new activities that Google would enjoy risk-free as a result of the settlement. In essence, the proposed settlement would give Google a license to infringe first and ask questions later, under the imprimatur of the court.

We are not experts on the proper scope of class action settlements, but we do wonder whether, as a constitutional matter, a class action settlement could decide issues that were not properly before the Court as part of the case and controversy presented during the litigation.[9] At the very least, within the context of copyright litigation, the class action mechanism has been used sparingly in recent years and has never resulted in the broad adoption of a settlement permitting extensive future uses of copyrighted products that were not the subject of the original infringement action.[10] A class action settlement that permits new activities for years to come, and removes the judicial remedies of millions of authors and publishers that are otherwise afforded by the Copyright Act, seems to us to be an excessive exercise of judicial power. The default rules for out-of-print books are not a small issue in the settlement because the *substantial majority* of books covered are out-of-print works—millions and millions of books. To be clear, the Office does not dispute the goal of creating new markets for out-of-print books – copyright duration has always been longer than the first print-run of a book and it has always been obvious that works will come in and out of favor, and in and out of print, during the term of protection. But copyright law has always left it to the copyright owner to determine whether and how an out-of-print work should be exploited.

Apart from its interest in ensuring the proper application of law and policy, Congress should be particularly concerned about the settlement since it would interfere with the longstanding efforts of Congress and many other parties to address the issue of orphan works. The broad scope of the out-of-print provisions and the large class of copyright owners they would affect will dramatically impinge on the exclusive rights of authors, publishers, their heirs and successors. Such alteration should be undertaken by Congress if it is undertaken at all. Indeed, this Committee has already invested significant time in evaluating the orphan works problem and weighing possible solutions. That process is not over. The Google Book Settlement would frustrate the Committee's efforts and make it exceedingly difficult for Congress to move forward. A much more

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[9] As Judge Friendly stated in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981), "If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." In *National Super Spuds*, a settlement purported to release the claims of class members who held both liquidated and unliquidated contracts when the original complaint only concerned persons who held liquidated contracts during a specific period of time. The Court held that the harm done by the unclear release of parties outweighed the benefits of settlement and reversed the settlement approval. *Id.*

[10] One of these class actions, *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1379 (S.D.N.Y.), is the remedies phase of an infringement suit brought by members of the National Writers Union, in which the writer-plaintiffs successfully challenged the sale of their newspaper and magazine articles in commercial databases. *See New York Times v. Tasini*, 533 U.S. 483 (2001). A settlement agreement has been proposed by the parties to the consolidated cases.[10] However, the proposed settlement, if finally adopted, would speak only to the activities originally at issue in the suit: the reproduction, display and distribution of copyrighted articles in electronic databases. Settlement Agreement, *In re Literary Works* (2005), ¶ 1(f). In contrast with the proposed settlement agreement, the *In Re Literary Works* settlement does not authorize the publisher and database defendants to further copy, package, and sell the copyrighted articles as part of new products such as subscriptions, books, or compilations, for example. Nor does it lock in licensing terms, including payment, for future kinds of activity.

productive path would be for Google to engage with this Committee and with other stakeholders to discuss whether and to what degree a diligent search for the rights holder should be a precondition of a user receiving the benefits of orphan works legislation, or whether a solution that is more like a compulsory license may make sense for those engaged in mass scanning. Whatever, the outcome, Congress is much better situated than the judiciary to consider such important and far-reaching changes to the copyright system.

As a side note, the Copyright Office would like to underscore for the Committee that out-of-print works and orphan works are not coextensive. Orphan works are works that are protected by copyright but for which a potential user cannot identify or locate the copyright owner for the purpose of securing permission. They do not include works that are in the public domain; works for which a copyright owner is findable but refuses permission; or works for which no permission is necessary, i.e. the use is within the parameters of an exception or limitation such as fair use. Many out-of-print works have rights holders who are both identifiable and locatable through a search. In fact, the U.S. works covered by the proposed settlement would all be searchable, at a minimum, through Copyright Office records because the settlement includes U.S. works only *if* they are registered. Proposed Settlement at 3, 9, ¶¶ 1.16, 1.72. Certainly, rights information may not be current and there may be disputes about rights between publishers and authors. However, these are the realities of the copyright system and the reason that Congress, the EU and other foreign governments have been working on a solution, with all of the deliberation and fine tuning that is appropriate. Until there is a legislative solution, it is our strong view that Google should conduct itself according to the same options available to other users of copyrighted works: secure permission; forego the use; use the work subject to risk of liability; or use the work in accordance with fair use or another limitation or exception.

The Office also notes that while the BRR might well provide a place for rights owners to come forward with contact information, it is also likely to have the unfortunate effect of creating a *false* database of orphan works, because in practice any work that is not claimed will be deemed an orphan. Many rights holders of out-of-print books may fail or refuse to register with the BRR for very good reasons, whether due to lack of notice, disagreement with the Registry's mission or operations, fear (*e.g.* privacy concerns) or confusion. The fact that the rights holder is missing from the BRR may also mean that he has no interest in licensing his work.

3. International Concerns

We are troubled by the fact that the proposed settlement implicates so many foreign works even when they have not taken steps to enter the United States market. While it would be appropriate to allow foreign nationals to participate voluntarily in licensing programs that may be developed by the BRR or other collectives, they should not be automatically included in the terms of the settlement. Moreover, we are aware that some foreign governments have noted the possible impact of the proposed settlement on the exclusive rights of their citizens. Indeed, many foreign works have been digitized by

Google and swept into the settlement because one copy was in an academic research library in the United States. As a matter of policy, foreign rights holders should not be swept into a class action settlement unknowingly, and they should retain exclusive control of their U.S. markets.

The settlement imposes a requirement that all "U.S. works" be registered with the Copyright Office. U.S. works are, in relevant part, works that are first published on U.S. soil or published simultaneously in the United States and a treaty partner. *See* 17 U.S.C. § 101. That the parties would apply a registration requirement in this manner comes as no surprise in and of itself, especially since the issue is pending before the Supreme Court in another case. *See Muchnick v. Thomson* (*In re Literary Works in Elec. Databases Copyright Litig.*), 509 F.3d 116, 122 (2nd Cir. 2007), *cert. granted sub nom. Reed Elsevier Inc. v. Muchnick*, 129 S.Ct. 1523 (2009). But in our view, this rule should be applied to all works in the class, i.e. to the extent foreign works are implicated at all, they should have been published in the United States and registered with the U.S. Copyright Office.[11]

For the past few months, we have closely followed views of the proposed settlement as expressed by foreign governments, foreign authors and foreign publishers. We have read numerous press accounts[12] and spoken with foreign experts. We know that some foreign governments have suggested that the settlement could implicate certain international obligations of the United States.[13] As the Committee is aware, the

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[11] Article 5.1 of the Berne Convention provides for national treatment of authors by requiring that authors enjoy, in other Union countries, the rights provided to nationals of such Union countries. Berne Convention, 102 Stat. 2853 (1988). TRIPS also provides for national treatment in article 3.1; it requires Members to "accord to nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property." TRIPS Agreement, art. 3.1, 33 I.L.M. 81 (1994).

[12] *See, e.g.*, *Google Books Leaves Japan in Legal Limbo*, The Japan Times Online; *Germany Wants EU to Fight Google Books Project*, The Local, June 2, 2009 (quoting Foreign Minister Frank-Walter Steinmeiser); *Politicians Back Heidelberg Appeal: German Authors Outraged at Google Book Search*, Spiegel Online, Apr. 27, 2009 ("German politicians have voiced their support for an appeal by 1,300 German authors…known as the Heidelberg Appeal"—sent last week to German President Horst Kohler, Chancellor Angela Merkel and the heads of Germany's 16 federal states); Letter to the European Commission from the Federation of European Publishers and Presidents of National Publisher Associations, June 16, 2009 (available at http://www.danskeforlag.dk/download/pdf/323absb035.pdf(last visited Aug. 26, 2009)); Federal Ministry of Justice, *Zypries urges European action against Google Books, Press Release of the German Minister of Justice*; ("In Brussels today, Federal Minister Zypries stressed that…Brussels must take further steps that may be necessary to protect rights holders."); *"EU to study how Google Books impact authors*, Reuters, May 28, 2009 ("'The commission will carefully study the whole issue and, if need be, to take steps,'" Vladimir Tosovsky industry minister for the Czech EU presidency, told a news conference."); *Agreement concerning Google Book Search is a Trojan Horse*, Boersenverin des Deutschen Buchhandels, Nov. 11, 2008 ("[T]he American precedent model is out of the question for Europe…Germany and Europe have already implemented legal provisions and models which allow wide access to digital content while respecting the rules of copyright").

[13] By way of background, the United States is a party to important copyright treaties and bilateral agreements which impose minimum obligations for copyright protection and enforcement, on the one hand, and confine the scope of permissible exceptions and limitations on exclusive rights, on the other hand. These include the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), the

governments of Germany and France have filed objections with the Court. Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, *The Authors Guild, Inc., et al. v. Google Inc.*, No. 05 Civ. 8136 (DC) (S.D.N.Y. Aug. 31, 2009); Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, *The Authors Guild, Inc., et al. v. Google Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y. Sep. 8, 2009). Numerous foreign authors and publishers have raised concerns as well, including concerns about navigating the settlement from a distance. Indeed, the inherent difficulties of doing business internationally is one reason that typical collective management organizations work through counterparts in foreign countries, making it easier and more efficient for rights holders to protect their works on foreign soil, in foreign languages, under foreign laws, and using foreign currencies.

Some foreign governments have raised questions about the compatibility of the proposed settlement with Article 5 of the Berne convention, which requires that copyright be made available to foreign authors on a no less favorable basis than to domestic authors,[14] and that the "enjoyment and exercise of these rights shall not be subject to any formality."[15] For example, the Federal Republic of Germany has asserted that "[T]he proposed settlement is contrary to both the Berne Convention and WCT." Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany at 4.

For purposes of this hearing, we are not suggesting that international obligations of the United States are at issue or necessarily would be compromised. However, it is a cause for concern when foreign governments and other foreign stakeholders make these types of assertions.

Conclusion

Mr. Chairman, thank you again for inviting me here today to present my observations and concerns. The Copyright Office welcomes any questions that the Committee has about the copyright implications of this unprecedented settlement agreement. To summarize, it is our view that the proposed settlement inappropriately creates something similar to a compulsory license for works, unfairly alters the property interests of millions of rights holders of out-of-print works without any Congressional oversight, and has the capacity to create diplomatic stress for the United States. As always, we stand ready to assist you as the Committee considers the issues that are the subject of this hearing.

World Trade Organization Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the World Intellectual Property Organization Copyright Treaty, as well as many bilateral agreements that address copyright issues. *See, e.g.*, US-Peru Trade Promotion Agreement, Dec. 14, 2007, 121 Stat. 1454. Under Berne,[13] copyright protection is afforded to works published in any country that is party to one of the copyright treaties and agreements to which the United States is a party or by any national of that country.

[14] Berne Convention art. 5(1).
[15] Berne Convention art. 5(2).

Mr. CONYERS. Thank you very much.

We are now pleased to hear from Randal Picker, the Leffmann professor of commercial law at the University of Chicago. His expertise is in laws relating to intellectual property, competition policy, and regulated industries.

We welcome you.

TESTIMONY OF RANDAL C. PICKER, PAUL H. AND THEO LEFFMANN PROFESSOR OF COMMERCIAL LAW, UNIVERSITY OF CHICAGO LAW SCHOOL

Mr. PICKER. Thank you, Mr. Chairman, Ranking Member Smith, and Members of the Committee.

I am, Mr. Chairman, I think as you put it, the only professional mousetrap user on the panel. So, that is what I do for a living. My office at the law school is in the library. Faculty offices surround the library. I literally walk from my office into the stack, sometimes quite literally.

So these kinds of tools are the things that make my job a wonderful job. And notwithstanding having access to one of the great university libraries, I regard Google Book Search as a wonder. It is a fabulous product. I have an unnatural liking for it. I am doing some research into some business practices in the early 1900's, and it is amazing what you can do with it. So, the points that Mr. Drummond makes and that Dr. Maurer makes about how it expands access—absolutely right. It is fabulous. And I applaud the product.

Notwithstanding that, I think the role that I am trying to play here, and the paper I wrote is, is to figure out how to improve the product. The fact that it is a great product doesn't mean it might not have problems. The fact that it is a great product doesn't mean it might not engage in behavior which is anticompetitive. And it is the job of antitrust regulators to sort through that and to make improvements.

Indeed, Google thinks of itself as a learning company. They are constantly running experiments to change their search algorithm to improve it. The agreement we were given is that it is a beta, and it is something we now need to take and turn into a full-blown product and figure out how to improve it. Indeed, to not do so—I don't see the clock running—to not do so would be almost positively—thank you—un-Googlish. So I hope that is what we will do today. I hope we will figure out how to improve the product.

Okay. So I wrote a paper; that paper makes a number of points. I think those points are directed toward different government actors.

I make a point about antitrust immunities, which is sort of a technical point. I think there is some risk that if the settlement is approved, that will make it hard for the Department of Justice to inquire into it afterwards. That is something called the Noerr-Pennington doctrine, antitrust immunity. It comes out of some Supreme Court cases. I don't think that would be the right analysis, but I think under the case law there is a risk of that. I think Judge Chin should address that if he approves the settlement. I think he should say, "No, Noerr-Pennington immunity doesn't attach." So that is a point for Judge Chin. He should address that.

I make a second point in the paper, and that is a point about the consumer purchase model. So there are sort of two core models for selling access to the work. One is the institutional subscriptions. My library will buy an institutional subscription, and I will use it every day. The other is individual sales and individual access to consumers.

The consumer purchase model has a pricing rule that I find surprising, and it involves sort of putting Google in the middle and engaging in a centralized, coordinated pricing. I am surprised they did that. The Department of Justice, as has been mentioned, will be making a filing in the case by September 18. It is my expectation that they will either say something about that or not say something about it—I expect that they will—and that Judge Chin will take that very seriously.

I think the pricing mechanism, which we can talk about in greater detail in questions if you want—I think it is complicated. I don't think it is simple. When I say it is complicated, that is not a shock. The whole agreement is extraordinarily complicated. But the pricing mechanism is complicated, as well. But I do think there are some issues there, possible issues under section 1 of the Sherman Act. But, again, not an issue for Congress. Really an issue for, first and foremost, the Department of Justice and Judge Chin.

Then I would make a third point, and the third point is about the orphan works. And the orphan works, obviously we have heard a lot of discussion of those, as well. Bringing those online is something to be greatly desired. And I will, as a mousetrap user, take full advantage of them when they are there. But the question is how to do that.

And the critical thing to recognize on the orphan works is that only the government can create a license to use those works. That is where we are. No one else can do it. And so then the question is, how is the government going to do that? And is the government going to create a license in favor of only one company or create a broad license in favor of everyone? And I can't imagine, if someone came before this body and said, "Give only us a license," that you would do that. I just find that inconceivable. The orphan works legislation that you put on the table before obviously would apply broadly. The great problem with the settlement agreement is that it only applies, really, in favor of Google.

So I would urge Judge Chin, as I do in paper, to expand the settlement agreement out, to expand licenses. And, obviously, I would urge this body to pass orphan works legislation. That is easy to say.

Now, I think it is very important to recognize the critical differences between the settlement agreement and the orphan works legislation that emerged from the Copyright Office's orphan works report and then also the legislation that has been proposed in the past.

One critical difference is this question of whether or not you need to engage in a reasonable search to use the material. That search, if you have to do that search, you are almost certainly taking lots of orphan works off the table. If you have to have a human being go look, go examine the copyright records, many of which are not

online, it is pretty unlikely those are going to come on. The settlement agreement does not require Google to search.

So the gap between past proposals of orphan works legislation and what is currently in the settlement agreement is quite dramatic. And if Congress moves forward on orphan works legislation to really bring meaningful competition in this space, to grant a broad license to everybody—and Google seems to support this, to their great credit—you are going to have to do something different than you have talked about doing in the past.

Thank you.

[The prepared statement of Mr. Picker follows:]

PREPARED STATEMENT OF RANDAL C. PICKER

Written Testimony

Randal C. Picker
Paul and Theo Leffmann Professor of Commercial Law
The University of Chicago Law School
and
Senior Fellow, The Computation Institute
The University of Chicago and Argonne National Laboratory

Hearing before the House Judiciary Committee
Competition and Commerce in Digital Books
September 10, 2009

Mr. Chairman and Members of the Committee:

Thank you for the invitation to testify today on competition and commerce issues in digital books. My name is Randal C. Picker. I am the Paul and Theo Leffmann Professor of Commercial Law at the University of Chicago Law School. I am also a Senior Fellow at the Computation Institute of The University of Chicago and Argonne National Laboratory. I have taught at Chicago since 1989 and write and teach in a number of areas including, of relevance to today's hearing, antitrust, copyright and network industries.

Faculty offices at the University of Chicago Law School are physically in the D'Angelo Law Library. I walk out of my office door into book stacks and I feel very lucky to have ready access to one of the world's great university libraries. Yet notwithstanding that, I have an almost unnatural level of affection for Google Book Search. If you haven't used it, you should, as it is a wonder. I have been doing research into some business practices in the early 1900s. Google Book Search is a powerful window into the past and one that I can look through from any computer anywhere. And, again, I say that as someone who has a great library literally outside his office door. Imagine what that access means for people who are less fortunate.

But creating a great new product doesn't somehow entitle a firm to a broad exemption from the law of the land. We wouldn't consider for an instant allowing Google or any other firm to violate environmental laws or civil rights laws merely because they were creating a great new product. You have to do both: innovate and comply with the law. More precisely here, the fact that Google Book Search generates substantial benefits to consumers does not somehow insulate the Google Book Search settlement from antitrust inquiry. We should expect antitrust officials to assess whether

those benefits can be preserved while at the same time minimizing any possible anti-competitive features of the settlement. Antitrust officials do not and should not allow firms to engage in anti-competitive practices merely because those practices have been bundled into a larger project that has substantial competitive benefits. Antitrust regulators need to separate the pro-competitive wheat from the anti-competitive chaff.

Earlier this year, I was asked to speak at a conference at Columbia Law school on antitrust and competition issues in the GBS settlement. In connection with preparing for that talk, I commenced a draft of the paper on those issues and subsequently completed it after the conference. That article was recently published in the September, 2009 issue of the *Journal of Competition, Law and Economics*. A preprint version of that article is attached to this testimony and my testimony is largely based on the article, though my thinking about the consequences of the GBS settlement has continued to evolve and there are some new thoughts in this testimony.

I make three central points in the article and those points are addressed to three different government audiences, first to the courts, then to the Antitrust Division in the Department of Justice, and then to the courts but really to Congress. Take those points one by one.

1. *No Antitrust Immunity from Approval of the Settlement*. One point is a particularly technical issue of antitrust law, namely whether court approval of the GBS settlement will insulate it from subsequent antitrust inquiry. This is a question of the scope of the *Noerr-Pennington* doctrine of antitrust immunity. That point is addressed to the court system and first to Judge Chin in particular who has the proposed settlement before him. Antitrust law provides that parties can petition the government and ask for competitive benefits without fear of antitrust prosecution, but the precise boundaries of that doctrine are uncertain. Should Judge Chin approve the settlement agreement, I don't believe that *Noerr-Pennington* immunity should attach, but I don't think the cases on this are completely clear. Should he approve the agreement, I think Judge Chin should add a provision stating that it is not his intent for *Noerr-Pennington* immunity to attach. I call this a no-*Noerr* clause. I should say that I made this up out of whole cloth and have no idea whether a subsequent court would respect that intent.

2. *Collective Pricing of Consumer Purchases as Sherman Act Section 1 Violation*. The second point is about the pricing mechanism for consumer purchases in Google Book Search. That point is addressed to our antitrust prosecutors. The Department of Justice is expected to file its views in this case by September 18, 2009. There are two core business models contemplated by the settlement. One is a blanket-license subscription for institutions to confer online bulk access to all of the works in Google Book Search. Although there have been concerns raised about the pricing of these blanket licenses, my paper says very little about those. Under current United States antitrust doctrine, high prices associated with legitimately obtain monopolies do not give rise to antitrust violations. We accept those prices as a consequence of successful competition. My paper instead addresses the second business of the settlement, namely sales of individual

access to online books to consumers. This is the online equivalent of going into Borders to buy a single copy of a book.

The settlement agreement implements a pricing algorithm for these individual consumer sales that is, like almost everything else in the agreement, quite complex. That said, I suggest in my article that there are ways that the algorithm can result in coordinated pricing among individual authors in a way that could give rise to problems under Section 1 of the Sherman Act which forbids much joint pricing as collusive. I don't regard that as a slam dunk argument, as I think that the pricing algorithm raises new issues, but I think that there is a good chance that the Department of Justice will address it in its filing.

3. *The Government Should Not Issue Just One License for the Use of Orphan Works.* The third point is addressed to Congress first and foremost but also to the court system. A key feature of the class-action settlement is that it will make available to Google—and only Google—the so-called orphan works. These are works that remain in copyright but where the holder of the copyright cannot be tracked down so that his or her work could be used with permission. I have seen figures from Google suggesting that perhaps as many as 80% of the works in GBS are orphans. The opt-out class action inverts the usual rule of copyright on its head. Usually someone like Google would need to get permission to use a copyrighted work unless its use would qualify as a fair use. Absent fair use, you have to ask to use a copyrighted work, and the problem with orphans is that you don't know who to ask.

The opt-out class action changes this. Orphan rightsholders need to come forward to be excluded from the settlement, and if they don't, Google will get full rights to use those works. Usually if you ask a copyright holder for permission and you don't get a response, you get nothing. You get no right to use the work at all. But here with the opt-out class action, silence is indeed golden: Google will get full rights to use the orphan works.

Google and the Authors Guild could implement large chunks of their agreement as a private deal without court approval. The key point of running this business plan through the court system is that it will give Google a government license to use the orphan works. No private party can create a right to use the orphan works. Only the government can do so either through some form of opt-out class action or if Congress enacts broader orphan-works legislation.

That leads to a number of natural questions. Under what circumstances should the government create a right to use the orphan works? Should the government create a right in favor of only one firm and thereby create a monopoly over those works or should the government grant multiple licenses to spur competition? If Google or Microsoft or Amazon came to Congress seeking orphan-works legislation, could we imagine new copyright legislation that granted a right in favor of only one of those companies and not the others? Given the role of the government in authorizing the use of the orphan works, the government will choose precisely how much competition is

possible. If only one firm is authorized to use those works, we will have a monopoly over those works.

My paper discusses ways in which the federal district court considering the settlement agreement might consider broadening that agreement to allow other firms to use the orphan works. But there is a more direct route available and that would be for Congress to pass orphan-works legislation. In considering that possibility, it is important to recognize how different the proposed settlement is from orphan-works legislation has been proposed in the past. That legislation typically has contemplated that an extensive search would be performed by the person or firm contemplating the use of the work that it believes to be an orphan. The only way to know that you have an orphan is to look for the owner.

The problem with that is that it imposes a substantial burden—indeed perhaps a crippling burden—on mass digitization efforts of the sort seen in Google Book Search. Anything that would require human beings to search individually as opposed to computers proceeding automatically would, I suspect, raise costs sufficiently to block most large-scale digitization efforts. In contrast, the Google Book Search settlement requires no such search in advance to include orphan works in the database. Moving from a required-search version of orphan-works legislation to something closer to the Google Book Search settlement might raise issues under the Berne convention, but those might be sidestepped by limiting the orphan-works legislation to United States works akin to what we do for the registration rules set out in Section 411 of the Copyright Act.

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To close, we might return to the early 1900s and the days of player pianos. It wasn't clear whether the piano rolls infringed on the underlying musical composition that they played. In 1908, in the *White-Smith* case, the Supreme Court ruled that the piano rolls weren't copies, but Congress planned to overturn that result in new legislation. Knowing that, Aeolian, the leading producer of player pianos, entered into widespread contracts to lock up access to the new player piano roll rights. Faced with the threat of a monopoly over those rights, Congress created the first compulsory license, the so-called mechanical license. Under that license, once a composer had licensed his or her work to one firm, a second firm could pay a statutory fee and making competing piano rolls.

Only the government can license use of the orphan works and the government will choose how many licenses to grant. One license means monopoly, open-licensing the possibility of meaningful competition. Congress should pass orphan-works legislation. To its great credit, Google remains in favor of such legislation. That legislation should track many of the features of the Google Book Search settlement so as to enable full competition in the use of orphan works. Only the government can make that competition possible.

ATTACHMENT

Forthcoming, *Journal of Competition Law & Economics*

THE GOOGLE BOOK SEARCH SETTLEMENT: A NEW ORPHAN-WORKS MONOPOLY?

Randal C. Picker[*]

ABSTRACT

This paper considers the proposed settlement agreement between Google and the Authors Guild relating to Google Book Search ("GBS"). I focus on three issues that raise antitrust and competition policy concerns. First, the agreement calls for Google to act as agent for rights holders in setting the price of online access to consumers. Google is tasked with developing a pricing algorithm that will maximize revenues for each of those works. Direct competition among rights holders would push prices towards some measure of costs and would not be designed to maximize revenues. The consumer access pricing provision might very well fail a challenge under Section 1 of the Sherman Act. Second, and much more centrally to the settlement agreement, the opt-out class action will make it possible for Google to include orphan works in its book search service. Orphan works are works as to which the rightsholder cannot be identified or found. The opt-out class action is the vehicle for large-scale collective action by active rights holders. Active rights holders have little incentive to compete with themselves by granting multiple licenses of their works or of the orphan works. Plus under the terms of the settlement agreement, active rights holders benefit directly from the revenues attributable to orphan works used in GBS. We can mitigate the market power that will otherwise arise through the settlement by expanding the number of rights licenses available under the settlement agreement. To do that, we should take the step of unbundling the orphan works deal from the overall settlement agreement and create a separate license to use those works. All of that will undoubtedly add more complexity to what is already a large piece of work, and it may make sense to push out the new licenses to the future. That would mean ensuring now that the court retains jurisdiction to do that and/or giving the new registry created in the settlement the power to do this sort of licensing. Third, there is a risk that approval by the court of the settlement could cause antitrust immunities to

[*] Copyright © 2009, Randal C. Picker. All Rights Reserved. Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. This paper is based on a talk that I gave on March 13, 2009 at the conference "The Google Books Settlement: What Will It Mean for the Long Term" at Columbia Law School's Kernochan Center for Law, Media and the Arts. I thank the Kernochan Center for hosting the conference and June Besek in particular for inviting me. I thank the John M. Olin Foundation and the Paul H. Leffmann Fund for their generous research support. I also thank Matthew Stoker for research assistance. Three disclaimers. First, I have served as a consultant in connection with the opposition to Google's proposed deals with DoubleClick and Yahoo!. I think that nothing there bears directly on the issues raised in this paper. Second, I have received research grants from Microsoft directly and the Law School receives funding from Microsoft. Again, I think that none of these bear directly on this paper. Third, and finally, I currently chair the faculty board for the Library at the University of Chicago. Our library is a member of the Committee on Institutional Cooperation, a library consortium of Chicago and the eleven schools in the Big Ten. As a group, the CIC has been library partners with Google since June, 2007.

attach to the arrangements created by the settlement agreement. As it is highly unlikely that the fairness hearing will undertake a meaningful antitrust analysis of those arrangements, if the district court approves the settlement, the court should include a clause—call this a no *Noerr* clause—in the order approving the settlement providing that no antitrust immunities attach from the court's approval.

JEL: D4; K20; K21; K41; L4; L43; O34

I. INTRODUCTION

Google is a company of modest ambitions. As it says in its brief corporate statement, Google's mission is to "organize the world's information and make it universally accessible and useful."[1] Organize it, put it online, display it and make a few dollars at the same time. Google's Book Search is a core piece of this vision. Think of the world's great libraries, all merged into one collection and all available online through any device connected to the Internet. Universal access indeed.

But creating such a wonder is not a simple undertaking. Books have to be found, bought or borrowed and copied. The resulting digital files need to be sliced and diced to make them as useful as possible but also preserved so that looking at books online is very much like looking at them offline. This is a substantial technical undertaking, plus we need to figure out a business model for accessing the books. In the past—and still today of course—individuals purchased books or borrowed them from libraries, who in turn had purchased the books. Will digital copies be purchased in the same fashion or will different rules apply? Were these technical and economic challenges not enough, we would confront the really hard problem, namely, how do we match an 18th century legal system with early 21st century opportunities?

Google moved forward nonetheless. That in turn led to two lawsuits and an eventual settlement agreement that will be considered at a fairness hearing in federal district court on October 7, 2009. The settlement agreement is exceedingly complex—though not obviously unnecessarily so—as befits an agreement that will create an extraordinary new platform for accessing books.[2] Successful new book platforms are rare—since Gutenberg have there been any?—and Google's is of breathtaking ambition.

This paper considers some of the antitrust and competition policy issues raised by the settlement agreement. The paper itself is divided into seven sections. Section II provides brief background to the creation of Google Book

[1] *See* Google Corporate Information, http://www.google.com/corporate/ (last visited July 8, 2009).

[2] *See* The Official Settlement Agreement, http://www.googlebooksettlement.com/ (last visited July 8, 2009). *See also* Google's Discussion of the Settlement, http://books.google.com/googlebooks/agreement/ (last visited July 5, 2009).

Search and the lawsuits that emerged. Section III sets out five quick situations—hypotheticals, as we call them in law school—to try to establish some antitrust bearings to help us triangulate on the settlement agreement.

Section IV sets out some of the salient features of the settlement agreement. Absent the lawsuit by the Authors Guild, the settlement agreement would be nothing more than a private contract between Google and individual rightsholders with both horizontal and vertical components. The lawsuit does not change that essentially though it does have the key consequence of bringing so-called orphan works within the agreement. These are works that remain within copyright but that are stuck in limbo: the rightsholder for the book cannot be identified or, if identifiable, cannot be tracked down. That means that it is not possible to license access to the work. You cannot contract with people you cannot identify or find.

That takes us to two antitrust/competition policy issues and then to a key question of timing and comparative institutional advantage. First, the settlement agreement implements a pricing algorithm for single-copy access to digital books that I think is questionable. This is a joint agreement among rightsholders with Google as to how Google will price online access to their works going forward. Rightsholders can choose to appoint Google as their agent for pricing online access to consumers where Google will seek to maximize revenues for each book. That is not the result that would emerge under pure competition between authors/rightsholders and seems likely to run afoul of Section 1 of the Sherman Act.

Second, as currently configured, the settlement agreement creates unique access for Google to orphan works. This emerges directly from the court's presence. Absent the lawsuit by the Authors Guild, Google and interested rightsholders could have crafted a deal very much like that in the settlement agreement and would have implemented that through private contracts. That deal, of course, would be subject to antitrust scrutiny, as it would involve large numbers of otherwise competing rightsholders contracting together with Google. That would not be unprecedented—we have similarly complex arrangements for other copyright collectives like ASCAP and BMI—but definitely worth antitrust attention (70 years worth for our music cooperatives).

But with the lawsuit and the opt-out class action, we have left the world of purely-private contracts. For some rightsholders, that change is just a bother: they would not have had to sign a private deal and could have done nothing but now must affirmatively opt out of the settlement. But for our orphan rightsholders, the change in default positions is everything. The orphan holders cannot act and the settlement agreement neatly sweeps them up to give Google releases for the ongoing use of their works. The settlement agreement solves this problem for Google, but only for Google, in creating a carefully-crafted license for Google to use those works. The great accomplishment of the settlement is

precisely in the way that it uses the opt-out class action to sidestep the orphan works problem. But, as has been noted elsewhere,[3] this gives Google an initial monopoly—and possibly a long-running one—over the use of the orphan works. This emerges *directly* from the court's role in this case because, again, the settlement agreement between Google and active rightsholders could have been implemented as a private matter without a lawsuit, though, again, with perhaps substantial antitrust attention. But the lawsuit is the device by which the initial orphan works monopoly is created: without the lawsuit, Google would acquire *no* rights to use the orphan works.

The way to prevent the creation of the market power that will arise directly from the court's role in approving the settlement would be to modify the settlement agreement by expanding the licenses created under it. I consider this issue in Section V. I think that there are strong reasons to think that the license created by the settlement agreement should be expanded so as to mitigate the market power that the court's approval of the settlement agreement will otherwise create. The most natural hook for this substantively would be the agreement's most-favored nations clause, which currently runs only in favor of Google. A more symmetric MFN would create a going-forward licensing mechanism for other entities to license the works of the active rightsholders as well to use the orphan works.

But I do think that there is a timing issue on that. Without real parties before the court on this, we are just shadowboxing. I do not know that I would modify the MFN clause in the abstract; we should probably wait instead until we have an actual case before us. The settlement agreement provides that the court will retain jurisdiction over it going forward. That jurisdiction needs to include the possibility that other parties can subsequently come to court and seek licenses. Another possibility is to ensure that the registry created under the settlement agreement has the power to issue licenses going forward. And there is a plausible reading of the settlement agreement that suggests that the registry is intended to have the authority to license the orphan works to third parties.

There is a second timing question and I consider that in Section VI. A standard fairness hearing for a class-action settlement does not begin to look anything like an antitrust inquiry. There will be no effort to define markets or any effort to inquire systematically into the likely market effects of a settlement. Fairness hearings often will just focus on what the proposed settlement means for the direct parties to the litigation, but even courts that consider more factors,

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[3] *See* James Gibson, *Google's New Monopoly*, Wash. Post, Nov. 3, 2008, at A21; *see* James Grimmelmann, *How to Improve the Google Book Search Settlement*, 12 J. Internet L. at 1, 11-20 (April 2009), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=james_grimmelmann; *see* Robert Darnton, *Google & the Future of Books*, 56 N.Y. Rev. Books 2 (Feb. 12, 2009), *available at* http://www.nybooks.com/articles/22281.

including a public interest factor, are unlikely to conduct a searching antitrust inquiry. The fairness hearing will also not come close to matching the business review process undertaken by the Antitrust Division of the Department of Justice when parties want some level of pre-deal comfort on their planned business arrangements.[4] All of this suggests that the approval of the settlement agreement by the court should not cause some sort of antitrust immunity to attach to the agreement. Under the current caselaw, there is some risk of that and Google and the Authors Guild will clearly argue for such immunities after the fact. The district court considering the agreement might minimize that risk by expressly providing in an order approving the settlement agreement that no antitrust immunities will attach from the court's approval of the agreement—a no *Noerr* clause as it were.[5]

II. BRIEF BACKGROUND TO THE SETTLEMENT

Books are the quintessential copyrighted works. The 1790 Copyright Act—the U.S.'s first federal copyright statute—addressed "any map, chart, book or books."[6] And copying a book—in its entirety—is exactly the sort of act that we would think would run afoul of most copyright laws. Of course, a project such as the one envisioned by Google—the world's information online—would necessarily intersect with copyright laws across the planet and across time. To simplify considerably, such a project would necessarily confront three key situations. The first would relate to works in the public domain, that great repository of expression available to be drawn upon by anyone at any time. The second would relate to works of authors or publishers—whomever holds the copyright—who could easily be found. For those works, we might imagine that consent of some sort would be the appropriate vehicle for determining whether works were or were not in our online collection. The need for consent would of course be tempered by the doctrine of fair use which makes possible use of copyrighted works without the copyright holder's permission in circumstances which are, to say the least, unclear.[7] Third, an online database of books would need to figure out what to do about orphan works. These are works that remain within copyright—they have not entered the public domain—but books as to which the copyright holder simply cannot be tracked down. These are not works

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[4] 28 C.F.R. § 50.6 (2009). *See also* Antitrust Division, U.S. Department of Justice, Instructions for Business Reviews, http://www.usdoj.gov/atr/public/busreview/201659b.htm (last visited July 5, 2009).

[5] *See* Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1985).

[6] 1 Stat. 124 (1790).

[7] *See* 17 U.S.C. § 107 (2009).

that we can all draw upon—they are not in the public domain—nor works for which consent provides a simple sorting mechanism.

Notwithstanding all of this, Google pressed forward.[8] After doing preliminary work in 2002 and 2003, on October 7, 2004, Google announced its new Google Print Service at the Frankfurt Book Fair.[9] More than a dozen publishers had agreed to participate in the new service which would bring their books into the Google search engine. Google would provide limited online access to chunks of the books—snippets—while linking to places to buy the books. Two months later, Google announced that it was working with the libraries of Harvard, Stanford, the University of Michigan and the University of Oxford and the New York public library to scan their collections and to bring them online.[10] Michigan made clear that the ambition of the project was to add all of the 7 million volumes in the Michigan library to the Google search engine and to, in the words of University of Michigan president Mary Sue Coleman, launch an era "when the printed record of civilization is accessible to every person in the world with Internet access."[11]

On September 20, 2005, the Authors Guild brought a class action suit against Google alleging copyright infringement relating to the copying of books from the Michigan library.[12] A month later, five publishing companies brought a similar action against Google.[13] Fast forward three years. On October 28, 2008, the Authors Guild, the Association of American Publishers and Google announced a settlement to the pending lawsuits.[14] That settlement agreement, now pending in federal district court in New York, will create a comprehensive

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[8] *See* History of Google Book Search, http://books.google.com/googlebooks/history.html (last visited July 5, 2009).

[9] *See* Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling*, N.Y. Times, Oct. 8, 2004, *available at* http://www.nytimes.com/2004/10/08/technology/08book.html.

[10] *See* Press Release, Google Inc., Google Checks Out Library Books (Dec. 14, 2004), http://www.google.com/press/pressrel/print_library.html.

[11] *See* Press Release, University of Michigan News Service, Google/U-M Project Opens the Way to Universal Access to Information (Dec. 14, 2004), http://www.umich.edu/news/?Releases/2004/Dec04/library/index.

[12] *See* Class Action Complaint, The Author's Guild v. Google Inc., 05 CV 8136 (S.D.N.Y. 2005), *available at* http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/authors-guild-v-google/Authors%20Guild%20v%20Google%2009202005.pdf.

[13] *See* Complaint, McGraw-Hill Co., Inc. v. Google Inc., 05 CV 8881 (S.D.N.Y. 2005), *available at* http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/mcgraw-hill/McGraw-Hill%20v.%20Google%2010192005.pdf.

[14] *See* Press Release, The Authors Guild, Authors, Publishers and Google Reach Landmark Settlement (Oct. 28, 2008), http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/press_release_final_102808/press_release_final_102808.pdf.

new regime for online access to United States books. A fairness hearing will be held on the proposed settlement on October 7, 2009 and, before that date, class members who wish to opt out must do so by September 4, 2009.[15]

III. FIVE HYPOTHETICALS

It might be useful to frame the GBS settlement by considering five hypothetical cases.

1. Poodle Book Quote. An entrepreneur—call the company Poodle—buys a physical copy of every book ever written. Customers call a toll-free number to ask about book quotes. In response to an inquiry, human beings scurry around a vast warehouse of books looking for quotes. Poodle initially charges a modest fee for the service but it is a hit with consumers and, facing no competition, Poodle jacks up its prices, enjoying the benefits of monopoly power.

What do copyright and antitrust say about this? Nothing, I think. Poodle has purchased books, not made copies of them, and the use that Poodle is making of the books almost certainly falls within traditional notions of fair use. As to antitrust, Poodle has acted on its own and has created a great product with a corresponding market power through successful competition in the marketplace. Antitrust does not condemn this.[16] Indeed, as the Supreme Court put it in its most recent antitrust decision "[s]imply possessing monopoly power and charging monopoly prices does not violate §2 … ."[17] Tweak this case slightly. Switch from purchased physical copies to digitized copies and have the quotes returned by a computing system algorithmically rather than by human beings. Given the massive copying through digitization, the copyright issues are quite different, but I see no change in the antitrust analysis of the situation.

2. Digital Book Rights. An author writes a book, publishes it on paper and retains the copyright. An entrepreneur approaches our author and seeks a license to sell digital copies of the book. Where do we stand? Our author starts with the full set of rights assigned to her by the Copyright Act. Those are statutorily defined rights—start with Section 106—and those rights are limited in some cases by compulsory statutory licenses and by the uncertain but overriding rules of fair use. But none of those rights limit her ability to license whatever rights

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[15] *See* Authors Guild v. Google Settlement Resources Page, http://www.authorsguild.org/advocacy/articles/settlement-resources.html (last visited July 5, 2009).

[16] As Judge Learned Hand famously put it in United States v. Aluminum Co. of America, 148 F.2d 416, 430 (1945): "A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."

[17] Pacific Bell Telephone Co. v. Linkline Communications, Inc., 555 U.S. ___ (2009).

she has to a third party; indeed, the Copyright Act contemplates such transactions and sets out basic rules governing them.[18] This transaction poses no copyright issues and we should think as such also poses no antitrust issues. Neither copyright nor antitrust insists that an author on her own exploit all of the uses of her work. Put differently, she need not vertically integrate into all fields where her work might be used. If she prefers to license the right to someone else to exploit her work in a particular medium, she is fully entitled to do so under copyright law and nothing in antitrust should foreclose this. Moreover, copyright law does not create an obligation for her to license her work to a second person merely because she licensed it to a first person. If JK Rowling chooses to allow a movie to be made of her latest Harry Potter novel, she does not need to license all comers who might like a chance to make competing versions of that movie.

3. Digital Books Cartel. One hundred authors—all of the authors in our little universe—write novels, publish them on paper and retain copyright to their individual works. They compete vigorously in the offline space with each author setting the price for his work. But as they approach a new medium—digital copies of works—they get together to implement a centralized sale system. In that medium, they set a uniform price for each work of $9.99. What does copyright law or antitrust law say about the situation? Again, copyright law proper says very little about this. Each author would be entitled to exploit her copyright in the new medium. We do see occasional nods towards the doctrine of copyright misuse, which clearly embraces some notion of competitive harm as a within-copyright limitation, but the application of that is typically quite uncertain.[19] But antitrust law is ready to address this situation, as this is classic price-fixing in violation of section 1 of the Sherman Act. Price-fixing remains one of the few behaviors that is *per se* illegal under Section 1.[20] That means that no further inquiry is required into market structure or actual market harm.

4. Author Book Quote. Return to the first case, but change the facts. Instead of Poodle buying physical books, the authors/rightsholders get together as a group, digitize copies of their books, and put these online as a searchable quote service. Access to individual books is sufficiently limited that we would not think of the online access as a substitute for purchasing a physical copy of the book. The service is a quote service, with charges per quote or with some sort of unlimited use blanket-license fee.

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[18] *See* 17 U.S.C. § 201 04 (2009).

[19] *See, e.g.,* Practice Management Information Corp. v. American Medical Ass'n, 121 F.3d 516 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998).

[20] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) (citing cases).

Again, there should be no copyright issues here assuming that the authors control their own copyrights. As to antitrust, we are now edging close to something like ASCAP or BMI, where we are nearing seventy years of antitrust regulation of those copyright collectives. Now alter this case slightly and consider a few key questions. They authors conclude that they do not want to enter the book quote business as they do not believe that search is their comparative advantage. But they do form a joint digital rights licensing group with the thought that they will then license those digital rights to firms that want to enter the book quote market. How many licenses would such a monopoly seller want to grant? One to, in my hypo, Poodle? More than one? A license to any entrant in the book quote business? How do we think that book-right licensing would work if the authors could not proceed collectively but instead were required to act individually? Would that alter the number of book quote entrants who would be able to obtain access to some digital rights?

5. Monopoly by Statute. Poodle approaches Congress and asks it to enact the "Online Book Quote Monopoly Act of 2009." Under the bill, Poodle would be the only company permitted to offer an online book quote service. Congress passes the act. This would almost certainly be bad policy, but that is not the same thing as an antitrust violation. We have been reluctant to create antitrust roadblocks to efforts to petition the government. Firms can pursue anti-competitive ends through the legal process. We could try to control those efforts through antitrust or we can give free flow to these forces consistent with fundamental First Amendment values. The *Noerr-Pennington* doctrine creates a broad antitrust immunity that protects efforts to seek competitive benefits from the government.[21]

IV. THE GBS SETTLEMENT

These five cases provide natural starting points for analyzing the settlement agreement currently under consideration in the class-action suit by the Authors Guild against Google for Google's book search service. The actual service provided is substantially more complicated than my examples and the settlement agreement infinitely more complex but we need starting points and these five examples should do the trick.[22]

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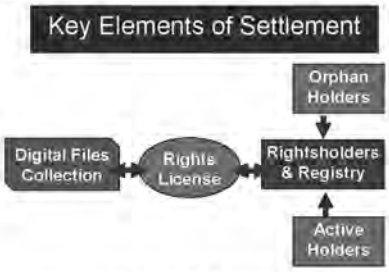
[21] *See supra* note 5.

[22] And the settlement agreement itself is not the only relevant document to the rights that will emerge from this process. For example, subsequent to completing the settlement agreement, Google signed a revised digitization agreement with the University of Michigan. *See* Press Release, University of Michigan News Service, U-M first to sign new digitization agreement with Google (May 20, 2009), http://www.ns.umich.edu/htdocs/releases/story.php?id=7162.

A. Key Structural Components

We should start by identifying key structural components of the settlement:



Google has set out to create a collection of digital files. It has done this through scanning books from a variety of sources but the two key sources are those that come from the Google Partner Program and the Google Library Project.[23] This allows Google to create Google Book Search which encapsulates the full variety of uses of the books that it has digitized.[24]

Without licenses from rightholders, it is not clear what Google could do with its digital collection. Google might have litigated a fair use claim to limit its exposure for copyright infringement, but it has instead chosen to seek licenses to use its amassed digital files. The settlement agreement itself operates as a rights license. That license sits between Google, as owner of its digital files collection, and the rightsholders and the registry created by the settlement to act on behalf of the rightsholders. As to the rightsholders, we can usefully divide them into active holders and orphan (inactive) holders.

We might think of the settlement agreement as two related deals neatly fused together. The class action itself is an opt-out class action and therefore any rightsholder who chooses to opt out neither enjoys the benefits of the settlement agreement nor is subject to its terms.[25] Of course, opt out is an active step and the class-action mechanism allows Google to sidestep neatly the problem of orphan works, as the holders of those works presumably will not opt out of the settlement. An orphan holder who shows up and opts out of the settlement is no longer an orphan, as we can now match the right in question with a particular individual or firm.

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[23] *See* Settlement Agreement at §§ 1.62, -61, The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Oct. 28, 2008), *available at* http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/settlement/Settlement%20Agreement.pdf ("Settlement Agreement")

[24] *Id.* §§ 1.60, 2.1(a).

[25] *Id.* § 17.33.

Active rights holders can embrace the settlement as is or opt out in toto. But opt out is only one way in which the collection can be limited. The agreement contemplates a removal mechanism to remove individual works from Google's collection.[26] The right to remove is time-limited and expires at the end of 27 months after the notice commencement date.[27] There is also a partial removal mechanism, which allows rightholders to exclude a work from particular display uses or revenue models.[28] These mechanisms are substantially more complicated than this quick summary suggests, as the agreement makes an effort to ensure that books made available generally to consumers are also included in institutional subscriptions—the so-called "coupling requirement"—but I will avoid most of these details here.[29]

The definition of "Book" is fundamental both for what it tells us about the works covered by the settlement and for what it says about how Google Book Search will evolve after the settlement is in place.[30] The definition covers written or printed United States works (as defined in the Copyright Act)[31] that have been registered with the U.S. Copyright Office and published before the Notice Commencement Date, which is January 5, 2009, the date of the first notice of the class action settlement.[32] The definition then excludes, among other things, periodicals, music books, works in the public domain and governmental works.

This raises two key points. The settlement is first backwards looking. That is exactly what we would expect for past damages, if any of course, but the settlement also will put in place licenses for the use of these works going forward but only for books that are registered U.S. books before January 5, 2009. That sounds like Google Book Search is not really a library of all books ever written but just those published in the United States before early-2009. A great resource to be sure, but one frozen at a point in time. That takes us naturally to the second point: Google will add content to GBS through separately negotiated contracts. That shows up most directly in the settlement agreement in the Google Partner Program, which contemplates exactly these sort of contracts.[33] To put the point slightly differently, Google must contract going forward to

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[26] *Id.* §§ 1.124, 3.5(a).

[27] *Id.* § 3.5(a)(iii).

[28] *See* Settlement Agreement, *supra* note 23, at 3.5(b).

[29] *Id.* § 3.5(b)(iii).

[30] *Id.* § 1.16.

[31] *See* 17 U.S.C. § 101 (2009).

[32] *See* Settlement Agreement, *supra* note 23, at § 1.94.

[33] *Id.* § 1.62.

continue to add to its collection and active rightsholders can opt of out of the settlement entirely and instead pursue separate contracts with Google. The group that cannot do that of course are the inactive rightsholders—the holders of rights to the orphan works—and a settlement cut off in early-2009 will encompass all of the preexisting orphan works.

These are the two deals fused together. Active rightholders can effectively embrace simultaneous contracts with Google pursuant to the terms of the settlement or can opt out and seek to execute separate deals with Google. Orphan rightholders will not do anything and the settlement agreement will make it possible for Google, and really only Google, to put those works to use.

That leaves our third building block, the Registry.[34] We have the digital files and the licensing regime that the agreement creates for those files, but the agreement also create a new institution—the Registry—to manage many of the aspects of the settlement agreement. The Registry will act as a middleman between the rightholders and Google. That is both about channeling money but also about managing the information that will be necessary to make this new complicated apparatus work.[35]

B. Use of Digital Copies

We should pay some attention to who gets a digital copy of a book and how it can be used. Google will make a digital copy of a book available to the rightsholder (typically, the author or the publisher).[36] Google will also create a digitized works collection known as the Research Corpus and two or three sites will host it.[37] Libraries that have been the source of the works that make their way into Google's collection will have the chance to receive back a digital copy (the Library Digital Copy).[38] The agreement is a little more complex than that. Cooperating Libraries make books available to Google but do not take back digital copies.[39] In contrast, Fully Participating Libraries receive back digital copies—subject to extensive and complex restrictions—and can make a specified set of uses of those files.[40] The breadth or narrowness of those uses depends on where you sit obviously, but it seems hard to think that these uses, taken individually or together, will amount to meaningful competition to GBS itself.

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[34] *Id.* § 1.123, Art. VI.

[35] *Id.* §§ 6.1(d), 6.3, 6.5, 6.6.

[36] *Id.* § 3.11.

[37] *See* Settlement Agreement, *supra* note 23, at §§ 1.130, 7.2(d).

[38] *Id.* § 1.78.

[39] *Id.* § 1.36.

[40] *Id.* §§ 1.58, 7.2(a), 7.2(b), 7.2(c).

It is clear that Google thinks of these digital files as such as belonging to Google, as the agreement limits the rights of rightsholders and the Registry to authorize the use of digital copies made by Google.[41] Google is authorized to make Display Uses and Non-Display Uses of the works that make it into GBS.[42] Display Uses turn on the business models embraced in the settlement agreement.[43] Non-Display Uses are at least as interesting, indeed perhaps even more so.[44] Google will be able to draw upon the digitized works to do internal research to improve its core search algorithms—the crown jewel of Google's business—and to develop new services, such as much-improved automatic translation services.

Google's competitors will not fare as well. They might turn to the Research Corpus but the agreement puts substantial limits on the sort of research that can be done. The Research Corpus brings together two overlapping sets of claims, namely, those of Google to the digital files as files it has created through its scanning efforts and then those of the rightsholders to the copyrighted works embedded in the digital files. The Research Corpus is to form the basis for what the agreement calls "Non-Consumptive Research."[45] That is research that is "not research in which a researcher reads or displays substantial portions of a Book to understand the intellectual content presented within the Book." Not reading the book to understand it but instead the use of the book for non-content understanding research. The definition sets forth five examples of research that might qualify, including research on automatic translation; indexing and search; linguistic analysis and others. This is exactly the sort of research that we should anticipate that Google will perform internally on GBS as part of its right to engage in Non-Display Uses.

The agreement limits the extent to which third parties can do this research. For-profit commercial "use of information extracted from Books" is barred, unless Google and the Registry consent to it.[46] That would seem to prevent the extraction of say, baseball statistics, to provide a fantasy baseball service. Moreover, the agreement expressly limits the use of "data extracted from specific Books" "to provide services to the public or a third party that compete with

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[41] *Id.* §§ 3.12, 6.6(b).

[42] *See* Settlement Agreement, *supra* note 23, at § 2.2.

[43] *Id.* § 1.48.

[44] *Id.* § 1.91; *see* Fred von Lohmann, *Google Book Search Settlement: A Reader's Guide* (2008), http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide.

[45] *See* Settlement Agreement, *supra* note 23, at § 1.90.

[46] *Id.* § 7.2(d)(viii).

services offered by the Rightsholders of those books or by Google."[47] That said, commercial exploitation of algorithms developed in doing research on the Research Corpus is permitted.[48] There may be some very fine lines being drawn here. Does algorithmic improvement count as information extracted from books? If so, Google would seem to have the power to block its competitors; if not, the settlement agreement seems to permit this sort of improvement, assuming of course that a prospective researcher can become a "Qualified User."[49] The use of the Research Corpus is limited, in the main, to such users.[50] Google competitors will not easily qualify—researchers based at U.S colleges and universities, non-profits and the government are covered directly—and both the Registry and Google must consent for a for-profit entity to so qualify.

It is not unusual for a firm to condition access to its property in a way that limits subsequent competition. For example, federal patent law makes it possible for a patent holder to limit the assignability of a license that it grants to another person. Absent the limit on assignment, the recipient of a license could immediately compete with the patent holder in the power to deliver a license to a third party. The patent holder would just create a new license for the third party but the original licensee could deliver its license to the third party if licenses were freely assignable. Federal patent law makes it possible for the original patent holder to bar assignment and avoid that competition.[51] To take a second example, courts sometimes enforce limits on reverse engineering of software. The limit on reverse engineering is again intended to limit the ability of the recipient of a work to compete with the originator of that work.[52]

All of that suggests that the limitations imposed by Google on the use of the digital files it has created are broadly consistent with the types of downstream limits on subsequent uses that we see in other circumstances. As to the rightsholders, the only wrinkle is that they are proceeding collectively in limiting that downstream competition. Were the rightsholders to proceed individually rather than collectively, we might very well see more competition as to the uses as to which the works could be put.

Again, this matters most for the orphan works. The settlement agreement is non-exclusive so a downstream user wishing to use a copyrighted work could

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[47] *Id.* § 7.2(d)(ix).

[48] *Id.* § 7.2(d)(x).

[49] *Id.* § 1.121.

[50] *See* Settlement Agreement, *supra* note 23, at § 7.2(d)(iii).

[51] Everex Systems, Inc. v. Cadtrak Corp., 89 F.3d 673, 679 (9th Cir. 1996).

[52] Bowers v. Baystate Technologies, Inc., 320 F.3d 1317, 1324-26 (Fed. Cir. 2003).

contract directly with an active rightsholder.[53] The fact that the settlement agreement pushes towards a default position in which the rightsholders will have moved simultaneously in limiting downstream competition may make it easier to limit that subsequent contracting. And of course subsequent contracting is not possible as to the orphan works. But even if we do see direct contracts with active rightsholders, those holders presumably cannot contract as to the digital files that Google has created. The rightsholder can contract as to the copyrighted work, but the digital file itself is a separate matter.[54]

C. Business Models

The settlement agreement contemplates a number of different business models and also contemplates that those business models may change over time. To simplify considerably, focus on institutional subscriptions and consumer purchases. Institutional subscriptions are akin to the blanket licenses that we have seen in ASCAP and BMI. A standard institutional subscription will give access to the entire body of digitized works, but for any particular work in that group, access will be limited. The agreement contemplates a high-transaction cost approach to limiting uses, meaning that it will circumscribe the ability to copy, paste and print. You can get small chunks of the works easily but they will try to make it difficult to aggregate those chunks into something that would compete directly with the traditional offline physical book.[55]

Institutional subscriptions will be priced usually on FTEs—full-time equivalency—meaning, in the case of academic institutions, the number of full-time equivalent students.[56] At what price exactly? The settlement offers pricing objectives that will result simultaneously in the realization of market rates for the books in the collection and in broad access to those books.[57] That may require squaring the circle, but it is clear that many fear that Google will ultimately charge monopoly prices for these institutional subscriptions.[58]

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[53] *See* Settlement Agreement, *supra* note 23, at § 2.4.

[54] It is not clear to me whether the settlement agreement makes a Host Site an owner of the Research Corpus. There is a mechanism for removing works from the Research Corpus, *id.* § 7.2(d)(iv), but that could just mean that the Host Site holds title, but a defeasable one, to the copy in the question. What turns on this could be the application of the first-sale doctrine, 17 U.S.C. § 109(a) (2009), though that doctrine seems to contemplate sale or other dispossession of the copy in question and would not seem to free the Host Site from the licensing limits of the settlement agreement.

[55] *See* Settlement Agreement, *supra* note 23, at § 4.1(d).

[56] *Id.* § 4.1(a)(iii).

[57] *Id.* § 4.1(a)(i).

[58] As Harvard Librarian Robert Darnton has put it "… Google will enjoy what can only be called a monopoly—a monopoly of a new kind, not of railroads or steel but of access to information."

But antitrust law proper may not forbid this. If we treat Google as having as having obtained its monopoly through a risky, entrepreneurial undertaking and therefore legitimately then, as the Supreme Court said most recently in *Linkline*, Google can charge monopoly prices without facing Section 2 liability.[59] Of course, Google's "monopoly" status is seemingly being created by the ability of the rightsholders to act collectively. Were they acting separately, there is every reason to think that we would end up with Google and other firms competing to license from individual rightsholders. That would result in more competition and more fragmentation.

And of course, on this framing, Google would also be the *victim* of the exercise of monopoly power and not just a perpetrator. The rightsholders would have combined horizontally to become the sole source of rights and would have chosen to issue only one license. To be sure, Google would have the right to use the copyrighted works and would be the only firm dealing with end users, but Google presumably would have paid dearly for that monopoly franchise in the deal cut with the rightsholders. If we hold an auction for a monopoly franchise, we will clearly suffer from the downstream harms of monopoly but all of the monopoly profits should be competed away in the auction and should inure to the benefit of the auctioneer, here the rightsholders. The actual situation is even more complex because we think that the auction winner will use what it learns in the direct market in adjacent markets. That is, as noted before, many believe that the Non-Display Uses of the book collection will benefit Google in its core search businesses. The rightsholders would love to access a cut of that incremental value and, again, in an auction process for a single rights franchise, we should expect some of the incremental value in adjacent markets to flow to the rightsholders.

The agreement's second core business model is Consumer Purchases.[60] This seems to contemplate online reading of a particular text with controlled copying, pasting and printing. The pricing mechanism for this access is interesting and seemingly problematic. Books made available this way will be priced either at the price set by the rightsholder or through a mechanism run by Google. The agreement defines a "Settlement Controlled Price."[61] Books will be slotted into particular pricing bins and indeed the agreement contemplates an initial distribution of prices across bins: 5% of the books will be priced at $1.99,

Google will "first, entice subscribers with low initial rates, and then, once they are hooked, ratchet up the rates as high as the traffic will bear." Darnton *supra* note 3.

[59] *See supra* note 17.

[60] *See* Settlement Agreement, *supra* note 23, at §§ 1.32, 4.2.

[61] *Id.* § 1.143, 4.2(b)(i)(2).

10% at $2.99 and so forth until we reach a final 5% to $29.99.[62] How does this match up with what we think would emerge under standard competition? I am not sure, as that seems to turn on a sense of exactly how spatial competition works, but I do not think that we can be particularly confident that this centralized spacing approach matches what would emerge from normal, decentralized competition.

Then turn to the pricing mechanism itself. Google is to create a "Pricing Algorithm" that Google is to "design to find the optimal such price for each Book and, accordingly, to maximize revenue for each Rightsholder."[63] That is not what we expect competitive pricing to do. Competition drives down prices to costs and does not have the effect of maximizing revenues to individual competitors. The rightholders are collectively appointing Google as their agent to implement pricing rules for Consumer Purchases that do not seem to mimic what we would see in pure decentralized competition. In that sense, it works its way towards tracking my digital book cartel hypo in Section II above.[64]

The agreement also recognizes that new revenue models might emerge and contemplates that Google and the Registry will negotiate the terms for any new models that might emerge.[65] Finally, the agreement creates a limited, free public access service. That service has been understandably criticized for being quite narrow[66] with one terminal for every 10,000 students at a college and one terminal in public libraries.[67]

D. Who Gets the Money and Unclaimed Funds

Focus next on the money. To track the agreement, start with the big picture and then head into the still-very-important details. Google will pay at least $45 million in cash into the settlement fund, plus another $34.5 million to get the Registry up and running, plus attorneys' fees for the plaintiffs on top of that. On a going forward basis, this is a percentage of revenues deal. Google is to pay the Registry on behalf of the rightsholders 70% of the revenues earned by Google

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[62] *Id.* § 4.2(c)(ii).

[63] *Id.* § 4.2(b)(ii).

[64] Two new papers develop this point further. *See* Eric M. Fraser, Antitrust and the Google Books Settlement: The Problem of Simultaneity (June 23, 2009) (unpublished manuscript, on file with author); *see* Christopher Suarez, Proactive FTC/DOJ Intervention in the Google Book Search Settlement: Defending Our Public Values, Protecting Competition (May 25, 2009) (unpublished manuscript, available at http://ssrn.com/abstract=1409824).

[65] *See* Settlement Agreement, *supra* note 23, at § 4.7.

[66] Jennifer Howard, *Harvard Says No to Google Deal for Scanning In-Copyright Works*, Chron. Higher Educ., Oct. 20, 2008, *available at* http://chronicle.com/news/article/5417/harvard-says-no-thanks to google deal for scanning in copyright works.

[67] *See* Settlement Agreement, *supra* note 23, at §§ 4.8(a)(i)(1), 4.8(a)(i)(3).

less ten percent for Google's operating costs, resulting in a split of 63% to rightsholders and 37% of revenues to Google.[68]

That is a good starting point but there are some subtleties and they may matter for the overall incentives of the parties. We need to track what the agreement does with regard to revenues associated with public domain works and orphan works. Start with the public domain. The definition of "Book" is one of the key linchpins of the settlement agreement and that definition excludes public domain works.[69] That should have the effect of excluding public domain works from the revenues that would flow to copyright holders. GBS will undoubtedly generate revenues from public domain works and Google will keep all of those revenues. Indeed, the agreement specifically addresses the possibility of mistaken payments by Google with regard to public domain works.[70] All of that certainly matches one vision of how the public domain works: anyone can use it as they wish and make or not make money on it. For fun sometime, go to Amazon and see how many different prices you will find for a work in the public domain.

Turn next to the orphan works. The unclaimed funds provision is particularly important here because of the role that it plays in assigning revenues associated with those works.[71] That provision creates different rules for subscription revenue and non-subscription revenue. Recall that the revenue split in the deal is 70%/30% subject to a 10% discount for Google's operating costs resulting in a net 63%/37% deal. The unclaimed funds provisions make it possible for active rightsholders to get a version of 70% instead of the 63%. Unclaimed funds from non-subscription revenue models are paid first to some of the costs of the Registry and after that to active rightsholders—those who have become Registered Rightsholders—until payments reach 70% of the revenues for their books.[72] That is a 7% carrot and is funded by revenues that arise from orphan works. For revenues that arise from the subscription model, there is a

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[68] *Id.* § 2.1(a). To track the agreement with more detail, Section 4.5(a) defines a standard revenue split for purchases as 70% of Net Purchase Revenues. The definition of that in turn, *id.* 1.87, makes clear that those are all revenues received by Google from all revenue models other than advertising, less the 10% operating cost deduction. There are parallel provisions for advertising revenues, id. §§ 4.5(a)(ii), 1.86, though the fact that there are parallel provisions rather than one unified provision suggests that I may be missing some subtle difference between the two.

[69] *See* Settlement Agreement, *supra* note 23, at § 1.16.

[70] *Id.* § 6.3(b).

[71] *Id.* § 6.3(a).

[72] *Id.* § 6.3(a)(i).

separate Plan of Allocation but, again, unclaimed funds from orphan works will fund additional payments to active rightsholders.[73]

The net effect of the agreement, bolstered by the unclaimed funds provisions, is to turn orphan works into a kind of private public domain. Google will be able to use the orphan works in GBS and both Google and the active rightsholders will benefit from the revenues that arise from those works. This is a common strategy of parties settling intellectual property suits: it is in their joint interest to preserve a property right as against the world. We have seen this pattern before in suits between Lexis and Westlaw regarding the status of page numbers in the West reporting system and in settlements between patent holders and generic entrants in the context of the Hatch-Waxman statute.[74]

V. MULTIPLYING LICENSES?

We should turn to the question of how many licenses are likely to be granted to use the orphan works. Recall hypo 4 from Section III where the book authors collectivized and then licensed digital rights to Poodle. I asked then: how many licenses are likely to be granted and how does the fact that the authors are collectivizing influence that? How many licenses should we want to be granted?

A. The Settlement Agreement's Most Favored Nations Clause

To get at this, start with the settlement agreement's most favored nations clause.[75] MFNs are fairly common when deals are done sequentially. An initial contracting party believes that its original agreement will make it possible for its counterparty to enter into other deals with third parties. The original deal may prove the concept and build a blueprint—or at least a starting point—for subsequent deals. An MFN ensures that the beneficiary of it shares in the incremental value that will accrue to its counterparty in other deals and may serve as an important inducement to do the deal in the first place. If potential deal partners believe that there is a second-mover advantage, each partner will hang back and hope that another partner moves first. That logic results in no deals at all—you cannot ever be a second mover if there is a never a first mover. The MFN helps to solve that dynamic problem.

But MFNs can also reduce future competition. A second mover knows that any benefits that it negotiates for will redound to the benefit of the first actor. The second mover knows that it is harder for it to gain a competitive advantage over the first actor and that reduces its incentive to compete to do so in the first

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[73] *Id.* § 6.3(a)(ii), Attach. C, 1.1(e).

[74] *See* Stephen Labaton, *Westlaw and Lexis Near Truce*, N.Y. Times, July 19, 2008 *available at* http://www.nytimes.com/1988/07/19/business/westlaw-and-lexis-near-truce.html; *see* In re Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003).

[75] *See* Settlement Agreement, *supra* note 23, at § 3.8(a).

place. And for the party granting the MFN, it knows that any benefit it gives to a later contracting party costs it doubly, not just as a cost in the deal with the second actor but also in the original deal with the beneficiary of the MFN. All of this makes clear why MFNs are tricky and probably hard for us to just embrace wholly or seek to forbid.

The actual MFN set out in the Settlement Agreement is interesting.[76] The MFN protects Google from better deals down the road in the standard fashion that MFNs operate. But what is more interesting is that the MFN seems to suggest that the Registry might be able to grant licenses to other third parties. The trigger for the MFN is a deal better than the one that Google is getting in the settlement agreement sometime in the next ten years and that includes "rights granted from a significant portion of Rightsholders other than Registered Rightsholders." That is, a deal about orphan works. But who is going to cut that deal for the orphan works? Google's MFN right is keyed to a deal by the Registry itself or by any substantially similar entity organized by the rightsholders. The MFN certainly operates most naturally in a context where the Registry is understood to have the authority to issue additional licenses for the orphan works. Two other provisions in the settlement agreement might bear on this. The organizational structure provision for the Registry provides that the Registry "will be organized on a basis that allows the Registry, among other things, to … (iii) to the extent permitted by law, license Rightsholders' U.S. copyrights to third parties."[77] And the settlement agreement extends some authority on its own terms for the Registry to act for rightsholders in executing agreements.[78]

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[76] *Id.* § 3.8(a) ("Effect of Other Agreements. The Registry (and any substantially similar entity organized by Rightsholders that is using any data or resources that Google provides, or that is of the type that Google provides, to the Registry relating to this Settlement) will extend economic and other terms to Google that, when taken as a whole, do not disfavor or disadvantage Google as compared to any other substantially similar authorizations granted to third parties by the Registry (or any substantially similar entity organized by Rightsholders that is using any data or resources that Google provides, or that is of the type that Google provides, to the Registry relating to this Settlement) when such authorizations (i) are made within ten (10) years of the Effective Date and (ii) include rights granted from a significant portion of Rightsholders other than Registered Rightsholders. …").

[77] *Id.* § 6.2(b).

[78] *Id.* § 6.7 ("Authorization of Registry. Where this Settlement Agreement confers on the Registry rights and obligations with respect to Books and Inserts, including with respect to the Registry's relationship with each of Google, the Fully Participating Libraries, the Cooperating Libraries and the Public Domain Libraries, Plaintiffs and all Rightsholders, as of the Effective Date, shall be deemed to have authorized the Registry to exercise such rights and perform such obligations on behalf of the Rightsholders with respect to their respective Books and Inserts, including to enter into Library-Registry Agreements.").

Those get close to the idea that the MFN contemplates—the Registry granting third parties licenses to use the orphan works—but it is not clear that they get there fully. U.S. copyright law does not generally authorize a third party to act on an author's behalf, so it is not clear what the agreement picks up. And the registry authorization clause—a power of attorney-type clause—does not empower the Registry to act directly for orphan authors, unless perhaps we conclude that that idea is embedded itself in the MFN in Section 3.8(a).

B. Clarifying (?) the Settlement Agreement

It seems possible that the settlement agreement intends for the Registry to be able to issue new licenses for the orphan works going forward. Again, it is hard to understand where the current version of Section 3.8(a) will work if the Registry cannot grant new orphan-works licenses. If that is indeed the intent of the settlement agreement, we should clarify 3.8(a) and probably make corresponding changes elsewhere in the agreement, perhaps to 6.2(b)(iii), 6.7 and elsewhere. But I also think that there is a pretty good chance that the current version of the agreement does not contemplate a going-forward licensing power for the orphan works.[79] What should the court do about that in considering whether to approve the settlement agreement?

We should start by assessing the incentives of the rightsholders to voluntarily license their digital works and in so doing also license the rights held by orphan holders. If we think that the collection of rights represented in the lawsuit really is unique, then we should not think that the Authors Guild would wish to license them to a second online book search provider. The rights represent a monopoly and licensing use to two or more providers will result in competition between those providers and will almost certainly make the returns to the rights provider much lower. Indeed, in the extreme case—frequently captured in the notion of Bertrand price competition—we might expect multiple online book search service providers to compete price down to marginal cost which may be close to zero.

If that is right, then the lawsuit by the Authors Guild and the proposed settlement agreement are themselves the vehicle to market power. The opt-out

[79] Google has addressed this question on its public policy blog:

> Under the settlement Google will be able to open up access to truly orphaned books, but we still think more needs to be done to allow anyone and everyone to use these works. Any company or organization that wants to open up access to this untapped resource should be able to do so. The settlement is not a panacea, since it only covers a subset of orphaned works, provides only certain uses, and is not able to extend these uses to other providers. The need for comprehensive orphan works legislation is not diminished.

Derek Slater, Google Book Search settlement and access to out of print books, June 2, 2009, http://googlepublicpolicy.blogspot.com/2009/06/google-book-search-settlement-and.html.

class action increases the likelihood that the rightsholders will act collectively in large numbers by shifting the default position on contracting. This is to take the learning of behavioral economics on the importance of defaults and turn it into large-scale contracting to achieve market power. That probably works that way even for identifiable rightsholders but it clearly operates in that way as to orphan authors. Nothing would have prevented large numbers of rightsholders from entering into private contracts with Google to create something akin to GBS but the numbers—and the resulting market power—would clearly have been smaller without the switch in default settings made by the opt-out class action. And what those private contracts could not have accomplished was bringing the orphan works into the deal, but the opt-out class action settlement does just that.

We would seem to have two natural approaches to changing the settlement agreement to ensure the possibility of competing digital books collections: (1) alter the settlement agreement now as part of the approval process to add additional licenses; or (2) ensure that the agreement contains a mechanism for new licenses to be considered going forward. Start with what those licenses might look like substantively. The current MFN gives Google the benefit of any other deals in the next ten years for new licenses of the orphan works. A fully symmetric MFN would make it possible for other entities to get the licensing regime that Google gets for the works licensed by active rightsholders and for the orphan works.

As to the latter, Google can use those fully and the release provisions in the settlement agreement ensure that Google will not face liability for copyright infringement for its use of those works.[80] Google will make payments to the Registry for the revenues that it derives from those works, just as it would any other work in GBS. And the Registry in turn distributes those revenues per the terms of the Settlement Agreement. Remember importantly that active rightsholders effectively benefit from the revenues generated by the orphan works.

A symmetric MFN would allow qualified entities to sign up for the going-forward provisions of the settlement agreement as to both the works of the active rightsholders and the orphan works. That license would mitigate both the problem that the active rightsholders will be reluctant to issue additional licenses on their own for their works—why compete with themselves?—and the problem that the settlement represents the only way to gain access to the orphan works. Note of course that those rights licenses would not actually enable immediate entry into the book search business. Any entrant will have to do its own scanning as nothing I have said here would justify some sort of mandatory access

[80] *Id.* at Art. X.

to the scans that Google has created. We should want to foster competition in scanning.

What does "qualified" mean? The rightsholders undoubtedly will emphasize that they cut a deal with Google, not any random entity. The rightsholders are relying on Google's incentive to go out and make money and pay 63% of the revenues generated to the rightsholders. A non-profit would not have the same incentives to generate revenues. And the rightsholders will argue that they have negotiated for an elaborate protective scheme for the scans that Google has created.[81] The rightsholders will understandably want a Google-class contracting partner if we are going to force them to duplicate the settlement agreement licenses and make those available to others. But those limits should not mean that non-profits are completely left out. The revised MFN should separate out the orphan-works deal from the deal made by the active rightsholders—unbundle the orphan-works license from the overall settlement—and make corresponding licenses (and releases) available to third-parties to use the orphan works.[82]

Active rightsholders might very well object to the Xeroxing of their deal to allow other firms access to licenses to use their works. But that would almost certainly reflect a desire to preserve the incremental market power that accrues to them from the ability to implement their deal with Google through the court system. Proceeding through the court system maximizes their ability to act collectively and it is that which shrinks the number of licenses granted to their works. If the active rightsholders were forced to act outside the court system, we would almost certainly see greater fragmentation in the licenses granted and more competition in book search.

And the active rightsholders would seem to have little basis to object to the expansion of the MFN to encompass additional licenses of the orphan works. I understand that they might want to squelch the competition that might emerge if multiple firms had access to the orphan works. That competition could easily reduce overall industry revenues for digital book search services and that would be against the interest of the active rightsholders given that they are cutting deals tied to percentages of revenues. But eliminating competition cannot be seen as a legitimate goal of the collective action of the active rightsholders captured in the settlement agreement. Absent the lawsuit, the active rightsholders could convey no rights in the orphan works to anyone and we need to guard against their ability to create a monopoly as to those works by issuing only a single license to those works.

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[81] *Id.* at Art. VIII, Attach. D.

[82] One could imagine any number of possible non-profit entrants, including the Internet Archive, the HathiTrust, JSTOR or a completely new nonprofit devoted to these issues.

The case against expanding the scope of the MFN now or ensuring a mechanism to issue additional licenses going forward might run as follows. Google undertook a substantial risk in digitizing works and putting them online. Even in proceeding carefully by controlling the scope of access to the works, Google faced substantial liability for the core copying of entire works that made this possible. To be sure, Google could make arguments regarding the permissibility of intermediate copying and regarding fair use, but those arguments were far from a sure thing, plus Google was operating at a sufficient scale that were it to lose the damages would likely be substantial.

In granting access to third parties to the rights regime created by the settlement agreement, we face a standard selection problem in that potential competitors are always eager to join in successful projects and share those costs, but rarely volunteer to fund those which have been revealed to be losers. That means that any notion of merely paying some measure of Google's costs in creating the new licensing regime is inadequate in that those costs need to be grossed up for the risk of failure.

If the settlement represents a clever solution to the orphan works problem, we could imagine a number of different approaches to follow-on efforts. One approach would require a subsequent entrant to pursue the same legal strategy. Of course, the path here was entry by Google followed by a class action lawsuit by the Authors Guild. As suggested before, it is not clear that the Authors Guild will want to grant a second collective rights license and that means a second suit might not ever be brought. Of course, the entrant might bring a declaratory judgment action naming as defendants the plaintiff class in the current litigation. But we should ensure that a subsequent entrant does not face an entry barrier based on the inability of a court to obtain new jurisdiction vis-à-vis the orphan works or based on the unwillingness of active rightsholders to grant a second license to the orphan works.

That would suggest a possible more limited approach to the settlement agreement: do not create additional licenses in the settlement agreement now but make sure that some combination of the Registry and the court can do so going forward. As noted before, there is a reading of the settlement agreement that suggests that the Registry can grant new licenses to orphan works under the current agreement. And we could make that more explicit in the agreement. Alternatively—or perhaps in addition—the settlement agreement provides that the district court will retain jurisdiction going forward.[83] If that retained jurisdiction was understood to cover efforts by qualified firms to license works covered by the settlement agreement and to license separately the unbundled orphan works—perhaps thought of as intervening defendants in the original

[83] *Id.* § 17.23.

case—that might solve the fear that the Authors Guild might not sue again or that jurisdiction might not attach for a declaratory judgment action.

VI. ANTITRUST IMMUNITIES AND THE TIMING OF ANTITRUST INQUIRY

To get a handle on the question of timing, consider a counterfactual. Suppose that Google launched its service as it did and that the Authors Guild drafted a complaint identical to the one filed. But in this alternative universe, no lawsuit is filed. Google and the Authors Guild negotiate an arrangement identical to the settlement agreement but they do so without the intervention of litigation. Where would we stand and how does that differ from the current situation?

A number of points matter. The arrangement between Google and the Authors Guild would simply be a matter of contract. Rightsholders who signed on the dotted line would become bound by the contract. Other rightsholders who declined the agreement would of course not be bound. No federal district court judge would have any role in approving the agreement. This would be purely a private matter and there would be no substantive review of the contract at the time of its execution. There would be no contemporaneous evaluation of whether the deal was fair as between the parties or what antitrust consequences might be of the new arrangement. There would of course be no possibility that some sort of *Noerr-Pennington* immunity would attach to the contract. Nor would there be a consideration of whether the contracting rights holders were somehow sufficiently similar that they could sign the same contract.

Now revert to the actual case. A lawsuit was filed: how does that change the analysis? The key point of course is that the nature of an opt-out class action means that the default setting as to whether or not the settlement is agreed to has changed. If a rightsholder does not affirmatively decline the contract, he or she is bound. That is the precise flip of the position we had in the counterfactual, and default positions, as behavioral economics is quick to point out, can matter enormously.

We also will have the fairness hearing on the settlement, but the antitrust analysis in the settlement hearing on the class action is likely to be minimal to non-existent. Circuits differ in the factors that they consider in a fairness hearing, with some looking to many factors, including the public interest, with others—and probably the Second Circuit—focusing more narrowly on what the settlement means for the parties to the lawsuit.[84]

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[84] As the Sixth Circuit framed its test in UAW *v.* General Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007): "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest."

Now we can frame the *Noerr-Pennington* point. In circuits that embrace a party-centered approach to fairness and class-action settlements, no possibility of subsequent *Noerr-Pennington* immunity for the court-approved agreement should attach. The court will not have considered what the competitive consequences would be of the arrangement and therefore clearly have engaged in no shaping or assessing of the agreement in those terms.[85] This case should be treated as our counterfactual case would be where no complaint had been filed. That private contract enjoyed no immunity from antitrust inquiry and in similar fashion these court-approved agreements should not either. And even in circuits that embrace a broader inquiry to fairness hearings, the antitrust analysis is likely to be minimal. This suggests, again, that no *Noerr-Pennington* immunity should attach to the approval of these settlements.[86] If the district court approves the settlement agreement, it should take the additional step of including a no *Noerr* clause in its order approving the settlement. That clause would provide that no antitrust immunities would attach to the settlement agreement from the court's approval of it.

VII. CONCLUSION

Google boldly launched Google Book Search in pursuing its goal of organizing the world's information. Even though Google was sensitive to copyright values, the service relied on mass copying and thus Google undertook a substantial legal risk in setting up the service. That risk was realized with the lawsuits by the Authors Guild and the Association of American Publishers. The October, 2008 settlement agreement for those suits will create an important new copyright

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[85] This is likely to be true, even if the Antitrust Division of the Deparment of Justice makes a filing in the case, as it may well do. *See* Letter from William G. Cavanaugh to Judge Denny Chin (July 2, 2009) (available at Order at 2, The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. July 2, 2009)).

[86] Like most interesting propositions, the caselaw is not clear on whether *Noerr-Pennington* immunity would attach to the court's approval of the settlement agreement. The Supreme Court certainly did not allow a court consent decree to block additional antitrust inquiry into the arrangements in ASCAP and BMI. See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 13 (1979) ("Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties."). But more recent lower court decisions have clearly relied on *Noerr-Pennington* to block some challenges to court-approved arrangements. See Sanders v. Brown, 504 F.3d 903, 913 n.8 (9th Cir. 2007) (finding that *Noerr-Pennington* doctrine protected a private party from antitrust liability from anti competitive harms resulting from tobacco settlement agreement negotiated with state entity but further declining to resolve whether that doctrine would insulate private parties from an anti-competitive settlement merely because that agreement was approved by a court). The Second Circuit has taken a narrower approach than most circuits to the scope of *Noerr-Pennington* immunity in the master settlement agreements for the tobacco litigation. *See* Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2nd Cir. 2004).

collective and will legitimate broad-scale online access to United States books registered before early January, 2009.

The settlement agreement is exceedingly complex but I have focused on three issues that raise antitrust and competition policy concerns. First, the agreement calls for Google to act as agent for rightsholders in setting the price of online access to consumers. Google is tasked with developing a pricing algorithm that will maximize revenues for each of those works. Direct competition among rightsholders would push prices towards some measure of costs and would not be designed to maximize revenues. As I think that that level of direct coordination of prices is unlikely to mimic what would result in competition, I have real doubts about whether the consumer access pricing provision would survive a challenge under Section 1 of the Sherman Act.

Second, and much more centrally to the settlement agreement, the opt-out class action will make it possible for Google to include orphan works in its book search service. Orphan works are works as to which the rightsholder cannot be identified or found. That means that a firm like Google cannot contract with an orphan holder directly to include his or her work in the service and that would result in large numbers of missing works. The opt-out mechanism—which shifts the default from copyright's usual out to the class action's in—brings these works into the settlement.

But the settlement agreement also creates market power through this mechanism. Absent the lawsuit and the settlement, active rightsholders could contract directly with Google, but it is hard to get large-scale contracting to take place and there is, again, no way to contract with orphan holders. The opt-out class action then is the vehicle for large-scale collective action by active rightsholders. Active rightsholders have little incentive to compete with themselves by granting multiple licenses of their works or of the orphan works. Plus under the terms of the settlement agreement, active rightsholders benefit directly from the revenues attributable to orphan works used in GBS.

We can mitigate the market power that will otherwise arise through the settlement by expanding the number of rights licenses available under the settlement agreement. Qualified firms should have the power to embrace the going-forward provisions of the settlement agreement. We typically find it hard to control prices directly and instead look to foster competition to control prices. Non-profits are unlikely to match up well with the overall terms of the settlement agreement, which is a share-the-revenues deal. But we should take the additional step of unbundling the orphan works deal from the overall settlement agreement and create a separate license to use those works. All of that will undoubtedly add more complexity to what is already a large piece of work, and it may make sense to push out the new licenses to the future. That would mean ensuring now that the court retains jurisdiction to do that and/or giving the new Registry created in the settlement the power to do this sort of licensing.

Third, there is a risk that approval by the court of the settlement could cause antitrust immunities to attach to the arrangements created by the settlement agreement. As it is highly unlikely that the fairness hearing will undertake a meaningful antitrust analysis of those arrangements, if the district court approves the settlement, the court should include a clause—call this a no *Noerr* clause—in the order approving the settlement providing that no antitrust immunities attach from the court's approval.

Mr. CONYERS. Thank you very much, Mr. Picker.

Well, we have had mousetrap builders, mousetrap users, and I think our last witness is a mousetrap watcher. Mr. Balto, senior fellow at the Center for American Progress, focusing on competition policy, intellectual property law, and health care. For more than two decades, he has had experience as an antitrust attorney: in the private sector, in the Antitrust Division of the Department of Justice, and in the Federal Trade Commission.

So I think you have appropriately been placed in this position of eighth to present your views now. And we are happy to have you here.

TESTIMONY OF DAVID BALTO, SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS

Mr. BALTO. Thank you, Mr. Chairman, Ranking Member Smith, and other Members of the Committee, for giving me the privilege of testifying today. And it is a privilege.

For the indigent student in a barrio in Los Angeles, for the child growing up on an Indian reservation in New Mexico, for the child living in a low-income area in Washington, DC, this settlement will potentially transform their lives.

One of the great things that Google has done is democratize information and level the playing field to make information generally available to millions of consumers. And that is the promise of the Google Books project. And that is why I am pleased to be able to testify before you today and explain why the settlement is procompetitive.

You know, it is easy, I know from my 25 years as a government enforcer, to use labels and to throw labels around, but labels can be deceptive. A monopolist is a firm that has the ability to exploit consumers by raising prices.

Mr. Drummond, I know monopolists, I have sued monopolists, but I am sorry to tell you, Google is no monopolist.

A monopolist has—when you determine whether or not a firm has the ability to exercise monopoly power, you have to look at its incentive and ability to exercise monopoly power. Look at what Google does in search. Google doesn't charge consumers. It would be foolish for it to do it because it would lose eyeballs, its search product would function less effectively, and it would be less attractive to advertisers. It also probably doesn't have the ability to because there are many rivals in the market. It lacks the incentive and ability to go and exploit consumers. And that is why it would lack the—for the same reason, it would lack the ability to harm consumers in its Google Books project.

I understand the concerns that the professor has raised about the pricing model used, but I am an antitrust enforcer, and frequently you have to go and find a second best for a competitive market. And the algorithm in the consent decree is not all that unusual considering the kinds of models that government enforcers frequently have to use.

Now, the paper I have submitted goes through each of the claims that Google somehow is going to exploit consumers in one fashion or another. The key question here is, does the settlement raise bar-

riers to entry? Does it make it more difficult for somebody to step in Google's shoes? The answer is unequivocally "no."

But you don't have to take my word for it. A group of 30 antitrust professors filed an amicus brief, and this is what they said: "The settlement overcomes barriers to entry for Google without raising them for any rival because every right of the settlement that is given to Google is expressly nonexclusive." "Nonexclusive," anybody can step in the shoes of Google.

There are two specific concerns the critics have raised. First, the question of orphan books. My paper goes and tries to discuss how limited the number of orphan books are, and I think they are limited, but let me make this simple. One is greater than zero. The problems that have been identified about orphan books would exist for anybody else. And only this solution goes to solve this problem.

Mr. Aiken articulately pointed out to you the market failure that exists on more orphan books. And unless this problem is solved—and the settlement does go extensively to solving the problem—these orphan books are just generally going to be unavailable unless we give that poor child in Los Angeles a ticket to go visit Harvard.

Second, the settlement goes and limits the problem of orphan books and helps solve the problem by clarifying these intellectual property rights. And for that Google should be applauded.

Now, there is a lot of criticism about another clause, called the "most favored nations clause." This clause is extremely limited, and it is appropriate for Google to make sure that people can't free-ride on its effort. Google went to tremendous expense and should be applauded for their efforts in going and trying to scan all these books.

Judge Learned Hand said over a half century ago, "The antitrust laws are not intended to punish superior skills, insight, and industry." That is Google, and that is what the settlement does. At its own risk, Google developed its own scanning technology, negotiated agreements, and navigated the uncertainty around complex copyright issues. People may not like where that line is drawn, but they deserve credit for trying to clarify this area, to the benefit of millions of us consumers.

The purpose of the antitrust laws is to open access and opportunities—open access and opportunities. And that is precisely what Google has done and what the Book Rights Registry will do. The Google Books settlement is in the public interest, and I hope it is approved.

[The prepared statement of Mr. Balto follows:]

PREPARED STATEMENT OF DAVID A. BALTO

Competition that Works: Why the Google Books Project Is Good for Consumers and Competitors

Testimony of David A. Balto

Before the House Judiciary Committee

Senior Fellow, Center for American Progress Action Fund

Hearing on Competition and Commerce in Digital Books

September 10, 2009

Mr. Chairman, Ranking Member Smith, and other members of the Committee, I am David Balto, a Senior Fellow at the Center for American Progress Action Fund. I appreciate the privilege of testifying before you today on Competition and Commerce in Digital Books which focuses largely on the Google Books project and the proposed settlement of litigation between Google and authors and publishers. As many of you know, I had a long career as a trial attorney in the Antitrust Division of the Justice Department and as the policy director of the Federal Trade Commission, and I frequently represent consumer and public interest groups in antitrust and intellectual property matters and testimony before Congress.[1] Based on my extensive review of the proposed settlement and the filings in the litigation, I strongly believe that the settlement in the Google Books project litigation does not pose significant competitive concerns and should be approved.

I have two simple points to my testimony. The Google Books project is a remarkable transforming achievement that we should all recognize has tremendous potential to democratize information and knowledge. I do not think anyone can dispute that. Second, the competitive concerns raised about specific narrow provisions of the settlement are not a basis to reject the settlement.

One of the greatest achievements in the last several years is the Google Books project, which scanned millions of books, many of which were available in only a handful of the most preeminent research libraries. This project led to class action litigation brought by publishers and authors charging a violation of copyright laws. To resolve the litigation, the protagonists entered into a settlement, which created a Book Rights Registry to make sure authors are appropriately compensated for their works. This settlement is currently under review by a federal district court.

The tremendous benefits from the Google Books project

The Internet is a great device for creating new markets, democratizing knowledge, and increasing competition. Google Books takes full advantage of this opportunity to expand the world's access to knowledge. Anyone can simply go on the web and, through Google Books, reach an almost endless array of information on nearly any topic. At the start of the 20th century, Andrew Carnegie spent an enormous sum to build the first truly public libraries in this country—before then, our libraries were for the most part only available to the educated and affluent. Google has taken on tremendous risk and expense to perform a comparable service, one that creates a virtual library of unprecedented proportions to millions of people, regardless of location, economic status, or resources. Thanks to the Google Books project, any individual anywhere in the United States will have access to an unprecedented corpus of information.

[1] A listing of my advocacy for consumer groups such as the Consumer Federation of America, Consumers Union, Families USA, AARP, and US PIRG is attached. Many of the arguments discussed in my testimony are set forth in an earlier paper: David Balto, "The Earth Is Not Flat: the Public Interest and the Google Book Search Settlement: A Reply to Grimmelmann," July 22, 2009, available at http://www.acslaw.org/node/13812. A later version of the paper is attached.

Under the settlement, Google Books will put out-of-print, expensive, or otherwise rare and hard-to-come-by texts online at reasonable prices. Libraries across the country will give people free access to Google Books: Google has pledged to give all public and university libraries across the country free, full-text, online viewing of millions of books at designated computers. Low-income, isolated, and underserved communities will have access to books that would have previously required enormous effort to track down. Lateef Mtima, a law professor at Howard University School of Law, has said that the settlement, by giving broad access to books and research materials to low-income communities, will "bridge the digital divide." Google's efforts will have the effect of expanding the body of knowledge readily available to the public, and make it even more accessible to people with disabilities and low-income or isolated populations.

It is not surprising that numerous public interest organizations and consumer rights advocacy groups have come out in favor of the settlement, including:

- United States Students Association
- American Association of People with Disabilities
- League of United Latin American Citizens
- Leadership Conference on Civil Rights
- National Federation of the Blind

Just to give one example of the remarkable consumer benefits, just consider the world of people with visual impairments—approximately 15-30 million in the United States alone. Google has committed to providing access to these users so that they "have a substantially similar user experience as users without print disabilities."[2] Google's commitment to making all books available to people with visual impairments through screen enlargement, screen reader, and Braille display technologies will completely transform the educational experience for the blind and visually impaired in this country and, indeed, around the world. The National Federation of the Blind, the nation's leading advocate for access to information by the blind, has stated that the settlement will have "a profound and positive impact on the ability of blind people to access the printed word."[3]

The settlement will also provide researchers with the ability to analyze books and language in ways that were previously impossible. They will, for example, be able to search the entire digital library corpus to compare language and cultural development, and to track literary developments across countries. The potential to unlock knowledge is seemingly unlimited. Not surprisingly, universities around the country have overwhelmingly acknowledged these benefits. According to Michael Keller, Stanford University's librarian and publisher of the Stanford University Press, "[t]he settlement promises to change profoundly the level of access that may be afforded to the printed

[2] eSight Community News , "Google Settlement with Authors, Publishers," Press release , November 23, 2008, available at http://www.tabinc.org/blog/archives/2008/11/google_settleme.html.
[3] Ibid.

cultural record, so much of which is presently available to those who are able to visit one of the world's great libraries."[4]

As a public interest attorney, I represent many who often cannot afford to purchase books and who do not live near Harvard or Stanford or other research libraries. For all of these people, and millions more, the settlement will unleash greater access to a tremendous amount of information. The public benefit of the settlement is, to me, unmistakable.

Imagine if you are an energetic and inquisitive student at the Wayne State University, or at a community college in Alaska, and you are doing research on an obscure medieval text. Currently, you might have to travel to one of the great research libraries in Cambridge or Stanford to conduct research. Now, the corpus of many of the major research libraries will be only a click away on your computer.

The Google Books project is a tremendous achievement. The scope of that achievement and its potential to open access and information for millions of consumers should be considered as the committee and the courts consider the limited competitive issues raised by the settlement.

Competitive concerns of the settlement are unfounded

A tremendous amount of ink and paper has been spent raising the specter that the Google Books settlement will be harmful to consumers. In fact, some of the witnesses testifying today have claimed that Google will become a "cartel ringmaster" and coordinate a cartel of publishers and authors, a "monopolist" and charge excessive prices to consumers for digital books, and a "monopsonist" and decrease compensation to authors, thus resulting in the reduction of output of books. As I explain in a moment, none of these labels are supported by real world facts.

As I explain in my testimony it is easy, but misleading, to confuse popularity with market power (*i.e.*, the ability to harm consumers by raising price). Google may have popular products, but it has not harmed consumers. To paraphrase Senator Lloyd Bentsen in the Bentsen-Quayle vice-presidential debate in 1988: "I know monopolists, I have sued monopolists, and Google is no monopolist."[5]

My experience of over 15 years as an antitrust enforcer taught me to be cautious about substituting labels for real antitrust analysis. Antitrust labels may be attractive to the press or in a public debate, but they are not a substitute for analysis. As Justice Byron White cautioned in the *Broadcast Music* case thirty years ago, "easy labels do not always supply

[4] University of Michigan News Service, "Major Universities See Promise in Google Book Search Settlement," Press release, October 28, 2008, available at http://www.ns.umich.edu/htdocs/releases/story.php?id=6807.

[5] Ed Black, president and CEO of the Computer and Communications Industry Association, made the identical observation in his June 10, 2009 article for *The Hill* entitled "Google venture; no violation of copyright or antitrust laws," saying "I know what a high-tech monopoly looks like. This isn't one." See http://thehill.com/opinion/letters/7012-google-venture-no-violation-of-copyright-or-antitrust-laws

ready answers" to the question of whether conduct is illegal under the antitrust laws. Anyone looking at the unique issues in the settlement should be guided by that cautionary instruction. Rather than relying on easy labels, the critical question in analyzing whether conduct is anticompetitive is what is the incentive and ability for a firm to engage in the alleged anticompetitive conduct?

To answer that question we need look no further than Google's conduct in the numerous markets it currently participates in. Certainly, Google is large, innovative, and remarkably popular in search. But one should not confuse size and popularity with market power. Google does not charge consumers for the use of its very popular search product. That is because it lacks the incentive to charge for its use—its product is valuable to advertisers because of the numbers of users of the product. It also lacks the ability to charge because of the numerous free search alternatives also in the market. When it comes to allegations of anticompetitive conduct concerning Google search, the proof is in the pudding: Google lacks the incentive and ability to harm consumers.

So let's return to the claims of the critics of the settlement. Does Google, through the Book Rights Registry, have the incentive and ability to act as a "cartel ringmaster" directing thousands of authors or publishers in some sort of cartel waltz and facilitating a price increase? No. Over 95 percent of Google's revenue is through the sale of search advertising. It has no incentive to artificially increase book prices since that will undermine its advertising revenue. The amount of revenue Google would earn from trying to form or facilitate a publisher or author cartel is inconsequential compared to the advertising revenue they would lose. "Cartel ringmaster" is a job Google would never apply for.

The critics of the settlement create the specter of harm by conflating Google and the Book Rights Registry as if they were one entity. They are not. The board of the registry will be appointed by authors and publishers. The registry will be charged with getting the most money for authors, whereas Google will be interested in books being as inexpensive as possible, because it wants to increase usage of its site and search tools, so it can make money the way it usually makes money: advertising. Rather than be in a collusive relationship, Google and the registry are more likely to be in an adversarial relationship.

Would Google act as a "monopolist" and drive up the costs of digital publications offered through the registry? Again, acting in this fashion would be contrary to its economic incentives. Moreover, since there are many other sources for the most valuable and popular books, it seems unlikely this effort to charge supracompetitive prices would be anticompetitive.

Those who suggest that Google can act as a "monopolist" also misunderstand how books will be priced. Critics point to the fact that some books will be priced through an algorithm. The settlement provides only an offer to sell rightsholders' books at certain prices, however, and authors may reject this offer. This is no different than a situation in which a distributor offers multiple suppliers the chance to sell through the distributor at a given price, and sellers can reject or accept the offer. Further, I believe that 80 percent of

digital books will initially be priced under $10.[6] Over time, the algorithmic pricing must be designed to mimic a perfectly competitive market.[7] Moreover, authors have the choice to opt-out of these "pricing bins" and determine their own price.[8] The result of this is that if Google sought to set monopoly prices, each author would have an incentive to undercut the market price in order to make additional sales.

And of course, all of these books will have to compete with: (1) public domain books which are free and downloadable from the site, and (2) the fact that every public and university library in the country will be able to have a free public access service terminal.[9] So any monopoly rents that Google might try to secure will be undercut by the fact that you can get the same thing for free at your local public library.

For the same reason that magazines practically beg you to subscribe, offering a fraction of the newsstand price, Google is more likely to pursue a model of broad access rather than price gouging for its subscription product, because that increases the advertising base. And even if Google misunderstood this, it is nevertheless obligated under the settlement to price the subscription to ensure "the realization of broad access to the Books by the public, including institutions of higher education."[10]

Finally, there is the claim that Google will act as a "monopsonist." A monopsonist is a firm that has market power in purchasing and may use that power to drive down compensation for a service provider resulting in a reduction in output. I have testified before Congress on behalf of farmers, nurses, doctors, and other healthcare workers about monopsony concerns, and there are very serious monopsony concerns in their markets. Monopsony concerns can arise where a service or good provider has limited outlets to sell its service or good. The Book Rights Registry is just one of dozens of means for authors or publishers to reach the market. If the prices are set too low, authors and publishers have numerous alternatives. The claims that Google would have the incentive or ability to become a monopsonist are simply fanciful.

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[6] See Settlement § 4.2(c)(ii).
[7] See Settlement § 4.2(b) ("The Pricing Algorithm shall base the Settlement Controlled Price of an *individual* Book upon aggregate data collected with respect to Books that are similar to such Book.") (emphasis supplied).
[8] See Settlement § 4.2(b)(i) ("A rightsholder may select one of two pricing options for Consumer Purchases").
[9] See Settlement § 4.8(a)(i)..
[10] See Settlement § 4.1(a)(i).

The settlement enhances the potential for entry[11]

The remaining competitive concerns are actually very narrow. There are two questions. First, does Google's access to "orphan works" limit the ability of alternative digital libraries to arise and compete against Google? Second, does a most favored nation provision restrict entry?

Both of these questions focus on entry barriers, and it is essential to get the entry barrier question right. The question is not whether it is hard to enter the digital books arena—it obviously is not easy. The operative question is whether the settlement *increases* entry barriers for the market. And to that, the answer is unequivocally no. As a group of 30 of the most preeminent antitrust law professors has observed, the "settlement overcomes barriers to entry for Google, without raising them for any rival because every right the settlement gives to Google to digitize, display, or sell books is expressly non-exclusive."[12] Thus, any right secured by Google can be shared with any existing or potential rival of the Google Books project.

Actually, the settlement makes it easier for others to follow in Google's footsteps in trying to enter the digital library arena. The settlement offers the potential to increase output and choice by expanding reducing legal and logistical barriers to similar digital books projects.

First, by expanding the public domain and resolving the uncertainty of rights of millions of books, the settlement will decrease entry barriers. Many books that have already been scanned by Google actually belong in the public domain; however, their status is currently unclear. In order to determine the copyright status of books under the settlement, Google is using records that have been scanned, compiled, corrected, and disseminated by Carnegie Mellon, Project Gutenberg, the Distributed Proofreaders, and Google itself. In addition to expanding the public domain in this way, the settlement also creates a procedure for publishers and authors to determine who should own digital rights, and it is expected that this will result in the clarification of these rights for thousands of publications. All of these efforts significantly expand access and facilitate entry. One study projects that the settlement should identify and resolve rights issues for at least 80 percent of rightsholders.[13]

Second, the settlement will also facilitate entry in another way: through its creation of the Book Rights Registry, an independent, nonprofit organization. The registry will significantly enhance the ability of subsequent entities to pursue book digitization initiatives.

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[11] In a very thoughtful amicus brief, the Computer and Communications Industry Association explains how the settlement will enhance market entry. They explain "[b]y thus lowering risks and licensing costs, the settlement may encourage competitors to enter the market, or may encourage participants who exited the market to reenter." Brief of Amicus Curiae Computer and Communications Industry Association on Proposed Settlement at 11, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009).

[12] Brief of Amicus Curiae *Antitrust and Economics Professors in Support of the Settlement* at 19, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009).

[13] Ibid at 5

Third, the registry will represent the interests of authors and publishers and locate rightsholders who have been separated from their works. With rightsholders' permission, it will be able to license millions of books, among them the most commercially valuable works covered by the settlement, to third parties, including Google competitors, on terms that might disfavor or disadvantage Google. Licenses will be provided on a nonexclusive basis, which means that authors and publishers will have the ability to negotiate with the registry or separately with other digital book providers. The ability to negotiate with other entities makes it unlikely that the registry could impose unreasonable license fees or otherwise restrict the availability of electronic books.

Finally, any institution with a license will be able to share the works in the project with other entities, including potential entrants into the digital books arena.

Access to orphan works

Much of the remaining competitive concerns surround Google's supposed exclusive access to orphan works. Orphan works are books that "retain their copyright but for which the rightsholders are unknown or cannot be found."[14] The concern is that Google's so-called control over these works will limit the ability of other other book scanning projects to be successful. These claims are overstated.

This provision affects a small number of books

First, there are a relatively limited number of orphan works. According to a careful economic study, orphan works probably make up less than 9 percent of the works at issue. Other estimates suggest there may be as few as 1.4 million works, of which Google may have scanned around 580,000. [15] Further, this number should decrease over time as the efforts of the Book Rights Registry to reach out to authors and publishers allow them to clarify the copyright status of a number of the books in questions.

It is hard to see how this small set of orphan works would be some kind of bottleneck to limit market entry. Moreover, these works may be "orphaned" for a reason—they may have gone out of print because other works were superior.

As soon as an author or publisher clarifies their rights to an orphan book, that book ceases to be an orphan. The rights holder can then contract directly with potential users, such as libraries, and Google will not enjoy any special advantages at this stage, either.

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[14] Jerry A. Hausman and J. Gregory Sidak, "Google and the Proper Antitrust Scrutiny of Orphan Works," *Journal of Competition Law and Economics* 5 (3) (2009): 411, 419.

[15] Brief of Amicus Curiae Computer & Communications Industry Association on Proposed Settlement at 12, *Authors Guild, Inc., et al. v. Google, Inc.*, No. 05-8136 (S.D.N.Y. September 8, 2009); A. Mark Lemley, "A New Balance Between IP and Antitrust," John M. Olin Program in Law and Economics. Stanford Law School. Working Paper No. 340. (April 2007)..

The settlement does not grant Google exclusive access to orphan books

Second, the settlement only provides Google with nonexclusive access to orphan books. The settlement does not give Google any advantages over second entrants for books which still have orphan status, and Google's current efforts in fact lower the barriers for second entrants. Any company that chooses to begin scanning orphan books will face fewer obstacles than Google has confronted. Critics claim that other firms would be unlikely to attempt a similar class action suit to obtain their own default licensing rights to orphan books. This is not necessarily the case. By increasing the size of the public domain, clarifying uncertain rights, and addressing innumerable complex legal issues, Google Books simultaneously provides a map and blazes trails through previously unchartered territories that others will be able to use for their own explorations.

The settlement creates value for orphan works

Finally, it is important to recognize that the value of orphan works is currently zero—there is no demand for them.[16] If they already had value, they would be in print or otherwise available to consumers. The Google Books Settlement creates economic value for these books by creating a means for consumers to access them and exercise demand for them.

The combined effect of the settlement's rights clarification efforts and financial incentives will be to clarify the copyright status of many works. As a result, the number of orphan works will be substantially reduced. The settlement enhances the ability of companies other than Google to provide digital access to books including orphan works.

The so-called most favored nation clause

A careful analysis of the most favored nation provision also shows that it is unlikely to increase entry barriers or harm competition in any other fashion. The "most favored nation," or MFN, provision of the settlement is extremely limited. It prevents the registry from offering a more favorable deal to other entities and the provision lasts for only ten years. I have written extensively and testified about the competitive implications of MFNs. These clauses can promote consumer welfare by permitting first movers to recoup their investments in innovation. Conversely, MFNs can impede entry and adversely impact competition. The MFN clause in the settlement falls into the former category.

The so-called "MFN" clause is narrow

The MFN provision is probably the most misunderstood provision of the agreement. This provision will have a limited effect on the marketplace. Nothing prevents the registry from striking better deals with Google competitors.[17] Specifically, the registry can pursue better deals with Google's competitors for all in-print works, which represent the vast

[16] Jerry A. Hausman and J. Gregory Sidak, "Google and the Proper Antitrust Scrutiny of Orphan Works," *Journal of Competition Law and Economics* 5 (3) (2009): 411, 419.
[17] Settlement § 3.8(a).

majority of today's book sales. Google competitors could also wait to see what the top-selling books are and strike deals only with respect to those books. Competitors could surely function in this way, like radio stations that seem to succeed despite playing only the top 30 songs over and over again. Section 3.8(a) pertains only to unclaimed works, that is, truly orphaned works, which no one comes forward to claim.[18] It also only operates *if* the registry is later authorized to license unclaimed works that fall within the scope of the settlement. The Book Rights Registry does not have this authority, and it may never receive this authority within the ten years that Section 3.8(a) operates. Thus, even Professor Picker's paper appears to concede that when the settlement first goes into effect, this provision will have no effect whatsoever.[19]

Clearly, the parties recognized that they were negotiating in an environment where Congress was very likely to legislate—orphan works. In fact, Google continues to advocate for orphan works legislation. This provision ensures that if legislation, or perhaps some future class action settlement, provides the registry authority that it does not have now that Google will receive equal treatment (not preferred treatment) under the new regime.[20] If that never happens, then this provision will have little relevance. This point has been lost on many of the provision's critics.

This is therefore a provision that will have no impact when the settlement goes into effect, and may never have any impact, and even if it does have an impact, it will only affect books which no one has claimed—books that have the *least* expected economic value.

The so-called MFN clause has efficiency justifications

Setting aside how narrow this provision is, it is worth noting that non-discrimination provisions are not uncommon. They are often used to protect the investment of first-movers who anticipate that their efforts will reduce the costs for second-movers, who can then strike more advantageous deals by free-riding off the investment of the first-mover. In fact, copyright law itself serves the same purpose: it protects the economic investment of the first mover—the author—who might not write if everyone could then free-ride off his investment. That is an undesirable outcome for all involved, including consumers. Google has invested $34.5 million in helping to create the registry, and millions more in legal fees, and thus, has a legitimate economic interest in protecting the value of that investment from free-riding.

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[18] The provision is limited to "rights granted from a significant portion of rightsholders other than registered rightsholders." Because "registered rightsholders is defined by the settlement to mean "any person who is a rightsholder and who has registered with the registry his, her or its copyright interest in a book or insert." See § 1.122, and a "rightsholder" is "a member of the settlement class who does not opt out…", see § 1.132, this section only governs works of settlement class members that do not register with the registry.

[19] Randall C. Picker, "The Google Book Search Settlement: A New Orphan Works Monopoly?" John M. Olin Law and Economics Working Paper No. 462, at 21.

[20] Antitrust scholars Areeda and Hovenkamp take the position that provisions requiring equal treatment are unlikely to cause antitrust problems. III.B Philip Areeda and Herbert Hovenkamp, Antitrust Law ¶ 768a6, at 159-160 (3rd edition 2008).

Conclusion

As Judge Learned Hand instructed over half a century ago, the antitrust laws are not intended to punish "superior skill, insight, and industry." When Google announced this project five years ago, book scanning technology was in its relative infancy and cost-prohibitive. At its own risk, Google developed its own scanning technology, negotiated numerous agreements with libraries, and navigated the uncertainty surrounding complex copyright issues. Its ability to do all of these things led to a virtual library that offers an unprecedented level of access to millions of consumers. The purpose of the antitrust laws is to open access and opportunities and that is precisely what the Book Rights Registry and the settlement does. Innovation should not be confused with monopoly power. The Google Books settlement is in the public interest and should be approved.

Appendix A

Public Interest Advocacy

by David Balto

Testimony on behalf of a number of the leading consumer groups in the United States:

- On behalf of the **Consumer Federation of America, Consumers Union,** and **U.S. Public Interest Research Group** before the House Small Business Committee regarding health insurer consolidation (October 25, 2007).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the concentration in agriculture and an examination of the JBS/Swift acquisitions (May 7, 2008).
- On behalf of the **Consumer Federation of America** before the House Small Business Committee regarding small business competition policy (September 25, 2008).
- On behalf of the **Consumer Federation of America** before the House Judiciary Committee regarding competition in the package delivery industry (September 9, 2008).
- On behalf of the **American Antitrust Institute, the Consumer Federation of America, the National Association for the Self-Employed,** and the **U.S. Public Interest Research Group** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding consolidation in the Pennsylvania health insurance industry (July 31, 2008).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the competitive impact of the Ticketmaster/Live Nation merger (February 24, 2009).
- On behalf of the **Consumer Federation of America** before the Senate Judiciary Committee regarding the nomination of Christine Anne Varney as Assistant Attorney General for the Antitrust Division of the Department of Justice (March 10, 2009).

Other congressional testimony:

- Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding GPO contract negations for medical supplies and devices (Sept. 14, 2004).
- Before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights regarding the competitive impact of the XM/Sirius merger (March 20, 2007).
- Before the Antitrust Taskforce of the House Judiciary Committee regarding the impact of antitrust laws and their impact on community pharmacies and their patients (October 18, 2007).
- Before the Consumer Protection, Product Safety, and Insurance Subcommittee of the Senate Committee on Commerce, Science, and Transportation regarding competition in the health care marketplace (July 16, 2009).

Amici curiae briefs:

- On behalf of **AARP, the Consumer Federation of America, Consumers Union,** and **Families USA.** *J.B.D.L. Corp. v. Wyeth-Ayerst Lab., Inc.*, Nos. 05-3860/3988 (6th Cir., Nov. 2005).
- On behalf of **the American Antitrust Institute** and **the Consumer Federation of America**. *McKinsey v. Peace Health*, No. 05-35627 (9th Cir., Mar. 2007).
- On behalf of the **American Antitrust Institute, AARP,** the **Consumer Federation of America, Consumers Union**, and **Families USA**. *In re DDAVP DIRECT PURCHASER ANTITRUST LITIGATION*, No. 06-5525 (2nd Cir., May 25, 2007).
- On behalf of **the American Antitrust Institute,** the **Consumer Federation of America**, and the **Organization for Competitive Markets**. *Federal Trade Commission v. Whole Foods Market*, No. 07-5276 (D.C. Cir., Aug. 23, 2007).
- On behalf of the **Consumer Federation of America** and the **Medical Device Manufacturers Association**. *Masimo Corp. v. Tyco Healthcare Group, LP*, Nos. 07-55960/56017 (9th Cir., Dec. 27, 2007).

- On behalf of the **American Antitrust Institute**, the **Consumer Federation of America**, and the **Public Patent Foundation**. *Rambus, Inc. v. Federal Trade Commission*, Nos. 07-1086/1124 (D.C. Cir., June 11, 2008).
- On behalf of several consumer groups. *Tafas and Smithkline Beecham Corp. v. Dudas and U.S Patent and Trademark Office*, No. 08-1352 (Fed. Cir., July 29, 2008).
- On behalf of **AARP, Patients not Patents**, and **the Public Patent Foundation**. *Apotex Inc. v. Sanofi-Synthelabo Inc.*, No. 09-117 (U.S. Supreme Court, Aug. 27, 2009).

Other public interest advocacy:

- On behalf of **the American Antitrust Institute** in opposition to the ExpressScripts/Caremark merger (white paper to FTC, Feb. 2007).
- On behalf of the **Consumer Federation of America, Consumers Union**, and **U.S. PIRG** in opposition to the FTC's proposed Consent Order against Kmart for deceptive marketing of gift cards (March 2007).
- On behalf of the **Organization for Competitive Markets**, and other groups in opposition to the Premium Standard/Smithfield merger (May 2007).
- On behalf of the **American Antitrust Institute, the Consumer Federation of America**, and **the Public Patent Foundation** on support for the FTC's proposed Consent Order in the Negotiated Data Solutions matter (white paper to FTC, April 24, 2008).
- On behalf of the **American Antitrust Institute** on Express Scripts' proposed acquisition of Wellpoint's PBM business (May 11, 2009).
- On behalf of the **Consumer Federation of America, U.S. PIRG**, and **Consumers Union** on pharmaceutical patent settlements (June 6, 2009).
- On behalf of the **Consumer Federation of America, U.S. PIRG**, and the **National Legislative Association on Prescription Drug Prices** on transparency by pharmacy benefit managers (letter to Speaker Pelosi, August 20, 2009).

Appendix B

The public interest and the Google Book Search settlement

By David Balto, Senior Fellow, Center for American Progress Action Fund

(September 9, 2009 version)

In 2004, Google began working with large research libraries to digitize their book collections and to make the content searchable online.Not long after the project was announced, a collection of authors and publishers sued Google for copyright infringement.After almost three years of negotiations, Google and the plaintiffs announced in October 2008 that they had agreed to a proposed settlement. While some commentators have lauded the settlement, others have vociferously claimed that it poses competitive concerns and does not promote the public interest.

As an advocate for consumer interests and a former antitrust enforcer, I took great interest in this debate early on and started to study the settlement. Over the last few months, I have learned much about Google Book Search, the ensuing litigation, the settlement, and the settlement's competitive implications.In doing so, I have come to the firm conclusion that the competition criticisms of the settlement are unfounded.I believe the settlement is good for consumers and should be approved.

At the outset, it is important to recognize what Google and the plaintiffs have accomplished. When Google started the project, book scanning technology was in its relative infancy and cost-prohibitive for operations at scale; the company thus had to develop its own scanning technology to move forward with the project.[21] At the same time, Google had to negotiate numerous agreements with libraries to gain access to their books and had to secure other rights directly from publishers and authors.[22]An additional deterrent was the great uncertainty surrounding the ownership of digital book rights. Indeed, it became abundantly clear that Google had undertaken considerable economic risk when its Book Search program became the subject of a class action lawsuit.

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[21] Maureen Clements, "The Secret of Google's Book Scanning Machine Revealed," National Public Radio, April 30, 2009, available at www.npr.org/blogs/library/2009/04/the_granting_of_patent_7508978.html.

[22] In December 2004, Google entered agreements with the libraries at Harvard University, the University of Michigan, Stanford University, Oxford University, and the New York Public Library to scan parts of their collections of books and make the contents searchable online. Google received access to the collections, while the libraries received an electronic copy of the books that they provided to Google. See "Google Checks Out Library Books," Google Press Release, December, 14, 2004, available at www.google.com/press/pressrel/print_library.html.

In settling the litigation, the publishers, authors, and Google have pursued a sound and necessary approach to resolving a number of rights-sharing problems that, until now, have posed seemingly insurmountable hurdles to making books digitally available.For example, by creating a nonprofit organization, the Book Rights Registry ("BRR" or "Registry"), to represent the interests of authors and publishers and to locate rightsholders who have been separated from their works, the settlement will significantly enhance the ability of subsequent entities to commence book scanning initiatives. As such, the settlement should be viewed in light of what it provides for the general public—increased access to the world's written cultural heritage, particularly books that have long been out of print. The settlement is, in other words, output-enhancing and procompetitive.

In this article, I first describe the settlement's consumer benefits, and then examine the impact of the settlement on entry barriers. I explain how, rather than increasing entry barriers, the settlement significantly decreases such barriers for other entities. I then focus on the criticisms posed by Professor James Grimmelmann,[23] and explain how the settlement is ultimately procompetitive and beneficial to the market.

The settlement will create significant consumer benefits

The Library of Alexandria, which Grimmelmann mentions in his articles, was one of the largest libraries in the ancient world. Although it remains unclear to this day how the library was destroyed, the leading theory is that Julius Caesar set a fire that unintentionally burned the library down in 48 B.C. during the Alexandrian War. The ancient texts contained within the library were destroyed, and the knowledge contained within the books was lost forever.

This historical incident is noteworthy for two reasons: first, on a practical level, the creation of digital copies of the world's books ensures that this disaster of the ancient world will not be repeated in modern times. Indeed, it would be borderline negligent not to use the electronic advancements of our generation to preserve the history and knowledge contained in books that have typically existed only on flimsy decaying paper. Second, despite the fact that there has been no fire or other calamity, a substantial percentage of the books in the United States (which Grimmelmann estimates is likely to be more than half of *all* books)[24] have been largely unavailable to the public, which amounts to a tragedy no less significant than the destruction of the Library of Alexandria. These are out-of-print books, which can be found in some public libraries and occasionally purchased second-hand, but which are otherwise inaccessible. There are a number of complications surrounding these books that have prevented them from being

[23] James Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books"(American Constitution Society, April 2009), available at http://www.acslaw.org/files/Grimmelmann%20Issue%20Brief.pdf; James Grimmelmann, "How to Fix the Google Book Search Settlement," *Journal of Internet Law* 1 (April 2009), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=james_grimmelmann.
[24] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,", supra note 3 at 8.

made more accessible. For many works, it is unclear whether they have fallen into the public domain because the rightsholder did not renew their copyright, as required by prior iterations of the Copyright Act. For some works, there is uncertainty as to who presently owns the rights to a book because the rights somehow got lost or otherwise disappeared over time. There is also ambiguity as to whether the author or the publisher owns the digital rights to hundreds of thousands of books.The combined impact of the varying shades of rights uncertainty has been to create gridlock,[25] which has prevented people from effectively accessing, and benefiting from, the knowledge encapsulated within an enormous number of books.

By settling their litigation, Google and the plaintiffs have ended the impasse. The settlement unleashes greater access to books, particularly to out-of-print books, which increases output in the marketplace of ideas.[26] Moreover, the settlement will serve as an equalizing force across socioeconomic, geographic, and linguistic barriers. Scholars and historians at the smallest schools in remote corners of this country will obtain the same access to knowledge as those at large, well-funded universities in our biggest cities. Citizens in poor communities will likewise have similar access to knowledge as those in affluent communities. And language barriers will be diminished under the settlement as Google's translation technology enables digital works in one language to be instantly translated into others.[27]

In addition to tearing down socio-economic and linguistic access barriers, the settlement will provide considerable benefits to those who are blind or otherwise print-disabled. Under the terms of the settlement, Google can provide books to "users with print disabilities so that such users have a substantially similar user experience as users without print disabilities."[28] The National Federation of the Blind, the nation's leading advocate for access to information by the blind, has stated that the settlement will have "a profound and positive impact on the ability of blind people to access the printed word."[29] The settlement will also provide researchers with the ability to analyze books and language in ways that were previously impossible. They will, for example, be able to search the entire digital library corpus to compare language and cultural development, and to track literary developments across countries. The potential to unlock knowledge is seemingly unlimited.

Universities around the country have overwhelmingly acknowledged these benefits. According to Michael Keller, Stanford's university librarian and publisher of the Stanford

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[25] See generally, Michael Heller, *The Gridlock Economy* (New York: 2008).

[26] James Gleick, "How to Publish Without Perishing, *The New York Times*, November 29, 2008, available at http://www.nytimes.com/2008/11/30/opinion/30gleick.html ("As a way through the impasse, the authors persuaded Google to do more than just scan the books for purposes of searching, but go further, by bringing them back to commercial life. Under the agreement these millions of out-of-print books return from limbo.... This means a new beginning — a vast trove of books restored to the marketplace.").

[27] See for example CNET News, "Google's Digital-Book Future Hangs in the Balance," June 15, 2009, available at http://news.cnet.com/8301-1023_3-10262203-93.html (noting that Google "increasingly sophisticated translation technology ... could bulldoze literary language barriers").

[28] eSight Community News, "Google Settlement with Authors, Publishers," Press release, November 23, 2008, available at www.tabinc.org/blog/archives/2008/11/google_settleme.html.

[29] Ibid.

University Press, "[t]he settlement promises to change profoundly the level of access that may be afforded to the printed cultural record, so much of which is presently available to those who are able to visit one of the world's great libraries."[30] Paul Courant, the Dean of Libraries at the University of Michigan, has likewise observed that Google Book Search will provide:

> Ubiquitous online access to a collection unparalleled in size and scope, preservation of the scholarly and cultural record embodied in the collections of great research libraries, new lines of research, and greatly expanded access to the world's printed work for persons with print disabilities.[31]

For all these reasons, it is difficult to exaggerate the benefits that consumers will gain from the settlement—and important not to overlook the fact that these vast benefits will disappear if the settlement's detractors succeed in derailing its approval. Even some of the settlement's most vocal detractors, including Grimmelmann, acknowledge these fundamental facts.[32]

The settlement substantially decreases entry barriers

Grimmelmann argues that the settlement will create various significant, if not insurmountable, barriers to entry that will prevent other potential competitors from competing in book scanning and online book sales. There is no doubt that book scanning is a difficult space to enter. Companies such as Microsoft and Yahoo have entered, seemingly determined that it would not be profitable, and exited.[33] Despite the costs and challenges, however, there are a number of entities that have entered book scanning and sustained their efforts.[34] As Grimmelmann acknowledges, the non-profit Open Content Alliance currently scans public domain works, and Amazon.com has the institutional capacity to make books available digitally on a "huge scale."[35] Most importantly, any challenges that do exist for large-scale book scanning should not be conflated with the question of whether the settlement increases or decreases entry barriers. The following

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[30] University of Michigan News Service, "Major Universities See Promise in Google Book Search Settlement," Press release, October 28, 2008, available at www.ns.umich.edu/htdocs/releases/story.php?id=6807.

[31] Paul Courant, "Other Voices: Google Agreement Will Extend U-M Libraries' Accessibility," Mlive.com, June 24, 2009, available at www.mlive.com/opinion/ann-arbor/index.ssf/2009/06/other_voices_google _agreement.html.

[32] See Grimmelmann, "How to Fix the Google Book Search Settlement,",supra note 3 at 12 ("Everyone is better off than they would be in a world without Google Book Search . . . .").

[33] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,", supra note 3 at 10.

[34] See, for example, Emory University, "Emory Partnership Breaks New Ground in Print-On-Demand Books" Press release, June 6, 2007, available at www.emory.edu/news/Releases/KirtasPartnership1181162558.html (announcing partnership with Kirtas Technologies, Inc., a maker of digital scanning technology to apply automated scanning technology to thousands of rare, out-of-print books in its research collections)..

[35] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,", supra note 3 at 10..

sections explain the ways in which the settlement decreases entry barriers for book scanning and online book sales.

The settlement expands the public domain

Google has scanned approximately seven million works,[36] one million of which come from the company's partner program[37] and another million of which were published prior to 1923 and therefore are clearly in the public domain.[38] The copyright status of segments of the remaining five million works are unclear. Many of the books will actually belong in the public domain because the rights owners did not renew their copyrights, as required under previous iterations of the Copyright Act. As Grimmelmann notes, more than 85% of works published between 1923 and 1978 were not renewed, as required by the Copyright Act, and therefore fell into the public domain.[39] The catch here, because the Copyright Office did not keep effective records during this period, is identifying which works were not renewed. Carnegie Mellon, Project Gutenberg, the Distributed Proofreaders, and Google have, however, combined to scan, compile, correct, and disseminate these records.[40] And Google is now using the records to determine the copyright status of books under the settlement.

Notably, the Copyright Office examined the feasibility of scanning these records and placing them online in 2006. They expressed reluctance to commit to such a project, however, because it would "involve a significant expenditure of resources"[41] as "preliminary figures estimated the costs to be about $35 million."[42] Fortunately, however, government inaction has not impeded progress because Google and others have filled the void – without the expenditure of public funds.
Each time that Google determines a book belongs in the public domain, consumers benefit by being able to download an entire PDF version of the text. Potential book scanning entrants benefit by having fewer books with uncertain rights — and can thereby avoid incurring expenses that Google had to incur to navigate these uncertain rights. By facilitating the clarification of the public domain status of potentially millions of works, the settlement thus significantly expands access and facilitates entry.

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[36] Juan Carlos Perez, "In Google Book Settlement Business Trumps Ideals," IDG News Service, October 30, 2008) available at www.pcworld.com/businesscenter/article/153085/in_google_book_settlement_business_trumps_ideals.html.
[37] Ibid.
[38] Ibid.
[39] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books.",supra note 3 at 8.
[40] Google Book Search Blog, "U.S. Copyright Renewal Records Available for Download," available at http://booksearch.blogspot.com/2008/06/us-copyright-renewal-records-available.html.
[41] United States Copyright Office, "Report on Orphan Works" (January, 2006), 29-30 n.46, available at www.copyright.gov/orphan/orphan-report.pdf.
[42] Ibid.

The settlement will lead to the resolution of uncertain digital rights

Another significant source of uncertainty surrounding the status of many out-of-print works is the ownership of the digital rights associated with particular books. Up until the 1990s, publishing agreements typically did not allocate digital rights to books, and publishers and authors have disagreed about who should retain these rights by default. The resulting standoff has harmed authors and publishers alike by denying them the possibility of gaining revenue from the sale of digital works. Consumers are likewise harmed by the loss of an effective option for accessing these publications. The settlement resolves this problem by creating a procedure for publishers and authors to determine who should own these digital rights. In addition, while publishers or authors may not have had any incentive to assert their digital rights in the past because their books were out of print or otherwise no longer profitable, the settlement creates an incentive for authors or publishers to come forward to assert their rights. Specifically, individuals and institutions can purchase access to out-of-print works that are still under copyright and the revenues that will be derived from these sales, combined with various inclusion fees described in the settlement, create financial incentives for owners of out-of-print books to claim them.

To ensure that copyright holders worldwide are aware of these financial incentives, the settlement has established the most comprehensive class-action notification program ever. Specifically, Google has funded a large direct-mail effort, created a dedicated Web site about the settlement in 36 languages, and spent about $7 million on advertising in newspapers, magazines, and even poetry journals, with at least one ad in each country.[43]

By creating an entity to resolve disputed digital rights claims between authors and publishers, providing financial incentives for rightsholders to claim their works, and funding the world's largest class-action notification program, the settlement generates substantial pro-competitive benefits and facilitates entry.

The 'orphanage' post-settlement

Grimmelmann alleges that the settlement will provide Google with "exclusive control" or a "monopoly" over "orphan works," which are works for which the current rightsholder is unknown. These claims lack economic substance.

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[43] Noam Cohen, "A Google Search of a Distinctly Retro Kind," *The New York Times*, ,March 3, 2009,, available at www.nytimes.com/2009/03/04/books/04google.html (noting that "200 advertisements have run in more than 70 languages: in highbrow periodicals like *The New York Review of Books* and *The Poetry Review in Britain*; in general-interest publications like *Parade* and *USA Today*; in obscure foreign trade journals like *China Copyright* and *Svensk Bokhandel*; and in newspapers in places like Fiji, Greenland, the Falkland Islands, and the Polynesian island of Niue (the name is roughly translated as Behold the Coconut!), which has one newspaper.").

First, Google will affirmatively not obtain a monopoly over orphan works because the settlement does nothing to make entry more difficult for a second entrant. Indeed, any company that chooses to begin scanning orphan works will face fewer obstacles – due to the settlement – than Google has confronted. In particular, by increasing the size of the public domain, clarifying uncertain rights, and addressing innumerable complex legal issues, the settlement simultaneously provides a map and blazes trails through previously unchartered territories than others will be able to use for their own explorations.

Second, we should remember that these works were orphaned because the rightsholders failed to keep track of their interests in the books. Thus, while it is obviously exciting that Google's scanning efforts could result in the (re)discovery of works of genius that have sat anonymously in the stacks of our nation's research libraries, we should also not forget that the true remaining orphans probably had indifferent parents and are likely of little value. As Roy Blount, President of the Authors Guild, noted, orphan works are books that "have been deemed unfit for continued commerce by traditional print publishers."[44]

Third, the number of true orphan works that will exist post-settlement warrants closer scrutiny. Contrary to the claims of Grimmelmann and others, the number of orphan works will be substantially reduced. Specifically, we know that:

- Over 85% of copyrighted works prior to 1964 were not renewed and belong in the public domain, which could amount to as many as 1.5 million works.[45]
- The settlement creates financial incentives for copyright owners to come forward and claim works, which will facilitate rights clarification,[46] and
- The Registry is obliged to locate authors under the settlement and, according to Roy Blount, studies on efforts to locate the rightsholder of out-of-print work have typically resulted in an 80-85% success rate.[47]

It is thus overwhelmingly apparent that the combined effect of these rights clarification efforts and financial incentives will be to clarify the copyright status of hundreds of thousands, if not millions of works, which will be an enormous improvement over the status quo. Studies on the number of true orphan works in the United State have,

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[44] See, for example, Roy Blount, "Let's Not Lose Our Heads Over a 'Monopoly' of Orphans," The Authors Guild, June 24, 2009, available at www.authorsguild.org/advocacy/articles/roy-blount-on-google-orphans.html.

[45] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,", supra note 3 at 8; Peter Hirtle, "Why the Google Books Settlement is Better Than Orphan Works Legislation," LawLibrary Blog, May 27, 2009, available at http://blog.librarylaw.com/librarylaw/2009/05/why-the-google-books-settlement-is-better-than-orphan-works-legislation.html.

[46] The minimum inclusion fee under the settlement is, for example, $60. Settlement Agreement, *Authors Guild, Inc. v.Google, Inc.*, Case No. CV 8136-JES § 2.1(b) [hereinafter Settlement Agreement].

[47] Blount, "Let's Not Lose Our Heads Over a 'Monopoly' of Orphans," supra note 44; see also Hirtle, "Why the Google Books Settlement is Better Than Orphan Works Legislation," supra note 45, (citing Carneige Mellon University study that located 79 percent of rightsholders).

moreover, found few fewer true orphans than critics of the settlement allege. Peter Hirtle, for example, concluded that there is a total of 12 million out-of-print works in the United States and that approximately 1.4 million could be true orphans.[48] If Google has scanned about 5 million out-of-print but in-copyright works, this means its library might include about 580,000 orphan works.

According to Brewster Kahle,[49] the head of the Open Content Alliance, it costs Google about $10 to scan a book and costs the Internet Archive about $30 to scan a book with "superior quality."[50] It thus would cost a rival to Google somewhere between $5.8 million and $17.4 million to scan the same body of orphan works—an expensive undertaking to be sure, but one that is certainly achievable. As such, it is entirely disingenuous to claim that the settlement increases entry barriers surrounding orphan works or that Google will obtain a monopoly over them.

The class-action nature of the settlement

Grimmelmann contends that the settlement is a good deal only for Google because "[i]n a post-settlement world ... potential competitors [in book scanning] face one insurmountable hurdle: copyright law."[51] This is absurd because the copyright law is no different in the "post-settlement world" than in the "pre-settlement world." Indeed, when Google started scanning these books, it was sued for alleged copyright violations. And as the settlement shows, copyright law is a surmountable hurdle and indeed, the settlement itself is a valuable guide for others seeking to surmount it.

Nonetheless, Grimmelmann posits that any subsequent entrant would be "sued into oblivion by a mob of angry copyright owners."[52] Conversely, he expresses concern that the class action nature of the settlement will serve as a "remarkably effective barrier to entry" because a subsequent entrant would not be sued by a class action, similarly to Google.[53] These concerns are unfounded once one understands the requirements for class certification, which are found under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 states that a class should be certified if it comprises numerous plaintiffs with common questions of law or fact that share typical claims and defenses and have interests that can be fairly and adequately protected by class representatives. Defendants usually

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[48] Hirtle, "Why the Google Books Settlement is Better Than Orphan Works Legislation," supra note 45.
[49] Kahle's criticisms of the settlement are unfounded. Kahle argued that the settlement should not be approved because Google would gain a monopoly over millions of orphan works yet also stated "[t]here are alternatives" to Google's scanning efforts and that entry at scale is "not that expensive." Brewster Kahle, "A Book Grab by Google," *The Washington Post*, May 19, 2009, available at www.washingtonpost.com/wp-dyn/content /article/2009/05/18/AR2009051802637.html. Kahle does not appear to appreciate that monopolies do not arise where alternatives exist and entry is viable.
[50] Brewster Kahle, "Economics of Book Digitization," Open Content Alliance, available at http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization.
[51] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,",supra note 3 at 10.
[52] Ibid..
[53] Ibid., at 11.

bitterly contest certification because it can mean the difference between exposure to individual damage claims that might amount to hundreds or thousands of dollars and the nationwide aggregation of these claims that might amount to millions or even billions of dollars in damages. In the book scanning context, however, a defendant will benefit from, and therefore support, class certification because it enables the defendant to simultaneously resolve all its copyright issues. Given the concerns of copyright owners, a supportive defendant, and the *Authors Guild v. Google, Inc.* class certification precedent, it seems highly likely any prospective class will be certified.

Innovation and transparency

Grimmelmann also worries about Google becoming a "chokepoint" for book distribution, and about the possibility of Google censoring information it does not want distributed. The irony of this argument is overwhelming. The Internet has facilitated an unprecedented explosion in the ability of individuals to publish content – regardless of how bizarre, tasteless, or offensive it may be – to the world at large. And Google, as the world's most successful search engine, facilitates greater access to published content than any other entity in history. The suggestion that the company thus might find the need to censor the content of books obtained from its library partners while simultaneously providing search results to users on virtually any topic is seemingly fanciful. In addition, Grimmelmann's argument appears to be premised on a Brave New World, where all other forms of distribution and access to literature have apparently become extinct. Even if Google were to decide not to distribute certain works through its system, one must remember that this settlement is non-exclusive, thus allowing copyright holders to freely negotiate with any potential competitors, and that these "censored" works could still be published, sold, and distributed through all the means of publication that exist today.

Furthermore, the settlement provides a mechanism to address this specific concern—if Google wishes to remove a book from its search results (which Grimmelmann notes is the company's First Amendment right), then it must inform the BRR and provide the BRR with a digitized copy of that work. No such mechanism would exist if Google were to have successfully litigated its case against the authors and the publishers, so the settlement actually provides greater transparency than the 'but for' world.

For all of the above reasons, there simply is no merit to the contention that the settlement will raise entry barriers for other would-be providers of digital books. The settlement will result in an expansion of the public domain and in the resolution of disputes over digital rights that are currently impeding our ability to access to vast quantities of books. And while issues inherent in our current system of copyright law, including orphaned works, will continue to impede access, none of these problems is increased by the settlement. In the post-settlement world, it will be in no way harder and in many ways easier for companies other than Google to provide digital access to books.

Remaining antitrust concerns are equally unfounded

Grimmelmann raises a number of specific antitrust concerns about the settlement, including that it facilitates price-fixing, confers monopoly power on the Registry, and contains an anticompetitive most-favored nation (MFN) provision.[54] Although these are legitimate points to examine, a careful examination of the settlement and the underlying economics shows they are unfounded.

The settlement does not facilitate price-fixing

Grimmelmann and others contend that the settlement will foster price-fixing among publishers and authors by creating an e-book program for consumer sales that gives copyright holders the option of allowing Google to determine sales prices. He points to a settlement provision that sets out twelve possible bin prices ranging from $1.99 to $29.99 and excitedly observes that "[s]urely the sophisticated companies with expert lawyers who drafted this settlement agreement wouldn't use it to set up a system of naked price-fixing ... ."[55]

When these consumer sales provisions are examined, it becomes readily apparent that the settlement does not establish a cartel. These provisions actually provide two ways by which prices for consumer book sales can be determined: (1) the individual author or publisher can specify price; or (2) Google can select a price based on its own algorithm.[56] For algorithmic pricing, which is the focal point of Grimmelmann's concern, the settlement states that "Google may change the price of an individual Book over time" and the "distribution of Books ... among the Pricing Bins may change over time."[57] These provisions also prevent the Registry, authors, or publishers from interfering with Google's pricing freedom. The settlement does not, in other words, create "a system of fixed prices." Grimmelmann is plainly wrong.

Courts and antitrust authorities have recognized that in many environments collective price setting can be procompetitive when intellectual property is involved. The Supreme Court has noted that, especially when dealing with copyright issues, price-fixing is "not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.'"[58] The Supreme Court ruled in *Broadcast Music Inc. v. CBS* ("BMI")

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[54] For example, Ibid..at 1 (Google developing a "dominant platform with control over a huge catalog of books that no one else has access to").
[55] Ibid at 5; Settlement Agreement, § 4.2.
[56] Besides the pricing options provided in the settlement, authors and publishers can also opt-out of the settlement and negotiate sales prices and other access provisions directly with Google. When seen in this broader context, it's even more difficult to contend that the consumer sale provisions will facilitate collusion.
[57] Settlement Agreement at § 4.2.
[58] *BMI*, 441 U.S. at 9 (further noting that "[l]iteralness is overly simplistic and often overbroad.").

that music copyright clearinghouses were not violating the antitrust laws *per se*, and in doing so, it expounded upon the purpose of copyright in general that aptly applies here:

> Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. *Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.*[59]

As in *BMI*, the Google settlement will not facilitate a *per se* cartel violation, but instead will accomplish "the integration of sales, monitoring, and enforcement against unauthorized copyright use."[60] This integrated facilitation of copyright enforcement and market enhancement in this manner is, as Grimmelmann himself has so often noted, unabashedly procompetitive and beneficial.

The registry is not a potential monopolist

Grimmelmann contends that the "Registry is also a potentially dangerous monopoly" because it "will speak on behalf of an entire industry."[61] At the same time, he argues that the "best way to make the Registry work well" is to expand its scope and powers.[62] This is a perplexing contradiction. No economist or antitrust lawyer would recommend expanding the powers of an entity to eliminate the monopolization concerns it poses. If the Registry were a "dangerous monopoly," it would be appropriate to curtail its powers. Period.

But his competitive concerns are simply misplaced. The Registry is no different than other collective rights management organizations that have been acknowledged as procompetitive under the antitrust laws. For example, the Department of Justice ("DOJ") previously examined a licensing program proposed by the Copyright Clearance Center, Inc. ("CCC"), a non-profit organization created by authors, publishers, and users of copyrighted material to facilitate copyright licensing and clearance.[63] The DOJ concluded that CCC's licensing arrangement, which authorizes users to make unlimited copies of any work in CCC's library for an annual fee, did not raise competitive issues in part because the copyright holders that are CCC members may continue to negotiate separate licensing arrangements with users and competing firms.[64] As part of its analysis, the DOJ

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[59] Ibid. at 18 (emphasis added).
[60] Ibid at 20.
[61] Grimmelmann, "The Google Book Search Settlement: Ends, Means, and the Future of Books,", supra note 3 at 6. He also noted that a "common theme" among his concerns "is that they all relate to, or are magnified by, centralized power." Ibid at 7.
[62] Ibid. at 14.
[63] Department of Justice Business Review Letter, "Copyright Clearance Center, Inc.," August 2, 1993, available at www.usdoj.gov/atr/public/busreview/211651.htm.
[64] Ibid.

also noted the procompetitive benefits of the blanket licensing agreement, such as encouraging use of copyrighted works among a wider range of users.[65] Similar to the CCC, the Registry will offer blanket licenses to digital book users on a nonexclusive basis. This is a key provision that Grimmelmann notes, but seemingly ignores its full implications.[66] Non-exclusivity means that, as with the CCC, authors and publishers will have the ability to negotiate with the Registry or separately with digital book providers. And because authors and publishers will have the ability to negotiate with other entities, the DOJ's conclusion regarding this provision in the settlement should be the same as the DOJ's conclusion with respect to the CCC—that absent exclusivity, it is unlikely that the Registry could impose unreasonable license fees or otherwise restrict the availability of electronic books.

Just because the Registry is important does not mean it is a monopoly, but ultimately it will provide significant benefits to consumers. Under the Settlement, the Registry will own and maintain a rights information database for books and their authors and publishers, locate rights holders, distribute payments from Google to rights owners, and assist in the resolution of disputes between those claiming to hold digital rights.[67] The Registry thus has the potential to significantly increase the amount of information and the number of books available in digital form to consumers.

The most-favored nation clause is procompetitive

Some critics suggest that the settlement's so-called Most-Favored Nation clause ("MFN") raises concerns; Grimmelmann suggests that it is "[t]he most pressing problem" because it "explicitly guarantees Google a privileged position."[68] I have written extensively and testified about the competitive implications of MFNs.[69] These clauses can promote consumer welfare by permitting first movers to recoup their investments in innovation. Conversely, MFNs can impede entry and adversely impact competition. The MFN clause in the settlement falls into the former category.

The MFN only applies in limited circumstances. Specifically, provision 3.8(a) states that the Registry will not license to third parties on terms that "disfavor or disadvantage Google" when such authorizations include rights granted from a "significant portion" of unclaimed works.[70] In other words, the Registry can license all the claimed works and some of the unclaimed works to third parties on terms that disfavor or disadvantage Google. The remainder of the works can moreover be licensed on identical terms to Google. It seems unlikely the MFN will hinder competition.

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[65] Ibid.
[66] Grimmelmann, "How to Fix the Google Book Search Settlement,", supra note 3 at 13.
[67] Settlement Agreement at § 6.1.
[68] Ibid at 6.
[69] See for example, David A. Balto, "Networks and Exclusivity: Antitrust Analysis to Promote Network Competition," *George Mason Law Review* 7 (523)(1999): 537-43.
[70] Settlement Agreement at § 3.8(a).

Conclusion

The universally accessible, searchable, digital library that will be realized by the Google Book Search settlement will provide unprecedented benefits to consumers worldwide. The settlement is an efficient and socially beneficial solution to the significant rights uncertainty that currently surrounds many books. Many of the leading critics of the settlement, such as James Grimmelmann, have failed to appreciate these procompetitive benefits while also dramatically overstating the antitrust risks. From a consumer welfare perspective, the settlement should unquestionably be approved.

Mr. CONYERS. This has been an extremely beneficial discussion among the eight of you.

I want to do something—I won't say that I haven't ever done it before. But, Mr. Drummond, I would like to give you an oppor-

tunity to try to clarify any comments that you have heard from your other seven panelists before the more precise questioning begins. Is there anything you would like to clear up here?

Mr. DRUMMOND. Sure. Quite a few things, but I will limit myself with these comments to a couple.

You know, this idea of the exclusivity that Google will have around orphan works, I think the orphan works problem, I think, is being exaggerated. I think one of the things that you have heard others say, we believe that the number of works that are truly orphaned will be small. The settlement goes a long way toward helping this by, A, clarifying rights issues between authors and publishers and, B, creating the financial incentive, for the first time really, for folks to come forward.

So we think that this will actually be a small number of works. The registry will have the ability to license to all comers, and has every incentive to license to all comers, all of the works that have come forward. So we think this problem is going to be very limited.

But let me just say this: We actually don't believe we are getting any competitive advantage here, but we want to make this very clear, and, quite frankly, we are willing to put our money where our mouth is. So here is something you are going to hear for the first time.

We believe, Google, in an open books platform. We are entering the e-book market, and we want to do this in an open way. So this summer we announced a program where we are going to work with publishers to take their in-print books and sell them anywhere, through any book seller, on any device—totally open platform. We are prepared and willing to commit to extending this program to the out-of-print books that are covered by the settlement, whether they are claimed or whether they are unclaimed. And what this means is that any book seller—anybody, whether it is Amazon, whether it is Barnes and Noble, whether it is Microsoft, should they ever decide to get into this market—would be able to sell access to the books that are covered by the settlement.

We have a—essentially, think of this as sort of a reseller program. We have a 37 percent revenue share that we get under the settlement. We will share that with any reseller who comes along——

Mr. CONYERS. Well, that is very generous of you. I appreciate that.

Mr. DRUMMOND. And, quite frankly, we will share the vast—the significant majority of that. We don't have a number quite yet, but most of the revenue will go to the reseller, which seems like a pretty good deal——

Mr. CONYERS. Sure.

Mr. Misener, don't you find that a thrilling new piece of information to come your way?

Mr. MISENER. The Internet has never been about intermediation. We are happy to work directly with rights holders without anyone else's help.

Mr. DRUMMOND. So, in any event, what we have here is—there have been complaints that people don't have access. We will provide access.

Mr. CONYERS. Mr. Misener is now going to review. Is there anything you heard here that you would like to clear the air on before I move on?

Mr. MISENER. Yes, sir. I really appreciate that opportunity. Thank you, Mr. Chairman.

The settlement is an enormously complex document, this proposed settlement is. And the reason why, of course, is it is much more like a joint venture agreement than it is a settlement of past claims.

But there have been a couple times when I have heard today that the settlement terms are nonexclusive, and that is just untrue. And I can point to exactly where it is. It says that, "The registry"—which would be the clearinghouse for competitors to Google to come and negotiate—"The registry will represent the interest of rights holders, both in connection with the settlement as well as in other commercial arrangements, including with companies other than Google, subject to the express approval of the rights holders of the books involved in such other commercial arrangements."

"Express approval." Orphans can't get express approval.

Mr. CONYERS. Mr. Consumer Watchdog, are you feeling any better now that you have heard all of the fellow panelists here this morning?

Mr. SIMPSON. I listened with concern to both of the representatives of the large corporate entities. And I am never quite sure what to make of what either of them are saying, and have to think about it just a little bit.

I was intrigued by Google's offer, and I am not quite sure what it means. I would have to think about it quite a bit more. I guess, though, that it is another one of these, sort of, pledges that are made. It doesn't seem to be part of the agreement. I am not sure they could be held to it.

It does seem to be indicative of the fact that they are finally coming around to the notion that there are serious people with serious questions that need to be taken into account. So I thank the Committee for providing that forum and some opportunity to get these issues on the table. But the process of the class action suit was the wrong place to negotiate what the other corporate colleague said was a joint venture.

So I think there were things being done here to pull an end-run around the appropriate legislative process, and further discussion and study is needed. And I would commend the Members of the Committee for helping to foster that.

Mr. CONYERS. Uh-huh.

Lamar Smith is coming up next. But let me just ask, would it be okay, Google, to expand the settlement to competitors through congressional action?

Mr. DRUMMOND. We have no problem whatsoever with Congress expanding or providing a similar structure legislatively that would apply to everyone, no problem at all.

Mr. CONYERS. Lamar Smith?

Mr. SMITH. Thank you, Mr. Chairman.

My first question is for Mr. Drummond and Ms. Peters, and it is this: Much concern has been expressed about the possible impact of the settlement, if any, on the enactment of so-called orphan

works legislation. Can you comment on whether there is anything in the proposed agreement that limits Congress's ability to enact as broad or as narrow an orphan works law as we determine appropriate?

Mr. Drummond first.

Mr. DRUMMOND. Sure. There is absolutely nothing in the settlement that would impede orphan works legislation of any flavor that Congress ultimately deems is most appropriate.

If anything, as Mr. Aiken and Mr. Balto pointed out, by providing a financial incentive for folks to come forward and have more people claiming these works, our sense is that the settlement will actually reduce the scope of the problem for books.

But there is certainly nothing that prevents Congress——

Mr. SMITH. Okay. You would argue that it addresses some of the problem but not all of the problem.

Mr. DRUMMOND. But not all—again, this is only books. Orphan works——

Mr. SMITH. Right, goes far beyond books.

Mr. DRUMMOND [continuing]. Is more than just books.

Mr. SMITH. Ms. Peters?

Ms. PETERS. My concern, we almost got to orphan works, and everybody would be treated the same. I guess the question that I have with that legislation for orphan works, whatever it was, apply to Google as well. Or are you basically saying that there is no search, that everybody then basically can copy every work.

And if you are saying that and you are going to put that in legislation, you do have concerns that you are creating a compulsory license and that you would have to go through international obligations and make sure that it met the treaty obligations that the United States has.

So I can't really answer. It depends on what happens.

Mr. SMITH. Okay. Thank you.

Mr. Misener, in your written testimony, you claim that, quote, "It is nonsense to claim that potential Google competitors would have access to the same deal as Google."

Why couldn't Amazon use their registry to locate orphan works authors and then cherry-pick the most sought-after works to license for their own Web site? For that matter, why couldn't Amazon initiate Google's strategy of digitizing all books?

Mr. MISENER. Thank you very much.

Mr. SMITH. And you touched part of that in your oral testimony, that you had started the process, but——

Mr. MISENER. Yes, sir. Thank you, Mr. Smith.

If the proposed settlement were approved, Google would be the only entity in the world that could treat copyright on an opt-out basis. They would be able to copy first, ask permission later. This is completely turning copyright law on its head. And competitors to Google, like Amazon, would still have to operate under current copyright law, where we would need permission in advance.

Mr. SMITH. Do you feel you have been disadvantaged by trying to play by the rules and get permission first?

Mr. MISENER. We have just complied with your laws.

Mr. SMITH. Yeah.

Mr. MISENER. These are the laws of Congress; we have complied. Three million works we have been able to copy, complying with the law.

Mr. SMITH. Okay. Thank you.

Mr. Aiken, let me address my last question to you. Some have suggested that the Book Rights Registry will enable authors and publishers to collude to set the price of books that are charged not just to Google but to all book retailers.

A couple of questions. What safety mechanisms does the settlement have built in, if any, to ensure that this does not happen? And, second, would the Authors Guild be open to ongoing court or Department of Justice oversight to guarantee that the Book Rights Registry is not misused and used for price-setting?

Mr. AIKEN. Thank you, Ranking Member Smith.

The agreement, really, is about out-of-print books. So I think a lot of the confusion that has been played out in the press and elsewhere is the thought that somehow this involves in-print books. For the most part, we don't expect in-print books to be actively used through the settlement, for several good reasons.

First, for an in-print book, you don't want to license it en masse with 10 million or 20 million out-of-print books. It is just not the way to maximize revenues.

Second, there is an attachment to the settlement called Attachment A. One of the reasons this thing took 30 months to negotiate was that we weren't just negotiating with Google. It was authors negotiating with publishers, and we rarely see eye to eye. So we had months and months and months of negotiations, trying to work out our differences.

In the course of that, we were able to build in all sorts of protections for authors that authors don't usually get—rights to arbitration, inexpensive arbitration; rights to an expedited reversion-of-rights process within the confines of the settlement—all sorts of good things for authors that we have a feeling publishers are not going to want to avail themselves of, so they are going to take every opportunity not to be covered by the settlement and to have things work outside of the settlement, to work through the Google partner program and through Amazon's program to make their in-print books available and leave this for the out-of-print books.

So we are talking about a small part of the market. Out-of-print books are always—always—going to be a tiny part of the market compared to in-print books. There is a good reason that many out-of-print books are out of print.

Mr. SMITH. Okay. Thank you, Mr. Aiken.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

Senior Member Mel Watt of North Carolina is now recognized.

Mr. WATT. Thank you, Mr. Chairman.

Let me say first how informative and instructive I think this hearing has been. And I thank the Chair for convening the hearing. Having said that, there is always a catch. I want to raise questions about the prematurity of the hearing.

And this is an amazing system in which we operate. We have an executive branch, a legislative branch, and a judicial branch. And, in this case, we have a case obviously before the courts. Quite

often—at least the Supreme Court quite often, maybe not the lower courts—but quite often the Supreme Court will say to us, "We invite you to legislate in this area, and there is really nothing that I can do here." And that right is also available. It seems to me that a lot of what we are talking about today is appropriately before the judicial branch of our government.

And I never second-guess the Chair about having a hearing. We can have a hearing about anything that we want to have a hearing about. And one of those things always is to protect the prerogatives of the legislative branch. But the best protection to the prerogatives of the legislative branch is for us to legislate. Since we haven't done very aggressively and effectively the legislation on orphan works, it is kind of hard for me to condemn the courts for having a case before it that questions what can be done and what can't be done with orphan works.

We have an existing law, which, obviously, all of us agree needs to be updated. But until we update it, the court is going to apply the law as it is currently written. But the court needs to do that, it seems to me, unless we are prepared to come before the court makes a decision and pass legislation updating the orphan works or updating the copyright laws or updating whatever is in our prerogative.

Now, I feel a lot more informed about this issue when we get to it, if we ever get to it. But at the same time, I am a great respecter of this division of powers that we have here. And I feel a little awkward being in a position of having a hearing on a case that is before the judicial branch, awaiting some disposition by the court, crying out, as at least one or two of the witnesses has said, for intervention and expression of opinion by the Justice Department, which is in the executive branch, who has a role to protect our legislative product and prerogatives.

So we are dibbling and dabbling in all three branches of government today. And, I mean, am I missing something here?

Okay. All right. I didn't want anybody to think that I was just imagining this. And Mr. Picker said it pretty well.

Is there anything other than updating the copyright law or updating the orphan works law that we ought to be doing right now with respect to this particular case? I guess that is my general question. If somebody can tell me that, then——

Mr. PICKER. No, I think that is exactly right. I think you have hit it exactly right. I think we have a number of things going on here simultaneously.

I will say I think what is tricky about the situation is precisely—I will go back to what I said, which is, only the government can create a license to use the orphan works.

Mr. WATT. But won't the court say that to us or say it to Google? And if they say it, if the court says that, or if the court says otherwise, it doesn't change our constitutional prerogative, does it?

Mr. PICKER. No, I don't think it changes your constitutional prerogative. I think, as a matter of how you make policy, I think that the discussion in the two different settings would be quite different.

As I tried to say before, I think it is inconceivable that someone would come before Congress and say, one firm should be granted this sole license. I think that is inconceivable. Google wouldn't do

that. Google has been very good about this. Google has said everyone should have a license.

Mr. WATT. As I have read the general parts of the proposed settlement, it doesn't even propose to do that, does it?

Mr. PICKER. No, no. Right now the only firm that will get a license in the settlement is Google.

Mr. WATT. Isn't that because they are the only firm out there that is trying to get a license?

Let me just ask one informational question, Mr. Chairman. Amazon has licensed 3 million books. How many is it estimated that are out there that haven't been licensed by Amazon?

Mr. MISENER. Oh, goodness. There is a factor of four, five more?

Mr. WATT. And so your argument is that we should somehow deprive all of those other folks of the opportunity to—or deprive the public of the opportunity to get access to that information, waiting on Amazon to go out and find that 3 million, multiplied times five? Is that the essence of your argument?

Mr. MISENER. We are following the law, Mr. Watt. We are going out and getting the opt-in permission from the rights holders.

Mr. WATT. And I take it, the corollary to that is that Google is not following the law.

Mr. MISENER. We think it was an extremely risky and irresponsible thing for Google to do.

Mr. WATT. I didn't ask that. People do extremely risky and irresponsible and cost-ineffective and costly things all the time that don't necessarily violate the law. Are you saying that Google has done something that violates the law?

Mr. MISENER. Sir, we looked at this very carefully. As I mentioned, we have been scanning——

Mr. WATT. Don't rope-a-dope me, Mr. Misener. Just answer the question. You are saying that they did something that violates the law?

Mr. MISENER. That was the consensus. The Authors Guild said it was "massive copyright infringement." This is the Authors Guild, now the partner of Google. "Massive copyright infringement" is what they said.

Mr. WATT. And the court, I take it, has the jurisdiction to determine that, too, right?

Mr. MISENER. Yes, sir.

Mr. WATT. Okay. All right. I am back to where I started then. The court can resolve this, and, in the meantime, hopefully we will do something on orphan works and whatever else we need to do in the copyright area, and maybe we will clarify the role of the court here.

Mr. SIMPSON. Mr. Scott, may I respond to that, as well?

Mr. WATT. I am not Mr. Scott. And——

Mr. SIMPSON. I mean Mr. Watt.

Mr. WATT [continuing]. Actually, we have been called for votes, and my time has long since expired. And I know Zoe wants to go before we go to a vote. So I am going to stop.

Mr. CONYERS. But I would like to get a brief response.

Mr. SIMPSON. My answer is simply to the question of whether Google broke the law. We would simply say the settlement violates

the law. We have faith that the judge will reach that conclusion and the settlement will not go through.

Mr. WATT. But we can't reach that conclusion, can we? That is the question. I mean, Congress can't reach that conclusion.

Mr. SIMPSON. I am suggesting that you will be faced with the orphan works issue, and we would hope you would take it up, and this is the appropriate place for it to come up.

Thank you.

Mr. CONYERS. Howard Coble, senior Member from—wait a minute. Wait a minute. We have Bob Goodlatte, more senior Member.

Okay. All right. Now that we have resolved that, Howard Coble, senior Member of the——

Mr. COBLE. Mr. Goodlatte, the gentleman from Virginia, is yielding to advanced age, I think, Mr. Chairman.

Mr. Chairman, thank you, and thank the very well-informed panel.

Mr. Aiken, what alternatives exist for copyright holders who opt out of the settlement, A? And, B, are they disadvantaged in any way?

Mr. AIKEN. The copyright holders who opt out of the settlement are free to do whatever they want. They can make agreements with Amazon, with—they can make their independent agreement with Google, with anyone. In fact, people who stay in the settlement can make independent agreements with Amazon and with Google. They are free to do so.

If I may, just because I think there has been a fundamental misconception here about the role of the Book Rights Registry. The Book Rights Registry, unlike ASCAP and unlike BMI, works on a completely nonexclusive basis. So if you are in the Book Rights Registry, you are still free to license elsewhere.

The Book Rights Registry has every incentive to find as many outlets as possible for these works. So it is the intention of those who were negotiating—the registry would be licensing to Amazon, to Microsoft, to all comers. We want as much competition out there. We want the works out there broadly in the public. We want to facilitate commerce and competition in the industry.

Mr. COBLE. Thank you, Mr. Aiken.

Madam Register, good to see you again.

Ms. PETERS. Good to see you.

Mr. COBLE. Two questions. And I think the answer to the first one is "yes." Is this settlement the equivalent of creating compulsory license, A? And, B, will your office have any role overseeing the settlement if it is approved?

Ms. PETERS. I think the answer to the first one is that we do perceive that this is compulsory license like, and the problem is that it only applies to one organization and that there has been no public debate.

And then I pointed out that with regard to new technology, because of the various pros and cons and so many players, that courts have said that Congress should be the one who is basically—if you are going to have a statutory license, that that is the way to deal with it, not through—not class action. No, the Copyright Office would have no role with regard to overseeing the settlement.

Mr. COBLE. Professor, if the settlement is approved and copyright holders do not opt out, will they have any control over Google's use of their work or their rights? And could they be assigned to third parties or other entities?

Mr. PICKER. Well, I heard what Mr. Aiken just said; and I guess I am a little confused. I think the agreement is not clear on what rights the Book Registry will have to license the work to use others. So we start with the orphan works. I assume they will have no rights to license the orphan works. And as to the nonorphan works I think the answer to that is, if the rights holder gives them rights, then they will have rights.

Mr. Aiken can address that directly, obviously.

Mr. AIKEN. I would like the opportunity to do that.

Mr. COBLE. All right. I still have time.

Mr. AIKEN. This sort of thing works in the music industry all the time. You never hear about orphan works in the music industry for good reason. There are well-established collection societies. People come forward and licenses happen.

What you do is when people come forward or you find them—and it is going to be the Registry's obligation to go out and find rights holders—when you find them, you ask them if the Registry can have permission to cut similar deals with other entities. You get this sort of blanket approval to cut new deals.

Then you have a body of work that you can then go to third parties. You go to Amazon and you say, look, we have the 100,000 most-used books, out-of-print books. We have got the rights here. Would you like to make use of them? We have the prior approval of these rights holders.

Then you cut the deal. You inform the rights holders. You tell them, this is how it is going to work. You have 60 days to tell us whether or not you are going to exclude yourself from it, but then you have another competitor in the field.

Mr. PICKER. But not the orphan works which are at the heart of the institutional subscriptions.

Mr. AIKEN. No, they are not at the heart of institutional subscriptions, because the orphan works problem is greatly exaggerated for books. For books, you always have a rights holder identified in the book. It is not photographs, which is the classic orphan works problem. The problem with photographs is the photograph gets separated from the rights holder information. With books there is always an author and a publisher listed right in the book. That is why in the real world people looking for rights holders find 90 percent of them. We can solve this problem for books. It is a different problem for photographs and other things.

Mr. COBLE. I had a photographer question, but I think I need to yield back. I will do that for another day, Mr. Chairman. I yield back.

Mr. CONYERS. That is extremely generous of you.

Zoe Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I think Mr. Watt is right. We really at this point don't have a role to play, but this has been a useful hearing in outlining what the issues are. I remember back a number of years ago trying to get ahead of this program legislatively, and we just utterly failed.

And what I look at in the settlement is really the private sector achieving what we failed to achieve.

I mean, when I look at the book registry proposal it is like ASCAP and BMI for books, except it is not exclusive. Rights holders could use somebody else.

I remember in the copyright report back in 2006, the Copyright Office pointed out that privately operated registries would be much more efficient and nimble, able to change. And one of the frustrations we had—and it wasn't just the Congress; I think it was the Copyright Office itself—you don't have the technology to do this, and you are never going to get the technology to do this. And so it was always going to have to be a private-sector effort to do this search in this registry, and now we have one.

I will just say I own a Kindle, and I use it all the time. But one of the things that we are going to see here is for the first time some competition to Amazon. Because if we have an open-source effort and a clearance of rights, you are going to have for the first time some real heavy duty competition which I know is sometimes a mixed blessing. But competition is good for us and for all technology companies so I think in the end it is going to make you a stronger company as well.

Finally, I want to say that we could solve the orphan works problem by repealing the Sonny Bono Copyright Extension Act. I don't think that is going to happen because then Mickey Mouse would then be in the public domain. But we helped create this problem, and now we have seen a solution to some of these problems.

I tried in vain for many years to put together an orphan works bill and even outside of this, Stanford University in my county. I worked with Stanford and the publishers association to see if they could work something out at the very early beginnings. I don't think Google even knew that. But it wasn't possible because it was too complicated to do.

So I think we ought to respect the fact, as Mr. Watt said, that we value our roles to play. And certainly the judicial branch has a role to play in—there is a way to settle rights and to directly attack Rule 23, that somehow the notice that is good enough for every other class action lawsuit is deficient here, I don't welcome that type of rhetoric without any evidence to that effect. And to say that somehow it is impermissible to use litigation and the settlement of litigation to settle rights and to distrust the judiciary for sorting through, that is not appropriate—for us as Members of Congress or I think for citizens who have to have confidence in our judicial system, which I do.

So I would just like to say—I mean, the one thing that would make this exclusive would be if Google had arranged with the libraries who possess these old books an exclusive arrangement. And I know I was thinking I grew up in the Bay area and I remember I use to be able to go to what was then the graduate business school and check out books. And when I was in high school, they were old books I would read. And they are not available.

Now, did Stanford do an exclusive deal with Google? Because if they did that, then Amazon or Microsoft or anybody else would not be able to replicate what Google has done.

Can you let us know what the answer is to that, Mr. Drummond?

Mr. DRUMMOND. All of our deals with library partners are non-exclusive. They can and, in many cases, are actively digitizing their materials with other partners.

Ms. LOFGREN. I just think—I know we have votes—but this is a major step forward for literacy and for the culture. I am glad to see it.

And sometimes I am sure that the library—I haven't had a chance to read the testimony. I am sure there is some regret that we failed. But we should instead take satisfaction that we have advanced. The goal that we hoped to achieve has been achieved here. So I appreciate this hearing, Mr. Chairman; and I thank you for allowing me to speak.

Mr. CONYERS. Thank you Ms. Lofgren.

We stand in recess for two quick votes.

[Recess.]

Mr. CONYERS. The Committee will come to order.

Before recognizing Bob Goodlatte from Virginia, senior Member of Judiciary, I would like to allow Mr. Misener 60 seconds.

Mr. MISENER. Thank you, Mr. Chairman.

Just before we broke, there were some statements made about Amazon's willingness to have competition in the e-book or the book selling market. And we certainly welcome it. That is not the problem. We certainly—I think it is probably a misconception about the size of Amazon. We actually sell only less than 10 percent of the books sold in the United States, and so it already a highly competitive market.

We would welcome Google as a competitor. We just want to be able to compete on a level playing field where we have the same access to orphan works and other works of rights holders who do not choose to participate in the process. If we had that same access, we would be fine to compete with Google.

Thank you.

Mr. CONYERS. The Chair recognizes Bob Goodlatte from Virginia, a senior Member of the House Judiciary Committee.

Mr. GOODLATTE. Mr. Chairman, thank you; and thank you for holding this excellent hearing. All of these witnesses are very well qualified to speak on various aspects of this subject, and it has been a very enlightening hearing.

I, like others, would say that the effort to digitize books is a very, very important thing; and I commend Google and Amazon and others who are about the business of doing that. But I do have some questions about this process and this lawsuit.

I agree with the gentleman from North Carolina, Mr. Watt, that most of the questions we have here today need to be addressed and hopefully will be addressed in the legal proceeding; and it would be inappropriate for the Congress to consider any action until we see what action the courts are going to do on this. But I would like to direct to Ms. Peters and then to Mr. Drummond and Mr. Misener a question about the nature of this lawsuit and settlement.

The suit was originally filed by rights holders who had been harmed. Their books had been scanned by Google. Yet the settlement is much broader and includes authors whose books have never been scanned. As I understand it, approximately 10 million

books have been scanned by Google; and there are approximately 30 million books in the United States.

Is it fair for the court to approve a settlement that will limit all authors' exclusive rights to their intellectual property when one could argue that two-thirds of the authors included in the settlement have not even been harmed by Google yet and when these authors are presumed to be part of the class only due to the special opt-out procedures in class action cases?

Ms. Peters, would you like to comment on that.

Ms. PETERS. I am not an expert in class action lawsuits, but I do understand—I think I understand that the scanning was a piece of the alleged infringement and that I think in our testimony we basically say that it may be appropriate in a settlement to allow some continued scanning. But we do make a point of the fact that to allow scanning to go on with no deadline, no cutoff date, we believe that that goes too far.

Mr. GOODLATTE. Mr. Drummond, yesterday you and I had a good conversation about this; and you indicated, because injunctive relief was sought and can be awarded in these actions, that it was appropriate to include authors whose books have never been scanned. And I would note that, while that is certainly the case, ordinarily, injunctive relief would be offered to somebody under quite different circumstances than this; and essentially it brings into this lawsuit people who really have had no rights taken away from them.

Is that a basis for granting some of the exclusive rights that are, as Ms. Peters and others have called it, effectively a compulsory license that has not been granted by Congress but is sought as a part of a settlement of a lawsuit?

Mr. DRUMMOND. Well, I would love to address the compulsory license part of your question in a second, but the meat of your question regarding sort of folks whose works haven't been scanned being included, it is absolutely appropriate. The settlement is coextensive with the remedy that was actually sought by the plaintiffs in the class action. They asked the court to stop us from scanning. And the class always included not just folks whose works had been scanned but folks whose works could be scanned. And the law on this is pretty clear.

If you look at the Second Circuit law as to when a judge can adjudicate this question——

Mr. GOODLATTE. I understand that. But, jumping ahead, the settlement doesn't stop you from scanning, does it?

Mr. DRUMMOND. No, it doesn't. But the question is whether or not it is appropriate for the court in the context of the settlement to allow the settlement to cover the entire class, which was the class that sued us in the first place; and, in fact, it is. So you treat people whose works have been scanned and people whose works haven't been scanned differently, but you can include all of them in the settlement.

Mr. GOODLATTE. Let me ask Mr. Misener and Mr. Picker to address that, and we will come back to your compulsory license comment.

Mr. MISENER. First of all, I would note that Google contested the class from the start. So their initial gambit was that the Authors Guild didn't represent the class.

But the real problem here is the going-forward nature of the release given to Google. This is not only covering the past acts of alleged infringement but also future acts, ones that—business models that Google has not yet participated in. And it has given Google this exclusive liability free monopoly over the orphan works because of the opt-out provisions that apply only to Google and the opt-in that would apply to everyone else.

Mr. GOODLATTE. Mr. Picker, do you have any comments? Mr. Picker?

Mr. PICKER. My paper really doesn't address the class action issue, so I can say I have looked at those in some contexts, and we often use class actions to do extremely broad remedies. I am not sure that this particular one is different in style and size than many we have seen.

Mr. GOODLATTE. Are you familiar with class actions in general?

Mr. PICKER. Yes. But not an expert, so I'd be very careful.

Mr. GOODLATTE. Why is the opt-out process for class actions appropriate in most cases and why do you believe that that is not the case in this particular class action?

Mr. PICKER. Well, I think the idea behind the opt-out nature of the class action is precisely the ability to deal with the rights of people that you can't get at very easily. And then the question is, are you better off suited to, as it were, leave those people out? And if you leave those people out, then they don't get any of the benefits of the agreement at all; and they are left with their original rights, which is the right to bring a lawsuit against Google. And I think that is the judgment that the class action law is making in embracing the opt-out idea.

Mr. GOODLATTE. Mr. Chairman, my time has expired, but I did tell Mr. Drummond that he could come back and address the compulsory license.

Mr. DRUMMOND. I just wanted to address this notion that this is a compulsory license. The problem with that is that a compulsory license, in order to be one, has to be compulsory. That is simply not the case here. So not only can the rights holder opt out of the class action which they could do up to the deadline, at any time in the future any rights holder can say to Google, we don't want you to sell this product or we want you to sell it at our price or we want to take it out of the settlement and sell it with Google through some other model. So it is completely nonexclusive and not compulsory.

Mr. GOODLATTE. Thank you, Mr. Chairman. I have many more questions, but this has been a good hearing.

Mr. CONYERS. Thanks so much, Mr. Goodlatte.

Sheila Jackson Lee, Houston, Texas, senior Member of the Committee.

Ms. JACKSON LEE. Mr. Chairman, thank you very much; and I add my accolades that other Members have know given. This has been instructive and informative.

And there is no doubt that I want to acknowledge that the presence of the National Federation of the Blind both impact and impress me primarily because I have worked with visually impaired soldiers. But I also see their presence here as an overall statement, if you will, about access that is so crucial in this discussion.

And I take a different perspective. We may have acted too slowly, but I think going forward I hope that, gentleman and lady, that we don't view this hearing as a hearing for hearing's sake. I think there are some opportunities here and some opportunities to be both proactive and responsive. So let me try to pose some snippet questions. Because I see there are some snippets here. Let me try to be snippet with you as well.

Mr. Drummond, I look forward to some more extended conversations, if we might be able to do that. I have interest in the digital divide, as many of us do—when I say "interest", interest in closing it—and will be holding a summit on that question for some of our inner-city youth and rural youth.

But what can you say about the settlement that you believe responds to the concerns—public settlement now—of the other side? What do you think—how do you think Google has come halfway? What do you think is in this settlement that responds to the other side?

Mr. DRUMMOND. When you say the "other side", do you mean the plaintiffs who sued us or——

Ms. JACKSON LEE. Yes.

Mr. DRUMMOND. Well, I think the settlement reflects absolutely a compromise and a middle ground.

Ms. JACKSON LEE. Give me the chief components of that.

Mr. DRUMMOND. I think at issue was that we were digitizing books but not making them available, and the plaintiffs didn't want us to do that. What we settled—we wound up settling those differences and actually creating something that works better for all the parties, which is that we continue to scan, make these books searchable but also make them available for purchase so that we reinvigorate the market for these out-of-print works and also provide broad access.

So I think if you look at the concerns—so one of the concerns of the rights holders here, publishers and authors, was that these books be made accessible.

Another one of the concerns is that there be some security in the digital copies that we had and that the library—our library partners had, and we negotiated a full set of sort of security protections to address those concerns.

So I think, on a whole range of issues, the settlement reflects a compromise and, quite frankly, a landmark compromise that I think ought to be a model for the future between technology companies and the Internet companies and rights holders.

Ms. JACKSON LEE. But it also lays the opportunity for to you to go forward and continue the work of expanding this type of access to books; is that correct?

Mr. DRUMMOND. That is right.

Ms. JACKSON LEE. But it provides security, and it provides some framework.

Let me ask Mr. Maurer very briefly, who heads the Federation of the Blind, is this a question for you for access and a level playing field for your constituency?

Mr. MAURER. The Google book settlement is the first and so far the only settlement that puts millions of books into accessible format. The largest collection of books that is accessible readily now

is in the Library of Congress, and it depends how you look at it. Those are not available for purchase but only to be borrowed. And those books, 70,000 of them, circulate on a regular basis. From the time of the beginning of the program in 1931, the program has put together about half a million books. It has been a great effort. We applaud the effort, but this is vastly better.

Ms. JACKSON LEE. Thank you. It is a question of access.

Ms. Peters and Mr. Misener, if you could, I am still troubled by the people not reaching the offering holders or book owners who couldn't found. What are we doing about the value of someone's copyright? We are in the midst of copyright discussion now on one of our H.R. 848 issues that we have been dealing with.

And comment on the idea of a public interest fee that addresses the question of closing the digital divide. Google might want to comment on this. In terms of giving you this privilege of accessing all of these books, we still have a digital divide. What about helping with that as you help those who are now challenged?

But if you would go ahead, Ms. Peters, on this question of who is left out.

Ms. PETERS. Let me start by saying that the Constitution anticipates exclusive rights and the law grants exclusive rights. You are talking about crafting exceptions, and those are usually what Congress does. And things like there are a variety of exceptions that deal with education, including on-line education. It would be appropriate, if you wanted to, to revisit those to see if where we are today we have the appropriate balance.

In fact, that is sort of my theme here. Congress has a role with regard to setting what the rights are and what the limitations are, including a compulsory license. But it is you who listen to all parties and then crafts what you believe is the appropriate balance.

Ms. JACKSON LEE. Both of you, Mr. Misener and Mr. Drummond.

Mr. MISENER. Yes, ma'am.

We believe that a competitive market is the best way to achieve that accessibility. Our principal concern here today in this discussion is that under the proposed settlement Google would be the only entity that could treat copyright as an opt-out mechanism. Everyone else would have to treat it as an opt-in. If we all had a level playing field on which to play, that kind of competition could drive accessibility out to the market.

We are very proud of the e-mails we consistently get from our customers about the accessibility of Kindle. That device has changed the lives literally of millions of our customers who write us and tell us how now they are able to adjust the font size of books. They are able to have, through text-to-speech, have books read to them. This kind of text-to-speech function is a real life changer, and the Authors Guild has actually opposed the use of text-to-speech. We are very proud of what we have done, but we have a long way to go. We acknowledge that.

Ms. JACKSON LEE. Repeat that one sentence again. Google can opt——

Mr. MISENER. Google would be the only entity in the world that could approach copyright as an opt-out mechanism where rights holders would opt out of Google's use of copyrighted works. Everyone else would face the current legal regime, which is opt-in.

Ms. JACKSON LEE. I have got you.

Mr. Drummond, on this issue of closing the digital device and public interest assessment fee, that would even enhance your equal playing field.

Mr. DRUMMOND. I think that is an interesting idea to explore should Congress legislate in this area making some clear rules for everybody around digitization and the copyright issues associated with it. I think it would be a very good idea to perhaps impose some obligations to do some things to close the digital divide and create accessibility.

We tried to—in the settlement, we tried to do some of those things. I think you are aware we have a free terminal for every public library in the United States. Well, it could be the case in some communities where libraries are closing and don't have the same capability. I think there is a lot of ways that could be refined and this concept built into legislation to make sure that the providers—both content owners and booksellers—are doing something to provide more access.

Ms. JACKSON LEE. I thank you.

The gentleman from the Federation of the Blind wanted to comment?

Mr. MAURER. I was startled to hear that access is Amazon's mode of operation, for the blind can't use its books. That is one of the things that has brought me to this support for the settlement. We have been trying to get other companies to take a lead from this book, and we intend to pursue it. And for the man who sits here to tell me that this is an access issue is startling to me who has tried to use it without success. I am glad to hear that Amazon is planning to change its method.

Ms. JACKSON LEE. Mr. Chairman, I think we have got the crux of some very ticklish issues that I think this Committee has the talent and the leadership to really look at.

There is a settlement, of course, and all parties did the best they could with the settlement, but I am hearing a lot of voices that we might add to this by clarifying how everybody could work in this arena. And particularly, Mr. Chairman, though I know that there are some other Committees that will be listening to my voice, I do think that Judiciary has as much concern about the digital divide as any other Committee; and I think some aspects of our work here could encourage us to participate in that effort.

So I thank the Chairman for I know he will not comment, but I hope we will get into the cross hairs, if you will, because I think our insight will be very helpful in this arena. And I yield back to the Chairman.

Mr. CONYERS. Thank the gentlelady.

Judge Charles Gonzalez of Texas.

Mr. AIKEN. Mr. Conyers, I apologize. Paul Aiken from the Authors Guild.

An allegation was just made about the Authors Guild which I would like to respond to from Amazon. If this is inappropriate, my apologies. I don't know the rules.

Mr. CONYERS. You may.

Mr. AIKEN. The position of the Authors Guild with respect to text-to-speech with Amazon's Kindle was that we wanted to make

it available to all the visually impaired. We thought there was a rule and copyright law in contracts that authors sign where we give away the rights all the time for blind people to be able to use text-to-speech and Braille and other things. We thought we could use that exception in copyright law to make text-to-speech available for every blind person in America, and that was our position.

Mr. Misener always says that Amazon has a small market share. It has a huge market share of the on-line market. It has 75 percent of the trade book market on-line and 90 percent of the book market—of the e-book market on-line. It has genuine market power. And to have Amazon throw allegations about monopoly when they are the ones we fear in this market seems a little crazy to us.

Thank you for the time.

Mr. CONYERS. Judge Gonzalez.

Mr. GONZALEZ. Thank you, Mr. Chairman.

First, an observation. I was a big proponent of mediation when I was a trial judge in Texas, and we had this incredibly successful mediator, and I asked him what is the secret? What is the secret of getting warring parties that argue in court and you get settlements? And he said, Charlie, it is simple. If I can devise a way that all parties make money, the case is settled.

I think we have a situation today where all parties make money. But Ms. Peters has observed that it is just not the parties who are involved here. There is public interest. And there is ongoing—Professor Picker—certain principles that we recognize. Mr. Balto, we even—copyright, antitrust. That is why we are having this hearing. It is not just about parties getting together and saying, can we reach some agreement where we all have some advantage? We know how that works. But it is bigger, bigger than Google, bigger than the parties.

So what I want to ask Mr. Drummond, the genesis of this whole lawsuit, which is very interesting, it was doing something good for mankind. And that was to make books available to the children in the school yards and those who are vision impaired and so on. And that is noble and wonderful. But you are also a business, so I suspect that there has to be some sort of business model associated with this. You are going to go ahead and scan the entire books, but under fair use you only use snippets, which is a lot like being little bit pregnant when it comes to copyright law.

My question to you is this: When you envisioned Google Books and the business model and before this lawsuit, did you entertain the following: that you would have and be part of and be central to institutional subscriptions? Just yes or no.

Mr. DRUMMOND. When we originally started the scanning?

Mr. GONZALEZ. Before you were made party to a lawsuit, was it your intention to have some sort of rights conferred—I will just go over the list that has been provided to the Committee as part of a memo. The memo doesn't take any sides. It is just very thorough, and I commend staff.

Listed below are various potential revenue streams for Google as identified within the settlement stemming from Google print: institutional subscriptions, consumer purchases, advertising uses, public access service, print on demand, custom publishing, PDF

downloads, consumer subscription models, summary abstracts, compilations of books.

That is what you are going to end up with, at a minimum. I am sure you guys are saying, thank God we got sued, because I don't think you would end up with any of this under what your original concern was.

So my point is—and I know the benefits of Google, and I have to be with Professor Picker. We have to have this disclaimer. We love you guys and everything, and then we come and ask this. We use you. We love you. You are the best at it. But that doesn't mean that you can act in a way that, in fact, may impact competition.

This reminds me of Microsoft a few years ago. Remember, because of technology, the laws not keeping up with it, forget about these legal principles, can't make the adjustments timely and so on. Let's just have temporary monopolies.

Don't you remember that argument? It is a great argument, and I think we are always going to have it.

I am not real sure this is really the model to be used as technology moves forward and maybe Congress doesn't act quick enough and the courts move in. What I am saying to you, Mr. Drummond, does this in fact place Google at such a tremendous advantage in disregard of what has been historically copyright law, prospectively you don't have to do anything on orphan works? I don't think you have to try to find anybody and get permission. We understand that. But, also, from a business model and the antitrust concerns that this Committee should have in mind, how do you respond to those concerns?

Mr. DRUMMOND. No, we don't think it puts us in a huge advantage. Again, you have to step back and remember what this market is. Electronic books, out-of-print books, which is what the settlement is largely covering, are not driving the electronic book market. It is in-print books.

As of today, we have zero market share in any sort of books. So we are a new entrant to the market. So far from being someone who is controlling the market, we are not even in it yet; and we are trying to get in there and compete with some of the existing players. It is an emerging market, and we think it will be very competitive, and there will be lots of players and lots of different models.

What we have is a settlement of a particular lawsuit that was brought against us being settled under a pretty well-established set of rules governing class actions with lots and lots of opt-out ability and flexibility for the rights holders and complete ability for them to go deal with others. And to the extent that there is a concern that truly orphan works that are going to be available to Google won't be available to others, certainly we support Congress going and legislating around that. And as I've announced here today, we are going to allow anybody to resell those orphaned works that we have access to, including all of our competitors.

Mr. GONZALEZ. But you would still be the gatekeeper. You still get a cut.

Mr. DRUMMOND. We would get a cut, but we would give more of the money to someone else.

Mr. GONZALEZ. Would you mind if other people were gatekeepers and you got the cut?

Mr. DRUMMOND. Excuse me?

Mr. GONZALEZ. Would you mind if there was another gatekeeper and you got a cut?

Mr. DRUMMOND. That happens in our business all the time. We have revenue shares and we work with partners and through other partners. That is pretty common practice on the Internet.

Mr. GONZALEZ. On this scale as it comes to copyrighted material I don't believe that exists. I guess what I am saying is this lawsuit went beyond what is the real issue here. And I understand there were financial advantages to some, and thank God for the writers and everybody else out there. But I think this goes way beyond what was intended. If you had gotten permission to scan books and use snippets as part of searches and such, that should have settled the entire case, I would imagine. But we are way beyond that now.

Thank you very much for your indulgence, Mr. Chairman.

Mr. CONYERS. Thank you very much.

From California, Mr. Brad Sherman.

Mr. SHERMAN. Thank you, Mr. Chairman.

I think we need to take a step back and just think of how wonderful it is that we are going to see 100 million books available in every village on this planet. Chiefly the private sector developed the Internet, and we need to make sure that this additional and huge chunk of information is available on the Internet. We ought to give a high priority to moving legislation in this area. It has been suggested that we provide to other firms the rights that Google has under this settlement. Surprisingly, Google seems to be the chief advocate of this.

Mr. Misener, would you object to legislation that codified this agreement and allowed other responsible parties to do exactly what Google is doing on their own?

Mr. MISENER. Instead of the settlement?

Mr. SHERMAN. I don't know if it would be instead or in addition to or superseding.

Mr. MISENER. Certainly not in addition to. Because this would give them a temporary—how long is it—a few months, advantage at the very best. But there are plenty——

Mr. SHERMAN. If everybody at the table agreed on the legislation, that is why we have suspension bills.

Mr. MISENER. I am happy to support legislation, as we have for years. We would be happy to support orphan works legislation to get at this problem. But we will not agree to a circumstance in which one company gets an exclusive opt-out copyright regime while everyone else waits for legislation. There are other problems with this proposed settlement, Mr. Sherman.

Mr. SHERMAN. You could probably move the legislation pretty quickly and delay the settlement. You have got some lawyers.

Moving along, you are focusing on the orphan works. What is Amazon doing and planning to do with respect to making orphan works available? What effort is Amazon making to scan out-of-print books?

Mr. MISENER. We are complying with the law.

Mr. SHERMAN. Well, so am I, but I haven't done a damn thing to make orphan books available.

Mr. MISENER. That is pretty funny. We have scanned 3 million books. So we have been at the scanning business longer than Google has, and we are very pleased with our efforts, but in each case we have gone out one by one and done what the law says.

Mr. SHERMAN. You are scanning the very popular books that have not become orphaned. As to orphaned books, what are you doing?

Mr. MISENER. We are not scanning books that the rights holders cannot be found and negotiated with in advance. That is what the law requires, and that is what we are doing.

Mr. SHERMAN. The law in my State and most States has an unclaimed property provision that says if there is any other property right where you can't find the owner it is unclaimed property. I think the principles of that law, if not directly applicable to copyright, but the general principle of law in my State is that we want unused property and unclaimed property made use of, and we want the ultimate owner to be compensated when that owner can be found.

To say that all the knowledge and learning of all the authors that cannot be found should be locked up and unavailable to humankind doesn't seem to be in the interest of knowledge.

What is—other than they seem to have a few months head start on you, what is stopping other companies from going down the exact same route, doing what Google did, getting sued by the same people that sued Google and entering into the same settlement? This assumes that Congress abdicates its responsibility in this area, which I hope we don't.

Mr. MISENER. It would be incredibly irresponsible for a company to do this. To actually seek out a class action lawsuit against us? Mr. Balto actually proposed that that could be a good way for an Amazon or a competitor to Google to go about doing this. To actually seek a class action is extraordinarily irresponsible. It is hard to imagine——

Mr. SHERMAN. I think the only thing irresponsible is to tell the people of the world they are not going to have access to all the knowledge in all the books for which authors cannot be found. That is what is irresponsible.

Now if Congress doesn't act, maybe that is irresponsible. If you try to prevent others from acting, that may be irresponsible. If you choose not to act yourself, that is irresponsible.

The overriding message here is this knowledge needs to be made available, and I hope that we do that as quickly as possible.

My time has expired.

Mr. BALTO. Mr. Chairman, I would just like to briefly reply.

I don't think I suggested that. Even though I am a class action attorney and would love more cases, I don't think I actually made that suggestion.

But, look, what we have here is a potential—what Google is offering is not only good for consumers but also good for the competitors who are there perhaps ready to compete against Amazon. And, like any other competitor, Amazon doesn't like competition. Google may make these books available for other electronic rivals which

can come up with other products which will compete with Amazon's products.

Mr. CONYERS. Thank you.

The Chair now recognizes former magistrate Hank Johnson, who is also a Subcommittee Chairman in the Judiciary.

Mr. JOHNSON. Thank you, Mr. Chairman; and I want to commend you for holding this hearing on this very important issue right now.

Who were the parties to the settlement agreement? In other words, who sued whom?

Mr. AIKEN. We sued him down there.

Mr. JOHNSON. All right.

Mr. DRUMMOND. Us, Google.

Mr. JOHNSON. Who sued whom?

Mr. AIKEN. The Authors Guild brought the first lawsuit, the class action lawsuit in September of 2005. Five publishers then filed suit a month later in a nonclass action lawsuit also against Google basically over the same set of facts.

Mr. JOHNSON. Was there any entity with the interests of the orphan works owners a party to the legislation—excuse me, a party to the litigation?

Mr. AIKEN. Orphan works are works for which you can't find——

Mr. JOHNSON. I understand. I understand. It is totally impossible to have a group that represents the orphan works owners. But perhaps there could be some entity set up that would be like a fiduciary, a guardian ad litem, if you will, for the orphan works owners. And that was not done in this litigation.

What troubles me about the settlement is what gets included within the scope of the agreement. Of course, settlements are a part of ordinary litigation. I love settlements myself. They must be fair, of course; and they generally only apply to the parties.

This settlement agreement it seems that it is going to bind orphan rights holders. It is not clear to me that copyright owners of orphan works were adequately represented. In fact, it appears that they were not represented in the plaintiff's class.

As Chairman of the Courts and Competition Policy Subcommittee, I am also particularly sensitive to the antitrust implications of the settlement. That is why I am troubled by the exclusive access Google will have to orphan works. It will be like the gatekeeper. Why should Google be the only entity permitted to sell access to orphan works? And I guess I will ask Mr. Balto that question.

Mr. BALTO. Thank you.

I think it is important to recognize a couple of things.

First, the number of orphan works is extremely limited.

Mr. JOHNSON. Well, I mean, does it matter whether or not it is one or 10,000? And I would submit to you that there is probably almost an infinite number of orphan works out there.

Mr. BALTO. My testimony and my paper cites different things that suggests that it is relatively modest, less than a million works.

Second, the problem with orphan works—I mean, I think it is really important—one is more than none. The problems that people are posing on orphan works would just prevent orphan works from

ever being accessible, and you need to overcome them, and I think this is one sound approach for being able to overcome them.

Mr. JOHNSON. To set up this process where Google is the gatekeeper you think is the way do settle this universally? When I say "universally"—in terms of U.S. law?

Mr. BALTO. Representative, I put myself in the shoes of—I used to be an antitrust enforcer. I did this for over 15 years. And I asked myself, how would I solve this problem? And I have found these people have gotten really sound antitrust advice. This is a sound approach for dealing with this issue. So there is not some kind of critical gatekeeper role. They have tried to permit in as many fashions as possible for these orphan works to be accessible. And, again, I just don't—I tend to think it is not that significant an advantage.

Mr. JOHNSON. Well, there are those who would thoroughly disagree with you, and I would be one of those.

Mr. BALTO. By the way, there is a great brief by 30 antitrust law professors—and 30 is more than two—and they went and analyzed the settlement at length and found that the exclusivity, it is really nonexclusive. And I commend that analysis to you.

Mr. JOHNSON. Well, let me ask Professor Picker for his response. Why should Google be the only entity permitted to sell access to orphan works?

Mr. PICKER. I guess I would start where you started, which was the question of how were the orphan works represented in the case. In many class actions or bankruptcy settings, for example, in tort situations, you have current tort victims and the possibility of future tort victims. It is pretty routine to appoint a separate representative, just as you said, as guardian ad litem for those future claimants.

So a very natural approach here would have been to appoint an independent representative as a guardian ad litem for the orphan works. Had that been done, God only knows what kind of licensing scheme would have emerged and whether it would have involved an exclusive license or a broad license.

To go back to what Google has said—Google is good on this; they are very clear—they favor broad licensing access to the orphan works, and I agree with them.

Mr. JOHNSON. Where would they get the license from?

Mr. PICKER. Only from the government. Only from you or the court.

Mr. JOHNSON. You are going to bind the United States Government, the legislative branch, to the terms of a settlement that is in the judicial branch?

Mr. PICKER. I actually think that is a tricky question. That goes back a little bit to Congressman Sherman's question he posed to Mr. Drummond, which is the interrelationship between the settlement and a subsequent legislation and the terms to when you can overturn that settlement in the legislation.

I don't know the answer to that. I love to write about that kind of question, so I am excited. I think it is hard.

Mr. JOHNSON. I would pose to you that the legislative branch of government is responsible for policy.

Mr. PICKER. I agree.

Mr. JOHNSON. You hear a lot of people talk about legislating from the bench. This would be a classic case. And that is why I am happy that you are holding this hearing, today, Chairman Conyers, because I think that it does give the parties to the litigation and others kind of a bird's eye view of the various issues that are involved here.

And also I doubt whether or not Judge Chin watches C-SPAN, but perhaps in a moment of pleasure he might. And I know judges are not supposed to look at outside information in making their decisions. But their decisions are based on their experience, their living, their experience. And so perhaps this hearing could be of some interest to the judge. I am not saying somebody here should pull his coattail and tell him to watch this later on at night on C-SPAN.

But the sweeping scope of this settlement and the significant limitations it places on rights holders who did not opt out it seems to me that the settlement is coming very close to whittling away the powers of the United States Congress. The treatment of orphan works rights holders who did not opt out is a matter that should be decided by Congress, not a group of plaintiffs in a private litigation format.

I would like to know, if I were to purchase a book through Google's service, what would I be getting exactly? Would I be getting actual—I could produce a hard copy and keep it forever? Or would I just be renting or leasing the book for a certain period of time? How does that work?

Mr. DRUMMOND. Two different ways. Many of the books we have are public domain books, and we will allow you to download those and do what you want with them, the digital bits. The in-copyright books will be in the cloud. Think of it as a cloud structure. I think amazon knows a lot about this as well. But you will get access to them. They will be streamed to you. They will not be downloaded onto your computer, but you will get access. Once you purchase them, you will have indefinite access to the books.

Mr. MISENER. Mr. Johnson, if I may, one of the future business models reserved to Google and the proposed settlement is for print on demand, which is the way the publishing industry is going. It is a highly efficient way to make physical books available to consumers. Google has reserved that to themselves as well. Imagine also these electronic books encompassing print-on-demand books, which would be a physical paper book that you would keep forever.

Mr. DRUMMOND. Just to complete the thought, you will be able to print out pages from the books as well. If you want to print out and have a hard copy, you can do that as well.

Mr. JOHNSON. Are books that are reduced to audio format covered under this litigation?

Mr. DRUMMOND. I am not sure what you mean.

Mr. JOHNSON. I mean, when you say purchase the rights to a particular book——

Mr. DRUMMOND. Oh, I see. The only thing that is covered in here is the ability to make books under the settlement available for the visually impaired. Beyond that, there is nothing.

Mr. JOHNSON. So this does not have any implication to those who produce books that have been——

Mr. DRUMMOND. Books on Tape, you mean? No, it is not covered.

Mr. JOHNSON. Why not?

Mr. DRUMMOND. We just didn't cover it.

Mr. JOHNSON. Okay. All right.

My last concern, and I would say also that this panel—the scope of the intelligence of the people on this panel is just breathtaking. And someone mentioned about the mousetrap. This would have to be—in order to match you all's intellect and knowledge on this issue, the mousetrap would have to be inconceivable in its largeness, in its scope; and the animal that it was seeking to capture would have to be a real, real beast.

To be clear, I don't think that this settlement will withstand a separation of powers review on the issue of its applicability to anyone other than the parties to the settlement. Could you talk about that, Mr. Simpson?

Mr. SIMPSON. Yes, thank you very much.

I think one of the tremendous problems here is that the settlement goes so far beyond the original complaint, and I find it particularly ironic that I would put myself in the camp with Google from the beginning of the suit, which is to say that, in the digital age, to scan things into a database and offer up snippets is a perfectly appropriate fair use.

What has happened here is that, instead of settling that issue, which was what the litigation was all about, we have created a tremendous new business model and gone off to areas that I think usurp, as you correctly have pointed out, Congressman Johnson, that go way, way beyond the powers that the party should have.

So I think that is a huge, huge problem. And were this simply about whether serving up snippets in a search is appropriate, I think that is what the settlement should have been about. And this is so far beyond that that it is, frankly, incomprehensible to me.

Mr. JOHNSON. Well, I tell you, I am really in awe of the technology that Google possesses to be able to carry out the terms of this settlement. And certainly to my friends who are visually impaired, you know, I am glad that relief is on the way.

But I will tell you, if it is only one entity involved, how can you—it is kind of like health care, health insurance. How can you create a competitive environment where you, as consumers, get the best price? I am concerned about that consumer protection angle.

And, with that, I do want to say that I am personally sensitive to the visually impaired, and I certainly appreciate you all coming to express your views on this important topic. And, at the same time, there is a larger picture out there that we, as legislators, have to be concerned about. And so we mean no disrespect to you as we oppose this type of settlement agreement.

Thank you. I will yield back.

Mr. CONYERS. The Chair would advise our Members that we will have 5 days to submit any additional questions and 5 more days for the submission of any other additional materials.

I think the importance of this hearing has been thoroughly restated, and I am deeply grateful to all eight of the members that comprised the panel for this afternoon.

And the Committee is adjourned.

[Whereupon, at 1:18 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Thank you, Mr. Chairman. I appreciate this opportunity to hear from our panel on such an interesting and unsettled area of copyright law.

The settlement between Google and copyright owners presents us with an opportunity to examine yet another area of evolving law involving copyright and the internet. Questions remain regarding several aspects of the deal between Google and content owners, both within the settlement and without. For example, what can Google do with a book online without paying for that use—i.e. what is fair use and what is not? Will giving Google so much blanket access to works grant them too much of an advantage over competitors? Can the marketplace advantages afforded Google under the settlement realistically be replicated by its competitors? Is the court, by accepting the settlement, bypassing the role of Congress to set public policy in the areas of copyright law, competition and the role of class action litigation? If the settlement is a byproduct of Google's having infringed on book copyrights, would the court's approval of the settlement encourage others to infringe copyright in other forms of digitized intellectual property, including musical works, sound recordings, and motion pictures? These are all significant questions of importance to this Committee.

It is important that any class action settlement not benefit one interest such as Google, at the expense of Google's competitors. Such a result would be completely inappropriate and unfair. I understand that the Department of Justice is currently examining this issue, and I look forward to reviewing their findings, as well as those of the U.S. Register of Copyrights Marybeth Peters, who provided testimony on behalf of the U.S. Copyright Office.

Thank you, Mr. Chairman. I look forward to working with you, Ranking Member Smith, and our other colleagues in reviewing the policy issues raised by this proposed settlement, and I yield back.

Ranking Member Lamar Smith
Questions for the Record
House Judiciary Committee Hearing on
Competition and Commerce in Digital Books

Question for all witnesses:

1. It is my understanding that under the settlement, a book satisfies the definition of "book" if not more than 35% of the pages contain more than 50% music notation, with or without lyrics. Is this accurate? If so, how do you think the settlement will affect music publishers and songwriters?

Oct. 14, 2009

The Hon. John Conyers Jr.
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC
20515-6216

Dear Mr. Chairman:

Here is my response to Ranking Member Lamar Smith's question mailed Sept. 29, 2009:

Because the parties in the class action suit are renegotiating key elements to overcome objections raised by the U.S. Department of Justice and others, it is impossible to know what form the new agreement will take.

Nonetheless, it seems to me that the troublesome issue of orphan rights applies to music publishers and songwriters just as it does to book publishers and authors. The orphan rights problem should be settled by legislation, not a class action suit.

Moreover, the settlement would appear to give short shrift to music rights holders if their work comprised less than 35 percent of a book.

These are matters for Congress to determine.

Thank you very much for the opportunity to respond.

Sincerely,

John M. Simpson

1750 Ocean Park Boulevard, #200
Santa Monica, CA 90405-4938
Tel: 310-392-0522 • Fax: 310-392-8874

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The Authors Guild, Inc.

Corporate Member of the Authors League of America, Inc.
31 EAST 32nd STREET, 7th FLOOR • NEW YORK, NY 10016
(212) 563-5904 • Fax: (212) 564-5363
staff@authorsguild.org • www.authorsguild.org

October 13, 2009

John Conyers, Jr., Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Conyers:

I write in response to your letter of September 29, 2009, which raised a question from Congressman Smith concerning the music notation provision in the definition of "Book" under the Google settlement agreement.

Congressman Smith accurately describes that provision. As to how the settlement may affect music publishers and songwriters, our intent in drafting the settlement agreement was to avoid any negative effect at all on their rights and markets. First, the "book" definition's provision on music notation was written carefully to draw a line between books used for playing music (for example, sheet music) and books about music and musicians. Our aim was to exclude books intended for the market for those who play music but to include, say, a biography of Mozart that contains illustrative stanzas of his music, as well as well as books about music history and music theory.

There is another provision in the settlement concerning music. The definition of "Inserts" in books includes song lyrics and music notation. We do not believe music notation will affect music publishers or songwriters for the reason stated above: the insert would not be used to play music. Therefore, it would not encroach on the music publishing market. As to lyrics as inserts in books, the settlement treats those inserts exactly as it treats poems, and we believe that is fair

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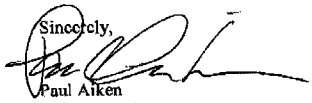
PAUL AIKEN, Executive Director
JAN CONSTANTINE, Assistant Director and General Counsel

and reasonable. Because partial or entire song lyrics are used only to the extent they are included in other books, the parties believe that their use in the settlement will not encroach on the music publishing market.

Sincerely,



Paul Aiken
Executive Director

cc: Hon. Lamar S. Smith

September 4, 2009

The Honorable John Conyers, Jr.
United States House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Lamar Smith
United States House of Representatives
2409 Rayburn House Office Building
Washington, DC 20515

Re: Hearing on Competition and Commerce in Digital Books

Dear Chairman Conyers and Ranking Member Smith:

The American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries (the Library Associations) are grateful for this opportunity to provide our views on the market for digital books, in particular the proposed settlement of the litigation concerning the Google Book Search service. The Library Associations provided the court presiding over the proposed settlement with detailed comments on May 4, 2009, and September 2, 2009. Our comments are attached to this letter. Additionally, on May 29, 2009, the Library Associations met with staff members of the Antitrust Division of the U.S. Department of Justice. Also attached is the letter the Library Associations sent to the Antitrust Division after that meeting.

The Library Associations recognize that the settlement has the potential to provide unprecedented public access to a digital collection of millions of books and could advance the core mission of the Library Associations and their members: providing patrons with increased access to information in all forms, including books.

At the same time, and just as importantly, the Library Associations recognize that the digital product enabled by the settlement would be under the control of Google and the Book Rights Registry. The cost of creating such a service and Google's significant lead time advantage suggest that no other entity could create a competing digital collection in the foreseeable future. In the absence of competition for the services it will enable, the settlement could compromise fundamental library values such as equity of access to information, patron privacy, intellectual freedom and fair use. Specifically, the libraries are concerned about equal access for all users to the service, monopoly pricing and reader privacy.

In order to mitigate the possible negative effects the settlement may have on libraries and the public at large, the Library Associations requested the court to exercise its jurisdiction

vigorously over the interpretation and implementation of the settlement. In the settlement agreement itself, the parties acknowledged the court's authority to regulate their conduct under the settlement.

In addition, the Library Associations requested the Antitrust Division to treat the settlement, if approved, as a consent decree to an antitrust action it brought. The Division should monitor the parties' compliance with the settlement's provisions as it would monitor the conduct of parties under an antitrust consent decree, and it should request the court take action when it concludes that the parties have not met their obligations under the settlement.

The likely demand among academic libraries for an institutional subscription allowed under the settlement is high; faculty and students performing serious research will insist on the ability to search and read the full text of out-of-print books. This means that libraries and their users will be among the primary fee-paying users of the services enabled by the Settlement. Accordingly, the Subcommittee should pay special attention to the perspectives of libraries on the settlement.

Please contact us if you have any questions concerning the Library Associations' position on the settlement.

Respectfully submitted,

Mary Ellen K. Davis
Executive Director
Association of College and Research Libraries
50 East Huron Street
Chicago, IL 60611
(312) 280-3248
mdavis@ala.org

Keith Michael Fiels
Executive Director
American Library Association
50 East Huron Street
Chicago, IL 60611
(312) 280-1392
kfiels@ala.org

Charles B. Lowry
Executive Director
Association of Research Libraries
21 Dupont Circle NW, Suite 800
Washington, D.C. 20006
(202) 296-2296
clowry@arl.org

Attachments (3)

July 29, 2009

William F. Cavanaugh
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Google Library Project Settlement

Dear Mr. Cavanaugh:

The American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries (the Library Associations) write to follow-up on our May 27, 2009 meeting with Antitrust Division staff concerning the proposed settlement of the Google Library Project litigation.

In the meeting, the Library Associations highlighted some of the points we made in the comments we filed with the court on May 4, 2009. We reiterated that we do not oppose the court's approval of the settlement. We believe that the settlement has the potential to provide unprecedented public access to a digital library containing millions of books. Thus, the settlement could advance the core mission of the Library Associations and our members: providing patrons with access to information in all forms, including books.

We expressed our belief that but for the settlement, the services it enables would not come into existence in the near term. A class action settlement provides perhaps the most efficient mechanism for cutting the Gordian knot of the huge transaction costs of clearing the copyrights in millions of works whose ownership often is obscure.

At the same time, we recognized that the digital library enabled by the settlement will be under the control of Google and the Book Rights Registry. The cost of creating such a library and Google's significant lead time advantage suggest that no other entity will create a competing digital library for the foreseeable future. In the absence of competition for the services it will enable, the settlement could compromise fundamental library values such as equity of access to information, patron privacy, and intellectual freedom.

In order to mitigate the possible negative effects the settlement may have on libraries and the public at large, the Library Associations requested the court vigorously exercise its jurisdiction over the interpretation and implementation of the settlement. In the settlement agreement itself, the parties acknowledged the court's authority to regulate their conduct under the settlement.

The Antitrust Division staff asked us what action we wanted the Division to take with respect to the settlement. We replied that the Division should join us in urging the court to supervise the settlement closely, particularly with respect to the pricing of the institutional subscription and the composition of the board of the Book Rights Registry.

Upon further reflection, we believe that the Division itself should take a proactive role in the implementation of the settlement. During our meeting, we mentioned that the settlement

agreement was in essence a "*de facto* consent decree." We now believe that the Division should treat the settlement, if approved, as a consent decree to an antitrust action it brought. It should monitor the parties' compliance with the settlement's provisions as it would monitor the conduct of parties under an antitrust consent decree, and it should request the court to take action when it concludes that the parties have not met their obligations under the settlement.

In particular, the Division should ask the court to review the pricing of an institutional subscription if the Division concludes that the price does not meet the economic objectives set forth in the settlement, *i.e.*, "(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education." Settlement Agreement at 4.1(a)(i). To assist the Division in evaluating the price of the institutional subscription, the Division should have access to all relevant price information from Google and the Registry.

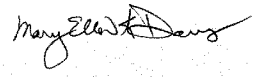
The Division should also request the court to review any refusal by the Registry to license copyrights on books on the same terms available to Google. Finally, if necessary, the Division should ask the court to review the procedures by which the Registry selects members to its board of directors, and to evaluate whether the Registry properly considers the interest of all rightsholders in its decision-making.

If the Division makes a submission to the court prior to the fairness hearing, we suggest that the Division inform the court of its intention to treat the settlement as an antitrust consent decree and to monitor the settlement's implementation. Additionally, the Division should ask the court, in its order approving the settlement, to confirm the Division's standing to request the court to enforce the settlement's provisions.

The likely demand among academic libraries for an institutional subscription is high; faculty and students performing serious research will insist on the ability to search and read the full text of out-of-print books. This means that libraries probably will be among the primary fee-paying users of the services enabled by the settlement. Accordingly, the Division should pay special attention to the perspectives of libraries on the approval and implementation of the settlement.

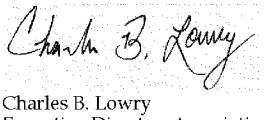
Please let us know if you have any questions.

Respectfully submitted,



Mary Ellen Davis
Executive Director, Association of College and Research Libraries

Keith Michael Fiels
Executive Director, American Library Association



Charles B. Lowry
Executive Director, Association of Research Libraries

September 6, 2009

The Honorable John Conyers, Jr.
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Lamar Smith
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Conyers and Rep. Smith:

Thank you for your interest in the settlement in Authors Guild et al v Google. The American Society of Journalists and Authors represents freelance, non-fiction writers. We are concerned that writers are not getting a settlement that compensates them for having millions of copyrights blatantly disregarded, but rather, one that would put them in a perpetual straightjacket when it comes to negotiating the sale of digital books.

We note that we are no enemy to Google; many of our members admire the corporation's innovations and use its products. ASJA also has a long-standing friendship with the Authors Guild. We have members who belong to both organizations.

But when it comes to this settlement, we believe the current settlement plan serves the needs of Google and the plaintiffs better than it does all of the nation's writers. We hope the plan will be substantially amended by the court.

ASJA is especially concerned that provisions of the proposed settlement effectively revise copyright law. Certainly, copyright law needs to be nimbler in this digital age, but it still should be Congress calling the plays, not a group selected by the Authors Guild and publishers. We have asked the court to remove the "opt out" provisions that turn copyright upside down, or at the very least, to direct the removal of deadlines for opting out of the Book Search. Copyright holders should control their works.

Alexandra Owens • Executive Director • director@asja.org

American Society of Journalists and Authors, Inc.
1501 Broadway, Suite 302 • New York, NY 10036 • (212) 997-0947 • Fax (212) 937-2315 • www.asja.org

ASJA believes present representation for both writers and publishers in this suit and settlement is ludicrously narrow. Roughly 30 million books are protected by copyright in the United States. They were not all written by members of the Authors Guild (or our members either) or published by McGraw-Hill, Pearson Education, the Penguin Group, Simon & Schuster, or John Wiley & Sons. These groups won't be writing or publishing all future books, either.

This is a class action suit, and the classes need better representation. More writers need a voice, which could be achieved by rotating membership in any registry overseeing payouts from among the many writer's organizations in the United States. More of the thousands of publishers also need a voice, especially small publishers and print-on-demand publishers.

ASJA asks that any settlement in this matter include rules that safeguard reader privacy. "Security" in the settlement document now means protecting Google. There are 17 pages of security provisions, all designed to keep someone from sneaking into Book Search files without paying.

Before they are writers, ASJA members are book-lovers and citizens. The ASJA board believes there simply must be language in the settlement limiting how Google can use the data it will collect on who is browsing, reading and buying books. Without it, the possibilities for privacy invasion are chilling -- especially when the corporation will have no true competition. We all know the strength of Google's algorithms for interpreting online activity. The ads that pop up when we search show it to us daily.

We recognize that it will be difficult to track compliance with such provisions, since much of Google's operating methods are proprietary. Nevertheless, we believe it foolhardy to leave any large corporation to monitor itself.

Writers already have a registry that channels payments for copyright infringements, royalties and the like to writers. It is the Authors Registry, a not-for-profit clearinghouse that has distributed more than $8 million to U.S. authors. It was founded in 1995 by a consortium of U.S. authors' organizations: The Authors Guild, The American Society of Journalists and Authors, the Dramatists Guild, and the Association of Authors' Representatives (literary agents.) Individual writers also can join the registry. It makes more sense to us to expand the duties of this existing registry than it does to create an extraordinarily powerful new one.

We thank you again for shining a spotlight on this settlement.

Sincerely, for the board of ASJA,

/s/ Salley Shannon
President

Alexandra Owens • Executive Director • director@asja.org

American Society of Journalists and Authors, Inc.
1501 Broadway, Suite 302 • New York, NY 10036 • (212) 997-0947 • Fax (212) 937-2315 • www.asja.org

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

HEARING ON "COMPETITION AND COMMERCE IN DIGITAL BOOKS"

SEPTEMBER 10, 2009

EXECUTIVE SUMMARY AND SUBMITTED STATEMENT
OF
VICTOR S. PERLMAN,
GENERAL COUNSEL AND MANAGING DIRECTOR,
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
ON BEHALF OF:
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
GRAPHIC ARTISTS GUILD
NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION
PICTURE ARCHIVE COUNCIL OF AMERICA

VICTOR S. PERLMAN
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
150 NORTH SECOND STREET
PHILADELPHIA, PA 19106

215-451-ASMP EXT. 207
FAX: 215-451-0880
perlman@asmp.org
http://www.asmp.org

SUBMITTED STATEMENT OF VICTOR S. PERLMAN
EXECUTIVE SUMMARY

ASMP's statement is submitted on behalf, not of just ASMP and its members, but of several other major organizations representing photographers, freelance commercial artists and illustrators, and other owners of copyrights in visual materials.

1. **Exclusion of Visual Materials and Their Rightsholders.**
As detailed in the objections filed in the U.S. District Court by ASMP, GAG, NANPA and PACA, visual materials were scanned by Google without permission on the same basis as textual materials. Despite that, the negotiations leading to the proposed settlement completely excluded the rights relating to visual materials. Not surprisingly, the proposed settlement carves out the interests of copyright owners of visual materials to the greatest extent possible. Most significantly, such rights would not be represented under the collective licensing system envisioned under the proposed settlement.

2. **Harm to Visual Materials Rightsholders.**
The concept of a collective licensing system that encompasses textual materials but that excludes visual materials appearing in the same books is absurd on its face. Reminiscent of Animal Farm, it takes the position that all copyrighted materials are equal, but some are more equal than others. The harm to those copyright holders whose works would be excluded from the system is obvious.

3. **Harm to the Public.**
Freelance creators of visual artworks are already, by and large, earning only modest incomes. Most new professional photographers last only approximately three years before financial pressures force them to find another career. Allowing their works to be scanned, and perhaps licensed, without a commensurate revenue stream or representation within the licensing entity would exacerbate an already difficult situation. As a result more professional creators would be forced out of the field. Professionally made images constitute a national heritage of extraordinary value and quality. If that resource is reduced, so is the benefit to the viewing and reading public.

Conversely, if images are not licensed by the proposed collective licensing entity (in spite of having been scanned), the public is then deprived of much of the value of the books they wish to access. How much good does a nature book without photographs or illustrations do for the reading public?

4. **Unconstitutionality and Inequity.**

Exclusion from a Congressionally created or mandated revenue source that is available to others whose interests are identical would be, at best, highly suspect under constitutional law (and, presumably, offensive to a Congressional sense of equity and logic). It would raise issues such as the deprivation of equal protection and the taking of property without due process. The sort of approach contemplated in the proposed settlement would turn copyright law on its head, by forcing copyright owners to take action by affirmatively opting out of a system in order to protect their rights, rather than forcing a prospective user of copyrighted material to take action by obtaining permission. That would so drastically alter the traditional and fundamental contours of copyright law as to raise constitutional issues of its own.

5. **Conclusion.**

The creation or mandate of a collective licensing system for book rights is an extremely complex issue with ramifications that require long and careful examination and consideration. Whatever Congress chooses to do, or not to do, it is crucial to the public good, to the rights of copyright owners of visual materials, and to the balance of interests dictated by Article I, Sec. 8, Clause 8 of the Constitution, that the traditional contours of copyright not be changed. It is especially critical that the copyrights in visual materials not be forgotten, ignored, or abused.

SUBMITTED STATEMENT OF VICTOR S. PERLMAN

Mr. Chairman, Ranking Member Coble, and distinguished members of the Committee, thank you for the opportunity to present our views on the proposed class action settlement in the case of The Authors Guild, Inc., et al v. Google, Inc. ASMP and the other parties on whose behalf I submit this statement have filed objections to the proposed settlement, and a copy of those objections is attached as an exhibit to this statement.

Introduction.
This statement of the American Society of Media Photographers (ASMP) is made on behalf, not of just ASMP, but also on behalf of the Graphic Artists Guild (GAG), The North American Nature Photography Association (NANPA) and the Picture Archive Council of America (PACA).

ASMP is the nation's preeminent organization representing the interests of professional photographers working in the field of publication photography, and it is the oldest and largest organization of its kind in the world. Founded in 1944 by a group of highly accomplished photographers, ASMP has long included in its membership the world's leading photographers. Their photographs have been published in magazines, newspapers and books all over the world for over 65 years. ASMP's mission is to promote and protect the interests of publication photographers in Congress, the courts, the Copyright Office and other forums, and to educate its members, other photographers, their clients, and the public with respect to the rights of photographers and the best business practices to preserve and protect those rights.

The Graphics Artists Guild ("GAG") is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members. GAG's members include graphic designers, Web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers and various combinations of these disciplines.

The Picture Archive Council of America ("PACA") is the trade association of North America that represents the vital interests of stock archives of every size, from individual photographers to large corporations, who license images for commercial reproduction. Founded in 1951, PACA's membership includes over 100 companies in North America and over 50 international members. Through advocacy, education and communication, PACA strives to foster and protect the interests of the picture archive community.

The North American Nature Photography Association, Inc. ("NANPA") promotes the art and science of nature photography as a medium of communication, nature

appreciation and environmental protection. NANPA provides information, education, inspiration and opportunity for all persons interested in nature photography.

Exclusion of Visual Materials and Rightsholders.
These organizations all have at least one thing in common: They represent the interests of visual artists whose works appear in the books that Google has scanned without permission, but who have been almost entirely eliminated from the proposed settlement and were completely excluded from the negotiations leading up to it.

In the event that Congress has occasion to deal with the issues involved in the Google Book Project and the proposed settlement of the Authors Guild class action, it is crucial to remember that visual artworks and their creators are every bit as impacted by them as text authors and publishers. The fact that the authors, publishers and Google have excluded the visual arts community from the proposed settlement to the greatest extent possible must not lead Congress down the path to the same travesty. The absence of any representative of visual creators and copyright owners from the panel that testified in this hearing suggests that our concerns are valid. We hope that this statement will alert Congress to the risk of inadvertently repeating the glaring omission of rightsholders of visual materials from the scheme embodied in the proposed class action settlement.

Indeed, since Congress is charged with overseeing the public good, it is critical to note that the exclusion of photographers, artists and other owners of the copyrights in visual materials from the proposed settlement hurts the public to possibly an even greater extent than it harms the visual creators. Congress must ask itself: If electronic access to books is in the public interest, how is the public interest served by giving them access to illustrated books without illustrations?

Collective Licensing Systems.
The proposed settlement has primarily two aspects: a retrospective pay scheme for past acts by Google, and a prospective arrangement for future acts, including the creation of a collective licensing entity. For purposes of this statement, we are going to assume that Congress' focus is primarily, if not exclusively, with the prospective aspects.

As mentioned briefly above, the interests of the owners of copyrights in visual artworks are identical, both legally and practically, to those of the owners of copyrights in textual materials. For that reason, if Congress were to create any kind of collective licensing agency, or take any action remotely resembling the arrangement set forth in the proposed settlement, excluding the copyright interests in photographs or other visual artworks would be irrational, inequitable,

and contrary to the public interest. Further, it would raise serious questions of constitutionality under the Equal Protection clause, among others.

Most photographers and artists are modestly compensated. The image of photographers driving a Rolls Royce and living in a world of luxury come from films like Antonioni's Blow-Up, and they have as much to do with reality as Star Trek. As the Register of Copyrights has pointed out on several occasions, they are the group most disenfranchised under the current copyright system. They look to the revenue streams from their copyrights to provide a living and, one hopes, some retirement income. If a licensing system were built that excluded their rights – or worse, that included their rights without providing representation in the creation and administration of the system – many of them would be forced out of the business. As it is, most photographers who "turn pro" currently end up changing careers after about three years for financial reasons, and the recent economic downturn has only exacerbated that situation. This affects, not only photographers and artists, but the public, as well. Anyone who has ever taken photographs knows that, no matter how good one may be as a serious amateur, his or her photographs almost never rise to the same quality as a professional's. Anything that contributes to the economic pressure on photographers and illustrators also inevitably contributes to the deterioration of the nation's visual heritage.

The above comments are relevant to how a Congressionally created collective licensing system along the lines set forth in the proposed settlement should be structured. An integrally related question is whether Congress should be involved in the creation of such a system, at all.

For over 200 years, the traditional contours of copyright law have been based on the concept that one generally must seek approval from a copyright owner to use a work, at risk of liability. That is, the burden of getting permission is on the user. Under the scheme embodied in the proposed settlement, that basic premise of copyright law is turned on its head: The burden is suddenly on the rightsholder to come forward and take affirmative action to stop his work from being used. Such a 180-degree reversal of a fundamental aspect of copyright law would be extraordinary and should not be pursued except in the most extreme circumstances and need. That extreme level of compelling need does not seem to exist today, and it certainly has not been demonstrated.

In addition, such a system would certainly change the fundamental and traditional contours of copyright law, and we know that legislation that does that runs the risk of being challenged, perhaps successfully, on Constitutional grounds.

We support fully collective licensing systems, as long as they are structured properly. Generally, licensing is best done through the private sector. However,

if Congress were deem it to be in the public good to create or mandate some form of collective licensing system for books, it must be on an opt-in basis for the rightsholders, for all of the reasons set forth in this statement. To conscript rightsholders or their works into a collective licensing system without their consent would be ill-advised, inequitable, and of questionable constitutionality under at least the Equal Protection and Due Process Clauses. As mentioned above, it might also, in the long run, adversely affect the quality of visual images available to the public.

In addition, we support and echo many of the concerns raised at the hearing, especially those of Marybeth Peters, the Register of Copyrights, which we will not waste the Committee's time by repeating in this statement. The problems of a de facto compulsory licensing system, are apparent to anyone who has been involved with the law and/or business of copyright licensing. In any event, if Congress were to deem it appropriate to create or mandate such a system, it would raise a host of problems outlined in Ms. Peters' statement and those of Messrs. Misener and Simpson. Many such objections to the proposed settlement agreement were filed by numerous individuals, groups and organizations in the U.S. District Court for the Southern District of New York. We are attaching a copy of the objections and supporting documents that we filed, for the Committee's further information.

Conclusion.
The creation or mandate for a collective licensing system for book rights is an extremely complex issue with ramifications that require long and careful examination and consideration. Whatever Congress chooses to do, or not to do, it is crucial to the public good, to the rights of copyright owners of visual materials, and to the balance of interests dictated by Article I, Sec. 8, Clause 8 of the Constitution, that the traditional contours of copyright not be changed. It is especially critical that the copyrights in visual materials not be forgotten, ignored, or abused.

Thank you for your time and consideration.

Respectfully submitted,

Victor S. Perlman
General Counsel and Managing Director
American Society of Media Photographers, Inc.
150 North Second Street
Philadelphia, PA 19106
215-451-ASMP Ext. 207
Fax: 215-451-0880
E-mail: perlman@asmp.org

EXHIBIT

OBJECTIONS FILED IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AUTHORS GUILD ET AL. v. GOOGLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American Publishers, Inc., et. al.,	
Plaintiffs,	
v.	Case No. 05 CV 8136-DC
Google, Inc.,	**FILED ELECTRONICALLY**
Defendants.	

OBJECTIONS OF CLASS MEMBERS THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., GRAPHIC ARTISTS GUILD, THE PICTURE ARCHIVE COUNCIL OF AMERICA, THE NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION AND INDIVIDUAL PHOTOGRAPHERS JOEL MEYEROWITZ, DAN BUDNIK, PETE TURNER AND LOU JACOBS, JR. TO THE PROPOSED SETTLEMENT BETWEEN PLAINTIFFS THE AUTHORS GUILD, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., ET AL. AND GOOGLE, INC.

Class members The American Society of Media Photographers, Inc. ("ASMP"), the Graphic Artists Guild ("GAG"), the Picture Archive Council of America ("PACA") and the North America Nature Photography Association ("NANPA"), together with individual photographers Joel Meyerowitz, Dan Budnik, Pete Turner and Lou Jacobs, Jr. (collectively, the "Objectors"), hereby submit these objections to the proposed settlement ("Proposed Settlement") of the class action filed by plaintiffs Authors Guild, Inc. ("AG") and joined by the Association of American Publishers, Inc. ("AAP"), together with various publishers and representative authors, against defendant Google, Inc. ("Google") arising from the "Google Library Project" ("GLP") (collectively, the "Settling Parties").[1] A declaration from ASMP Managing Director and General

[1] The term "Objectors" as used herein encompasses the four trade associations named herein and their members. "Objectors" also includes the four photographers named herein. For brevity purposes, the term "Visual Arts Rights Holders" will be used herein to refer to all members of the trade association Objectors, including photographers, illustrators, graphic artists and other copyright owners or their licensees that derive income from the licensing of visual images in books.

Counsel, Victor S. Perlman, in support of all Objectors is submitted as Exhibit A hereto ("Perlman Dec.").

The Objectors are trade associations for freelance photographers, graphic artists and illustrators, and further include four of the leading photographers in the United States.[2] As set forth herein, Objectors' interests would be adversely and permanently affected by approval of the Proposed Settlement, which Objectors oppose. The Proposed Settlement would sacrifice the interests of Visual Arts Rights Holders to promote the interests of a subset of copyright owners (authors and publishers) and Google. This abuse of the class action process cannot fairly be judged to be in the public interest.

The Objectors are largely excluded from the "Settlement Class" definition of authors and publishers contained in the Proposed Settlement. If the Settlement receives final approval, they would, therefore, not receive any of the compensation for past infringement provided for in the Proposed Settlement, however inadequate it may be. Nor would they benefit from the Book Registry and revenue-sharing provisions of the Proposed Settlement on a going-forward basis.

While largely excluded from the Proposed Settlement, Objectors would nevertheless suffer profound and far-reaching prejudice if it were to be approved. The technology prowess of Google, together with its unparalleled market power, would establish new and price-limiting market "norms" that would further damage the already weak bargaining position of Visual Arts Rights Holders. They would find it difficult, if not impossible, to obtain fair compensation for the licensed use of their works in the digital environment, even though they had no input into the settlement terms and were apparently included in the class solely to enhance the negotiating position of authors.

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[2] A brief description of ASMP, GAG, PACA and NANPA is provided in Exhibit B to these Objections.

The deliberate exclusion of the Objectors from a Proposed Settlement that would nonetheless damage their interests in the marketplace is fundamentally unfair, constitutes a breach of the fiduciary duty of class counsel and the class representatives to all members of the class, and will permanently damage Objectors' ability to obtain fair and equitable relief from Google's willful and ongoing infringement. Accordingly, the Objectors request that the Court:

(i) Deny approval of the Proposed Settlement;

(ii) Strike the Second Amended Complaint, which purports to exclude Objectors from the Settlement Class;

(iii) Appoint new class counsel to represent the interests of the Objectors, for purposes of either reopening settlement negotiations or continuing the litigation;

(iv) Appoint new class representatives to represent the interests of Objectors; and

(v) Such other relief as this Court deems necessary and appropriate.

In sum, if there is to be a fair and equitable settlement of this class action, a comprehensive settlement would better serve the public interest in broad access to copyrighted works while still protecting the rights and economic status of all copyright owners.

I. INTRODUCTION AND SUMMARY

The Proposed Settlement purports to be a comprehensive settlement of this class action that would serve both the public interest and the interests of the class members as well as Google. In fact, the Proposed Settlement is not a comprehensive settlement of this dispute and would serve only the financial interests of the Settling Parties and class counsel, while irrevocably damaging the interests of other members of plaintiffs' class who would be largely written out of the Proposed Settlement. As a result, the vast majority of Visual Arts Rights Holders, whose works have been and continue to be digitized by Google without authorization, and who have been members of the plaintiffs' class since July 2006, would receive nothing under the Proposed Settlement -- not a dime of compensation for past infringement, and not any benefit

from the various elements of the Proposed Settlement providing for going-forward relief for which the Settling Parties seek Court approval.

The Objectors have copyright interests at stake in this controversy that are identical to those of the copyright interests of authors and publishers. Indeed, plaintiffs' class counsel recognized as much when he amended the complaint in this action in July 2006 to encompass not only the Objectors but all copyright owners whose works were found in the University of Michigan and other library collections that Google was, and presumably still is, digitizing.

Having acknowledged the legitimacy of Objectors' copyright interests and their substantial stake in this controversy, and having obtained whatever leverage was gained by the expansion of the plaintiffs' class to include them, class counsel then proceeded to eliminate the Objectors from the scope of the settlement -- without any notice therein and with the result of cutting a deal for the benefit of a subset of the class (*i.e.*, authors) to the detriment of other members of the class. This manipulation of the class action procedure to enrich some members of the class at the expense of others, with the accompanying very substantial proposed remuneration to be paid to class counsel ($30 Million), constitutes an abuse of the class action system that should not be condoned or rewarded by this Court.

The truth is that this Proposed Settlement, if approved, would not only exclude many of the Objectors from receiving any of the benefits of compensatory relief and other elements of the Proposed Settlement, it would also permanently damage their ability to protect their copyright interests both with respect to past and future infringements arising from the GLP. If the Proposed Settlement is approved, the Objectors will most likely lack the bargaining power or resources either to continue this litigation in some form (or file separate actions), or to negotiate a settlement that provides for comparable or even more favorable protection for the interests of Visual Arts Rights Holders, who are historically among the most vulnerable and powerless in the real-world enforcement of copyright rights.

While the Objectors do not believe that the terms of the Proposed Settlement would provide fair compensation to all Visual Arts Rights Holders for past and future infringements arising from the GLP if they were included on the same basis as creators of other "Inserts," it is quite clear that being excluded from the Proposed Settlement would make it virtually impossible for the Objectors to obtain comparable relief, however adequate or inadequate it may be. Indeed, the Objectors believe that the establishment of the Proposed Settlement scheme, once in practical effect, will establish a ceiling for the payment of fair compensation in the future to Visual Arts Rights Holders not only by Google, but equally as important, also by other infringers or potential licensees. To the extent that some of the Objectors' works are included in the Proposed Settlement, they believe that compensation is inadequate and will have a negative impact on the values of all of their and their members' copyrights.

As a matter of economic reality, the implementation of that scheme will make it virtually impossible for Objectors' members to negotiate fair compensation for past and future infringements by Google or by other parties. Nor will Objectors be able to negotiate and benefit on the basis of a fair and equitable system for compensating their members for future infringements caused by the continuation and expansion of the GLP to include multiple libraries.

The enormous market power of Google and the publishers, together with the exclusion of the Objectors from the Proposed Settlement, will doom their members to second-class status in all future negotiations with Google, publishers or other parties whose bargaining positions already far exceed those of Visual Arts Rights Holders. This Court's endorsement of a class action settlement that selectively protects the interests of some copyright owners and affirmatively damages the identical copyright interests of other members of the class would be a miscarriage of justice. Accordingly, the Proposed Settlement should not receive final approval by this Court.

II. FACTUAL BACKGROUND

A. The Evolution of the Class Definition

In the initial complaint filed by class counsel on September 20, 2005, the class was defined narrowly to include only persons or entities holding copyrights in literary works contained in the University of Michigan collection. *See* Exh. C, Class Action Complaint, ¶ 22. Given the definition of "literary works" under the Copyright Act, 17 U.S.C. § 101, which provides that such works are "expressed in words, numbers, or other verbal or numerical symbols or indicia…," this definition of the class excluded non-text works such as photographs and graphic art.[3]

Nine months later on July 24, 2006, class counsel amended the initial complaint to expand significantly the definition of the class of copyright owners alleging infringement by Google's GLP. The new definition of the class expanded it to include "all persons or entities that hold the copyright in any work that is contained in the library of the University of Michigan." Exh. D, First Amended Class Action Complaint, ¶ 22. This new definition represented a dramatic expansion of the class. Under this expanded definition, all copyright owners, including but not limited to the Objectors, holding copyrights in works contained in the University of Michigan collection were included in the class. Thus, the newly defined class was no longer limited to authors of "literary works"; as of July 24, 2006, and continuing until the Settling Parties proposed to redefine the class in the Second Amended Complaint filed contemporaneously with the Proposed Settlement, the class was defined to include Visual Arts

[3] Photographs, graphic art and designs fall under the definition of "Pictorial, graphic and sculptural works" under the Copyright Act, a category of works distinct from "literary works" for purposes of that statute. Under the copyright statute, "Pictorial, graphic, and sculptural works" are defined to include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models and technical drawings, including architectural plans." 17 U.S.C. § 101.

Rights Holders -- indeed, it included the copyright owners of all copyrighted works in that collection, regardless of the form or media of such works.

Having obtained whatever negotiating advantage may have been conferred by an extremely broad definition of the class as of June 2006, class counsel then proceeded to negotiate owners of "Pictorial, graphic and sculptural works" out of the class. In the Second Amended Complaint filed on October 28, 2008, the Settling Parties insured that the definition of the plaintiffs' class tracked the proposed "Settlement Class." Specifically, the Second Amended Complaint changed the class definition to "all persons that… have a Copyright Interest in one or more Books or Inserts." Exh. E, Second Amended Complaint, ¶ 34. Books were defined in the conventional manner, but "Inserts" (a new term coined for purposes of the Proposed Settlement) were defined to exclude "pictorial works, such as photographs, illustrations…maps, paintings and works that are in, or as they become in, the public domain…." *Id.*[4]

Consistent with the changed definition of plaintiffs' class in the Second Amended Complaint, the Settling Parties then proposed a definition of the "Settlement Class" that would exclude the Objectors and any other owner of a copyright interest other than in "Books" and "Inserts" as defined in the Proposed Settlement. Specifically, the proposed "Settlement Class" was defined as "all Persons that… have a Copyright Interest in one or more Books or Inserts." Settlement Agreement ("S.A."), § 1.142. *See* Pls. Mem. at 5. Those persons would be "either members of the Author Sub-Class or the Publisher Sub-Class, or both." *Id.* Again, the Settling Parties chose not to tell the Court that the Settlement Class definition was inconsistent with the definition of the class that was established under the First Amended Complaint. *See* Pls. Mem.

[4] It is striking that nowhere in their Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Settlement Approval ("Pls. Mem.") did the Settling Parties inform the Court that the class had been dramatically expanded in the First Amended Complaint and then drastically changed in the newly-filed, post-settlement negotiations Second Amended Complaint. *See* Pls. Mem. at 5 (mentioning the Second Amended Class Action Complaint, but failing to point out the changed definition of the class reflected therein, which was both narrowed and expanded simultaneously).

at 5-6 (discussing the "Settlement Class" but failing to state that its definition departed from the class definition in the First Amended Complaint and thus the "Settlement Class" did not include many copyright owners included in the First Amended Complaint).

B. **Only "Books" and "Inserts" Are Covered by the Proposed Settlement**

The Proposed Settlement is applicable only to two types of "Copyright Interests" (another defined term, *see* S.A., § 1.38; Pls. Mem. at 6). First, the Proposed Settlement is applicable to "Books", which are defined as "a written or printed work" meeting three requirements pertaining to copyright registration, publication or distribution, and "Copyright Interests" (meaning that it cannot be a work in the public domain). S.A., § 1.16; Pls. Mem. at 6-7. An "Insert" under the Proposed Settlement must consist either of:

(1) text, such as forewords, afterwords, prologues, epilogues, poems, quotations, letters, textual excerpts from other Books, periodicals or other works, or song lyrics; or

(2) tables, charts, graphs, musical notation (*i.e.*, notes on a staff or tablature), or children's book illustrations.

S. A., § 1.72; Pls. Mem. at 7.

In addition, an "Insert" must meet three other requirements:

(b) be contained in a Book, government work or a book that is in the public domain;

(c) be protected by a U.S. copyright, where the U.S. copyright interest in the Insert is owned or held by someone *other than* a Rightsholder of the Book's "Principal Work" (*e.g.*, the "narrative story" in a work of fiction, a group of short stories published as a collective work, or a play in a Book with a foreword); and

(d) be registered, either alone or as part of another work, with the U.S. Copyright Office as of the Notice Commencement Date (another defined term), unless the Insert or work was first published outside the United States, in which case such registration is not required.

S.A., § 1.72; Pls. Mem. at 7 (italics in Mem.).

Specifically excluded from the definition of "Insert" are the following of particular interest here:

(1) pictorial works, such as photographs, illustrations (other than children's book illustrations), maps and paintings; and

(2) works that are in the public domain.

S.A., § 1.72; Pls. Mem. at 7.

Given these terms, the vast majority of photographs, graphic art and other non-text works are expressly excluded from the scope of the Proposed Settlement. The only way in which photographs, for example, would be covered by the Proposed Settlement is with respect to Books in which the contents of a Book are photographs, the Book of photographs was published and was registered in the Copyright Office, and the copyright in the Book is owned by the photographer. *See* definition of "Book", 1.16.

C. Plaintiffs Class Counsel Would Be Paid a Substantial Sum for a Partial Settlement

The Proposed Settlement provides for the payment of attorneys' fees and costs by Google of $30 Million for counsel for the "Author Sub-Class" alone. S.A., § 5.5; Pls. Mem. at 13. That is the same class counsel who first added the Objectors to the class definition and then negotiated a settlement that would exclude them from it.

In addition, as part of the settlement of the separate copyright infringement action brought by five publishers, the AAP would be paid $15.5 Million by Google in part to cover attorneys' fees and expenses. Pls. Mem. at 13, n. 9; Attachment M thereto.

ARGUMENT

I. THE PROPOSED SETTLEMENT SHOULD NOT BE APPROVED BECAUSE IT WOULD EXCLUDE THE VAST MAJORITY OF THE OBJECTORS FROM THE BENEFITS OF THE SETTLEMENT

A. The Objectors Would Receive No Compensation for Past Infringements

If the Proposed Settlement is approved, the Objectors and their members would not receive a penny of the $45 Million to be paid by Google to compensate authors and publishers for past unauthorized infringements. According to the Settling Parties, the $45 Million would be paid "to compensate Settlement Class members whose works have already been scanned without permission." Pls. Mem. at 2. But there is no dispute that the entire contents of books have been "scanned without permission" of the copyright owners by Google, including photographs, graphic art and other non-text works. Thus it is clear and undisputed that all members of the class as defined by the First Amended Complaint have been the victims of Google's unilateral decision to "scan…without permission." *Id.* Yet Visual Arts Rights Holders would be paid nothing for Google's admitted past infringement -- solely because they were negotiated out of the Settlement Class by class counsel, the class representatives and Google.

There is no rational reason why this Proposed Settlement of a class action that included Visual Arts Rights Holders in the class for litigation purposes should provide for payment for past infringements to some copyright owners in the class (namely, authors and publishers), but not for others (namely, the Objectors and their members). Google committed systematic, willful copyright infringement by digitizing the entire contents of books in the University of Michigan collection (and in other library collections). A partial settlement that selectively provides for

compensation only to certain categories of copyright owners (*i.e.*, authors and publishers) and not for other types of copyright owners (*i.e.*, Visual Arts Rights Holders) is fundamentally unfair and arbitrary, and inevitably would place the excluded copyright owners in a compromised position. Approval of this Proposed Settlement would leave Visual Arts Rights Holders with no financial compensation and very little practical ability to pursue a remedy for a separate financial package after this class action is terminated. The resulting prejudice is undeniable and inexcusable.

B. **The Objectors Would Not Be Eligible to Participate in the "Book Rights Registry"**

Under the Proposed Settlement, Google is obliged to pay an additional $34.5 Million on top of the $45 Million compensation fund in order to establish a "Books Rights Registry" ("Registry") that will reach out to Settlement Class members, secure their contact information and collect and pay revenues to them "for the use of copyrighted works through this Settlement." Pls. Mem. at 2. In addition, the Registry would "otherwise protect and represent the interests of the Settlement Class." *Id.*

Once again, the Objectors, having been excluded from the proposed Settlement Class despite being included in the litigation class, would not receive any benefits from this new structure to be established by Google at its expense. Nor is there any rational reason for such a structure to be established for the benefit of some copyright owners who have been the victims of Google's unauthorized digitization project while other similarly situated copyright owners are completely shut out of the Registry. Needless to say, there is little prospect that the Objectors would ever have the resources, both financial and technological, to establish and administer such a Registry for their works, which are excluded from the Registry under the Proposed Settlement.[5]

[5] As the Settling Parties stated in their motion for preliminary approval of the settlement, it would "catapult…the publishing industry into the digital age, a result that greatly benefits individual authors and publishing houses, which simply could not launch such a program on their

Thus, the simple reality is that the Registry to be established and administered under the Proposed Settlement will be the only one of its kind in the marketplace. To the extent that aggrieved copyright owners whose interests are adversely affected by Google's unauthorized digitization program are excluded from the operation of the Registry, they will inevitably suffer substantial prejudice and additional financial loss, with no practical means of redress.

C. The Objectors Would Not Receive Financial Remuneration for Google's Future Commercial Uses of their Copyrighted Works

Closely tied to the establishment of the Registry, the Proposed Settlement further provides that 63% of the revenues earned from Google's future commercial uses of the works of copyright owners included in the Settlement Class will be paid to them, presumably through the operation of the Registry. Pls. Mem. at 2. Since Google has digitized and continues to digitize entire books, including photographs and non-textual material, the future commercialization of those digitized works are likely to include the entire contents of the books.[6] If and when such commercialization occurs, the Objectors would receive no share of the resulting revenues -- indeed, they would be cut out of the infrastructure for calculating and paying the "royalties" of 63% altogether.

D. The Objectors Would be Deprived of the "Rights Clearance Mechanism" Provided for in the Proposed Settlement

own." Pls. Mem. 2-3. The precise point can be made about the Objectors and their members, who are equally, if not more so, unable to set up a comparable program on their own.

[6] It is implausible to suggest that, when it comes time to commercialize the digitized "books," photographs, visual art, illustrations and other non-text works will be excised from them. It is highly unlikely that customers of this commercialization effort would find it acceptable to gain access to portions of books, from which these materials have been excised. To the extent that there is commercial value in the digitized works, that value arises from the works as a whole, not from piecemeal dissemination of their contents. To put it bluntly, an illustrated book without its illustrations is not worth much compared to its illustrated counterpart.

As the Settling Parties informed the Court, in addition to the benefits outlined above, "the proposed Settlement creates a rights clearance mechanism that lets members of the Settlement Class, at all times, retain control over their copyrighted works by giving them the ability to determine the extent to which those works are included or excluded from the Google Library Project." Pls. Mem. at 2. Unfortunately, the Objectors would not have access to this rights clearance mechanism. And they would therefore have no ability to decide whether their works should, or should not, be included in the GLP. Instead, they would be in the same position they are today -- their works have been and will continue to be systematically digitized without their authorization or knowledge, and if this class action is settled without their representation and participation, they lack the ability and resources either to benefit from that digitization or to do anything to insure their works are not included in it. The resulting prejudice to the interests of the Objectors would be both immediate and enduring.

II. THE PROPOSED SETTLEMENT WOULD ESTABLISH A NEW, POWERFUL VALUE MODEL FOR THE USE OF COPYRIGHTED WORKS IN THE ONLINE ENVIRONMENT THAT WOULD RESTRICT PRICE COMPETITION AND DAMAGE THE NEGOTIATING POSITIONS OF THE OBJECTORS

The Proposed Settlement would establish a new, technology-driven, potentially far-reaching model for selling and, therefore, valuing "books" and "inserts" in the online environment. That model, driven by Google's extraordinary market power and the still-formidable market power of publishers, is likely to have a profound effect on the rights and financial position of the Objectors. More specifically, the pricing structure established by the Proposed Settlement, whereby specific monetary values are assigned to commercial uses of "books" and "inserts," is likely to be used in the marketplace to set an upper limit on what would be "fair compensation" for the online use of photographs, graphic art, illustrations and other non-text works that are not covered by the Proposed Settlement and are excluded from the model. The market power of this new economic model is likely to be such that the future value of the

copyrighted works of Objectors would inevitably be affected -- even though they had no input into the valuation structure established by the Proposed Settlement and even though it expressly excludes those works from its coverage.

Such a result would further deplete the already woefully weak negotiating position of most small copyright owners, including Visual Arts Rights Holders who have historically been among the weakest in terms of negotiating power. They would likely find it difficult, if not impossible, to negotiate compensation higher than that provided for in the Proposed Settlement for unauthorized uses of copyrighted works by infringers or by parties seeking to license those works prospectively for online use. Once the valuation model of the Proposed Settlement is in place, the market realities would be such that Visual Arts Rights Holders would have even less ability than they have today (which is already little enough) to negotiate a fair and equitable price for the use of their works. *See* Exh. A, Perlman Dec., ¶¶ 42-43.

For example, with respect to the payment by Google for past infringements (a minimum of $45 Million), Google will make a cash payment of $60 per "Principal Work", $15 per "Entire Insert," and $5 per "Partial Insert" (defined as any other "insert" that is less than an entire foreword, afterword, introduction, song lyrics etc., *see* Pls. Mem. at 11, n. 6). But only one such cash payment for these works will be made by Google, regardless of the number of times it may have digitized that work. *Id.*[7]

While the Objectors had no input into the negotiation of these values, and while these payments may be viewed as absurdly low and surely fail to take into account differences in

[7] The Proposed Settlement defines an "insert" to include texts such as forewords, epilogues and even song lyrics, as well as tables, charts, graphs and musical notation. S.A. § 1.72. Yet the definition of "insert" excludes "pictorial works" such as photographs, illustrations, maps and paintings, while including "children's Book illustrations." *Id.* One can fairly question the logic of and rationale for these arbitrary distinctions. It is not intuitively obvious why song lyrics or charts should be covered by the Proposed Settlement, and yet other types of "pictorial" works that plainly add value and character to a "book" are left out. Presumably these judgments reflect the outcome of negotiations between the Settling Parties, but their arbitrariness demonstrates the consequences of the Objecting Parties having no "seat at the table."

quality or value of different copyrighted works, the Objectors will likely find themselves presented with these values as purported evidence of the market value of "similar" works in the online environment. *See* Exh. A, Perlman Dec., ¶ 41. In such a case, the Objectors will have the worst of both worlds -- they will have been excluded from the negotiations leading to the establishment of these valuations, they will be excluded from any "upside" value associated with the Proposed Settlement and the structures it puts into place, and yet they will suffer the potential "downside" effects of the pricing mechanisms therein established.

III. CLASS COUNSEL AND CLASS REPRESENTATIVES BREACHED THEIR FIDUCIARY DUTY TO OBJECTORS

Class counsel and class representatives owe a fiduciary duty to Objectors. Once a complaint is filed, an attorney for a class owes a fiduciary duty to the entire class. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 801 (3d Cir. 1995); Newberg & Conte, *Newberg on Class Actions* § 11.65 (4th ed. 2003). *See also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 375 B.R. 719, 727 (S.D.N.Y. 2007) ("The representative plaintiff owes a fiduciary duty to absent members even before the class is certified") (citing *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 331 (1980)); *In re Avon Securities Litig.*, 1998 WL 834366, at *10 n.5 (S.D.N.Y. 1998) (same). Class representatives owe the same fiduciary duty. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Shelton v. Pargo*, 582 F.2d 1298, 1306 (4th Cir. 1978). Thus, once the class was defined to include Objectors, class counsel and class representatives owed them a fiduciary duty.

Class counsel and class representatives breached this fiduciary duty by failing to adequately represent their interests and by actively prejudicing their interests in the class action litigation.

A. Class Counsel and Class Representatives Breached Their Fiduciary Duty to Objectors by Failing To Adequately Represent the Interests of Absent Class Members in Their Negotiations with Google

Far from adequately, class counsel and class representatives did not represent Objectors' interests at all in their negotiations with Google. A fiduciary, even at the pre-certification stage, must adequately represent the interests of the absent class members. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 375 B.R. 719, 720 (S.D.N.Y. 2007). *Cf.* Fed. R. Civ. P. 23(g)(2)(A) advisory committee's note (2003) ("[A]n attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole."). Adequate representation of these interests must include, at its core, bargaining on behalf of all members of the putative class. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 375 B.R. 719, 726–28 (S.D.N.Y. 2007). A settlement that purports to protect the interests of some class members and provides no relief for other class members cannot be reasonably considered fair to the class as a whole.

By representing the interests of some members of the class and jettisoning the interests of others, class counsel and class representatives have inevitably breached that fiduciary duty by negotiating a settlement prejudicial to the interests of the Objectors. By filing the First Amended Class Complaint that defined the class broadly enough to include Objectors, class counsel and class representatives assumed a fiduciary duty to the Objectors and all other members of the class. That fiduciary duty did not somehow disappear by the convenient mechanism of negotiating a "Settlement Class" that excluded Objectors. *See also In re Holocaust Victim Assets Litig.*, 2007 U.S. Dist. LEXIS 92117, at 20 (E.D.N.Y. Dec. 14, 2007) (noting that a class representative has a fiduciary duty to bargain on behalf of the class). Indeed, as the Supreme Court has made clear, when the district court "certifies for class action settlement only, the moment of certification requires 'heightened attention' to the justification for binding

the class members." *Orvitz v. Fireboard Corp.*, 527 U.S. 815, 849 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

Moreover, excluding the Objectors from the Proposed Settlement impermissibly furthered the interests of the Settlement Class at the expense of other class members. The members of the two "sub-classes" of the Settlement Class would obtain substantial benefits from the Proposed Settlement. Class counsel's interests were enriched at the expense of the Objectors because the Settlement Agreement provides for $30 million in attorneys' fees for class counsel, while the Objectors received nothing. *See* S.A., § 5.5. *See also Assoc. of Bar of the City of N.Y.*, Op. 2004-01, available at 2004 WL 2155078, at *6 (March 2004) ("A class lawyer's decision [to settle], likewise, may not be influenced by the lawyer's desire to increase the fees he or she will receive."). Rather than bargaining on behalf of the Objectors, whose interests class counsel and class representatives introduced into the case, they proceeded to bargain them away.

B. Class Counsel and Class Representatives Breached Their Fiduciary Duty to Objectors By Prejudicing Their Interests in the Class Action

Class counsel and class representatives have done more than fail to represent Objectors' interests -- rather, class counsel and class representatives have actually forfeited them. Prejudicing putative class members' substantive legal interests in the class litigation, even prior to class certification violates the fiduciary duty to those class members owed by class counsel and class representatives. *See Schick v. Berg*, 2004 WL 856298, at 5 (S.D.N.Y. Apr. 20, 2004), *aff'd*, 430 F.3d 112 (2d Cir. 2005) (noting that class counsel's fiduciary duties arise because class counsel "acquires certain limited abilities to prejudice the substantive legal interests of putative class members even prior to certification."). *See also Rothman v. Gould*, 52 F.R.D. 494, 496 (S.D.N.Y. 1971) (noting these same dangers to absent class members when a class action is filed); *Turoff v. Union Oil Co. of Cal.*, 61 F.R.D. 51, 56 (N.D. Ohio 1973) (noting the danger that

when a class definition is narrowed, the statute of limitations may bar those who rely on a class plaintiff's first broader class definition from asserting claims).

Under the circumstances of this Proposed Settlement, the resulting prejudice to the interests of the Objectors is manifest at several levels.

First, given the length of time that this suit has been pending, it is unclear whether the three-year statute of limitations for copyright infringement is implicated. While clearly there are factual questions surrounding how copyright owners could have learned of the unauthorized copying of their works by Google under the Project, to the extent that the Proposed Settlement may create statute of limitation issues, it should not be approved. *See also In re New York City Mun. Sec. Litig.*, 87 F.R.D. 572, 581 (S.D.N.Y. 1980) (noting the danger of the statute of limitations barring claims of class members who mistakenly rely on a class to represent their interests in a well publicized case).

Second, as noted above, the exclusion of the Objectors from the Proposed Settlement obviously means that they receive no monetary compensation for Google's past infringements. Whether or not the $45 Million to be paid by Google is fair and reasonable to those authors and publishers who were also the victims of Google's past infringements may be debatable, but it is surely true that zero compensation for the Objectors is detrimental to their interests. Any suggestion that the Objectors can be adequately compensated for past infringements by filing separate actions or a "new" class action fails to conform to reality. Objectors lack the resources to file multitudes of individual infringement actions and there is no justification for forcing them to resort to a "new" class action and thereby be consumed by years of litigation and negotiation with Google over the terms of a separate deal.

A look at the timing of the class complaints further illustrates the prejudice to Objectors' claims. For almost two and a half years, the operative class definition included the Objectors, even though they were never informed of that fact. Not knowing that their members had been included in the class when it was expanded in July 2006, Objectors did not realize that

their members had been cut out of the "Settlement Class" when the settlement between authors, publishers and Google was announced in October 2008. As far as Objectors knew, the class definition had been limited to authors for the duration of the litigation. Neither class counsel nor class representatives ever informed Objectors that the class definition had been expanded to include photographers and other Visual Arts Rights Holders. Nor were Objectors informed that the class definition was subsequently contracted to exclude them and at the same time broadened to encompass vastly more authors. Accordingly, Objectors lacked the knowledge to protect their interests, and class counsel and class representatives had an obligation to do so.

IV. AMENDING THE COMPLAINT TO REMOVE OBJECTORS FROM THE CLASS DEFINITION AND TREATING IDENTICALLY SITUATED PARTIES DIFFERENTLY IN THE PROPOSED SETTLEMENT AGREEMENT ABUSES THE CLASS ACTION DEVICE

The Proposed Settlement is the product of an intolerable abuse of the class action process by class counsel and the representative plaintiffs. "District courts...have an ample arsenal to checkmate any abuse of the class action procedure, if unreasonable prejudice to absentee class members would result, irrespective of the time when the abuse arises." *Shelton v. Pargo*, 582 F.2d at 1306. Where certain plaintiffs have assumed the fiduciary role of class representative, they may not use the class action device for unfair personal aggrandizement to the detriment of absent class members. *Elliott v. Allstate Investigations, Inc.*, 2008 U.S. Dist. LEXIS 21090, at 4–5 (S.D.N.Y. Mar. 19, 2008). Courts have "supervisory power over and ... special responsibility in ... class actions to see that representative parties do nothing, whether by way of settlement of his individual claim or otherwise, in derogation of the fiduciary responsibility it has assumed, which will prejudice unfairly the class he seeks to represent." *Shelton v. Pargo*, 582 F.2d at 1306. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812 (noting that Rule 23 and due process require that "the named plaintiff at all times adequately represent the interests of the absent class members.").

The potential for abuse exists even at the pre-certification stage. *Soskel v. Texaco, Inc.*, 94 F.R.D. 201, 203 (S.D.N.Y. 1982). *See also* Manual for Complex Litigation (Fourth) § 21.61 (2004) (noting a variety of abuses of the class action device in proposed settlements). Among abuses that arise are when class counsel amends a complaint to eliminate the class portions of the complaint for strategic purposes, or when settlements treat identically situated parties differently. *See id.* at § 21.61 n.954, 956 and accompanying text; *see, e.g., Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D. Ill. 1970).

A. Class Counsel and the Representative Plaintiffs Abused the Class Action Device by Amending the Complaint to Remove the Objectors from the Settlement Class

Class counsel and the representative plaintiffs have impermissibly abused the class action process by purporting to represent the Objectors' interests when they, in fact, did not. When plaintiffs amend a complaint striking all reference to a class action in exchange for a substantial settlement for the named plaintiffs, courts have found an impermissible abuse of the class action device. *See, e.g., Munoz v. Ariz. State Univ.*, 80 F.R.D. 670, 672 (D.C. Ariz. 1978); *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61, 71 (S.D. Tex. 1977); *Yaffe v. Detroit Steel Corp.*, 50 F.R.D. 481, 483 (N.D. Ill. 1970). Abuse exists because the "[p]resence of class allegations in a complaint gives a plaintiff leverage in negotiations. ...Courts have accordingly found abuse of the class procedure where a plaintiff obtains a higher settlement for itself by amending a complaint to omit class allegations or by settling a class action without damages for unnamed plaintiffs.... In such cases, the plaintiff effectively abandons other class members' claims when offered the favorable settlement. This potential for such abuse may be most acute before certification of a class." *Wyman v. Conn. Gen. Life Ins. Co.*, 1990 U.S. Dist. LEXIS 18762 at 18–19 (N.D. Ill. Sept. 25, 1990) (citations omitted).

For example, in *Yaffe v. Detroit Steel Corp.*, certain Detroit Steel shareholders, seeking money damages and equitable relief on their own behalf and on behalf of a class of other

shareholders, brought suit to challenge the legality of a tender offer. No formal motion for class certification was filed. Without explaining the circumstances, these plaintiffs subsequently sought and were granted leave by the emergency judge to amend their complaint to strike all reference to a class action. Following this amendment, the named plaintiffs reached a settlement. 50 F.R.D. 481, 483 (N.D. Ill. 1970). The court vacated the emergency judge's order permitting amendment of the complaint. *Id.* The court further ordered a hearing to be held to determine if plaintiffs and their counsel would "fairly and adequately protect the interests of the class." *Id.* Key to this decision was the leverage named plaintiffs had acquired when negotiating their individual claims. *Id.* The court noted that defendants might be willing to pay the plaintiffs a premium for the elimination of a class. The court stated that "[n]o litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class." *Id.* (citation omitted).

Here, the redefining of the Settlement Class to include Objectors during the settlement negotiations, followed by the narrowing of the Settlement Class to exclude Objectors raises the same specter of abuse. The expansion of the class from "literary works" to "all works" provided leverage to class counsel and the class representatives to threaten vastly larger damages. Moreover, the timing of the First Amended Complaint further coincides with commencement of settlement negotiations. *See* Final Notice of Class Action Settlement, at 5 (stating in October 2008, "after more than two years of settlement negotiations"). These circumstances strongly suggest that class counsel and class representatives used the existence of Objectors as members of the class to draw Google to the bargaining table and then discarded them to facilitate a settlement. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (noting that the potential for abuse in a settlement that effects the dismissal of a class action requires judges to "exercise the highest degree of vigilance in scrutinizing proposed settlements").

B. Class Counsel and the Representative Plaintiffs Abused the Class Action Device by Treating Similarly Situated Parties Differently in the Proposed Settlement

The fact that the Proposed Settlement explicitly excludes Objectors while including parties who are identically situated further justifies an inference of abuse. *See Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 459 n.9 (E.D. Pa. 2008) (noting that relevant factors to consider in determining whether a proposed settlement is fair, adequate, and reasonable include "the existence and probable outcome of claims by other classes and subclasses" and "the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved -- or likely to be achieved -- for other claimants"); *Manual for Complex Litigation* (Fourth) § 21.61 at n.956 and accompanying text (2004) (noting that treating similarly situated class members differently is a recurring abuse in class action settlements of which judges should be wary). *Cf. id.* at § 21.62 (determining that a settlement is fair "calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class."); *id.* at § 21.222 ("If the [class] definition fails to include a substantial number of persons with claims similar to those of the class members, the definition of the class may be questionable.").

In *McDonald v. United Air Lines, Inc.*, the district court originally defined the class in an employment discrimination case as "all women who were employed by United as stewardesses and who resigned or were terminated because of United's no-marriage policy." 587 F.2d 357, 359 (7th Cir. 1978). Then without explanation, the district court vacated the class order and narrowed the class to include only those women who were discharged between the certain dates, thus excluding those who resigned under United's no-marriage rule in contemplation of marriage. *Id.* The Seventh Circuit reversed the district court's judgment and held that the first class determination was correct. *Id.* at 359–60. The Seventh Circuit found no

distinction between stewardesses who were fired and stewardesses who resigned voluntarily rather than await firing.

Similarly, no distinction exists here between the infringement claims of the Objectors and those of the Settlement Class. Even if class counsel believed there was a conflict between the Objectors and the Settling Plaintiffs, the proper action would have been to create a subclass rather than exclude the Objecting Parties altogether. *See* Fed. R. Civ. P. 23(c)(4) & (5) (a class may be divided into subclasses which may each be treated as a class or the class may be narrowed to deal with specific issues).

CONCLUSION

For the foregoing reasons, the Proposed Settlement should not be approved by this Court, and Objectors request the right to be heard at the Fairness Hearing on October 7, 2009.

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Respectfully submitted,

S/ Shirley O. Saed
Charles D. Ossola
Elaine Metlin
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403

Shirley Saed
DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, NY 10019-6708
Tel: (212) 277-6500
Fax: (212) 277-6501

Victor S. Perlman
Managing Director and General Counsel
AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC.
150 North Street
Philadelphia, PA 19106
Tel: (215) 451-2767
Fax: (215) 451-0800

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American Publishers, Inc., et. al., Plaintiffs, v. Google, Inc., Defendant.	Case No. 05 CV 8136-DC **FILED ELECTRONICALLY**

DECLARATION OF VICTOR S. PERLMAN, ESQ. IN SUPPORT OF OBJECTIONS OF CLASS MEMBERS, AND MOTION TO INTERVENE BY, THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., GRAPHIC ARTISTS GUILD, THE PICTURE ARCHIVE COUNCIL OF AMERICA AND THE NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, AND THE OBJECTIONS OF INDIVIDUAL PHOTOGRAPHERS JOEL MEYEROWITZ, DAN BUDNIK, PETE TURNER AND LOU JACOBS, JR.

I, Victor S. Perlman, being over 18 years of age, hereby declare as follows:

1. I am General Counsel and Managing Director of the American Society of Media Photographers, Inc. ("ASMP"). I have served as General Counsel for the last fifteen years and as Managing Director for the last fourteen years. Before joining ASMP, I was in private law practice in Philadelphia for twenty-three years, where among other clients, I represented photographers on a broad range of copyright, contractual and other matters. All in all, I have been involved in the negotiation, protection and enforcement of photographers' rights for over 30 years.

The Objectors/Proposed Intervenors

2. Objector ASMP is the nation's preeminent organization representing the interests of photographers working in the field of publication photography. Founded by a group of highly accomplished freelance photographers in 1944, ASMP has long

included in its membership the world's leading photographers whose works have been published in an extraordinarily broad range of publications, including magazines such as *Life*, *Sports Illustrated*, *Vogue*, *National Geographic* and *Time*, and also including books on every conceivable subject, including biographies, textbooks and historical studies, as well as books consisting entirely of their photographs. ASMP members' photography has also been published throughout the world in newspapers such as *The New York Times*, *The Washington Post*, *the International Herald Tribune* and many others.

3. ASMP has 39 chapters across the country and its 7,000 members include many of the world's foremost photographers. ASMP's members are almost entirely freelance photographers who operate small businesses, the principal assets of which are the copyrights to the body of works created by them over the course of their careers. Many of ASMP's members, including most of the individual photographers who join these objections (see §§ 7-10, *infra*), have published their photographs in books that fall within the class defined in the Proposed Settlement Agreement ("Proposed Settlement") *(i.e.*, books consisting of their photographs in which they own the copyrights to both the books and the individual photographs appearing in the books, and which books have been registered in the Copyright Office). As to these "books" of photographs, those ASMP members are part of the Settlement Class.

4. However, many of our members – often the same individuals who have one or more "books" covered by the Proposed Settlement - collectively own copyrights in millions of other photographs that the Proposed Settlement has expressly excluded from the definition of "Inserts." Thus, as for those ASMP members, they own some

works (i.e., "books") that are included, and many that are excluded (*i.e.*, images not included in "books"), from the Proposed Settlement.

5. Many other members of ASMP do not own copyrights in any "books" of photographs. Collectively, those ASMP members own copyrights in millions of photographs that are not found in "books" as defined in the Proposed Settlement. Since such photographs are expressly excluded from the definition of "inserts" under the Proposed Settlement, those photographers are not covered at all by it.

6. In sum, ASMP has some members who own the copyrights in works (*i.e.*, "books" of photographs) covered by the Proposed Settlement, but for whom the rest of their body of work is not covered. And ASMP has members who do not own the copyrights in any "books" as defined in the Proposed Settlement. The inherent unfairness and arbitrariness of this disparate impact of the Proposed Settlement is readily apparent from these facts.

7. Objector Joel Meyerowitz is an award-winning photographer whose work has appeared in over 350 exhibitions in museums and galleries around the world. His first book, *Cape Light*, is considered a classic work of color photography and has sold more than 100,000 copies during its 25-year life. He is the author of 15 other books, including *Aftermath: The World Trade Center Archive*, *Bystander: The History of Street Photography*, and *Tuscany: Inside the Light*. Meyerowitz is a two- time Guggenheim fellow, a recipient of both the NEA and NEH awards, as well as a recipient of the Deutscher Fotobuchpreis. His work is in the collection of the Museum of Modern Art, the Boston Museum of Fine Art and many others.

8. Objector Dan Budnik is an American photographer noted for his portraits of famous people and photographs of the Civil Rights Movement. Budnik received ASMP's prestigious Honor Roll Award in 1988. Budnik's work is included in the collections of the King Center in Atlanta, Georgia, and the Museum of Modern Art. Budnik has also exhibited his work at the Agnes gallery. Budnik is the author of *The Book of Elders: The Life Stories of Great American Indians*, and his photographs appear in numerous other books, including a number of Time-Life books.

9. Objector Pete Turner's photographs are in the permanent collections of major museums, including the MEP in Paris, the Tokyo Metropolitan Museum of Photography and ICP in New York. The George Eastman House International Museum of Photography and Film in Rochester is the central depository of Turner's life's work. Turner has received innumerable awards from various design groups and photography associations, including The Outstanding Achievement in Photography award from ASMP. In 1986, Harry Abrams published *Pete Turner Photographs*, Turner's first monograph. Turner's second monograph, *Pete Turner African Journey*, is the visual diary of his adventures in Africa, which began with his first journey in 1959 from Cape Town to Cairo. Turner's latest book, *The Color of Jazz*, is a comprehensive collection of his memorable and provocative jazz album covers that have become legendary.

10. Objector Lou Jacobs Jr. is a freelance editorial photographer whose work spanning more than five decades has been published in dozens of magazines. In the mid-50s, Jacobs began writing for photographic magazines, illustrating stories with his journalistic and fine art photographs. In 1960, Jacobs wrote his first "how-to" photography book, followed by 36 more how-to books covering subjects such as

photojournalism, selling stock photographs, studio photography, a college textbook and more. His best selling books are *Petersen's Basic Guide to Photography* (1973 - 500,000 copies) and *How To Take Great Pictures with Your SLR* (1974 - 300,000 copies). Jacobs has also worked with numerous book publishers, authoring 15 books for young readers on topics such as air traffic control, transportation, space exploration, Polaroid photography and jumbo jets. Jacobs was President of ASMP in 1984-85 and served on the national ASMP Board of Directors for more than 15 years. His prints are in the collections of George Eastman House, Los Angeles County Museum of Art, International Center of Photography and California Museum of Photography.

ASMP's Mission

11. Since its founding in 1944, ASMP has been at the forefront of freelance photographers' struggle to protect and commercially benefit from the value of their copyrights in their photographs. Generally, ASMP members retain their copyrights and grant their clients one-time publication rights for the use of the licensed photographs in specified publications, or for certain periods of time, or for specified purposes. As ASMP has advocated for many years, photographers must attempt to preserve their ownership of the copyrights in their published photographs, for it is those photographs that generally have the greatest value in the marketplace as potentially licensable to other clients for other purposes (or to the same clients for different purposes). Those copyrights are the source of a valuable and continuing stream of income. Accordingly, ASMP's members have historically depended on their retention of copyright rights in their works, and the corresponding revenue stream that results from licensing them in the

marketplace, to sustain their businesses and build a foundation for their retirement income.

12. Throughout the years, ASMP has fought to protect the rights of photographers through negotiations with publishers, by participating in significant copyright cases in the federal courts, in policy discussions and testimony before the Copyright Office, in legislative consideration of copyright reform in the Congress and in educational campaigns to provide useful information to its members about copyright law, contractual issues and good business practices. Among the most notable of the copyright cases in which ASMP participated as an *amicus curiae* was the Supreme Court case of *Community For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), which unanimously rejected the argument that freelance photographers' works should be considered "works made for hire" under the 1976 Copyright Act. This important victory preserved freelance photographers' copyright rights in their works created for publication purposes (absent a written agreement to the contrary) and confirmed that they should not be considered "employees" of publishers or other corporations for copyright purposes, but not for any other purposes.

13. ASMP also filed an *amicus curiae* brief in one of the first Supreme Court cases to address the impact of digital technology on the rights of authors and other creators. In *The New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), ASMP argued, and the Court ultimately held, that publishers could not re-use an author's work first published in a periodical in an electronic compendium of such periodicals on the false premise that the compendium was a "revision" of the original issue under §201 (c) of the Copyright Act.

14. ASMP similarly supported photographer Jerry Greenberg in his ultimately unsuccessful battle with the National Geographic Society over its alleged right to re-publish Greenberg's photographs without his permission in an electronic collection of the issues of *National Geographic* magazine. *Greenberg v. Nat'l Geo. Soc.*, 244 F. 3d 1267 (5th Cir. 2001).

15. The success of freelance creators in *Tasini*, followed by the setback in *Greenberg*, are illustrative of the volatile legal landscape in which photographers, graphic artists, illustrators and other copyright owners or their licensees that derive income from licensing of visual images in books (collectively "Visual Arts Rights Holders") struggle to retain and economically benefit from their copyrights in their works.

The Challenges Faced by Photographers and Other Visual Arts Rights Holders

16. I have personally testified before Congress and the Copyright Office on numerous occasions on behalf of ASMP on a broad range of issues implicating the copyright rights of photographers. Recently, these issues have included Congress' consideration of the copyright status of so-called "orphan works," the Copyright Office's roundtables on "orphan works," its efforts to facilitate group copyright representation of photographs by freelance photographers and its consideration of amendments to §108 of the Copyright Act.

17. As Congress and the Copyright Office have long recognized, and as ASMP members have long experienced, photographers and other Visual Arts Rights Holders have historically been among the most vulnerable of copyright owners with respect to their ability to retain and profit from their copyrights. Like other individual or

small business copyright owners, photographers and other Visual Arts Rights Holders have traditionally found themselves in a weak bargaining position when negotiating with publishers, corporations and other clients.

18. With the decline of traditional media such as magazines and newspapers, combined with the rise of new forms of electronic media, the negotiating position and economic status of publication photographers and other Visual Arts Rights Holders have dramatically declined. Thousands of professional photographers and Visual Arts Rights Holders have been forced to abandon their profession because they simply could not make a living. Those who have survived have suffered a decline in income and increasingly few opportunities to license their works. The consolidation of potential clients has resulted in a worsening of the "David and Goliath" bargaining position for photographers and other Visual Arts Rights Holders. The recent economic downturn has exacerbated these problems, and Visual Arts Rights Holders have sought new and innovative ways to license their works, especially in the context of the expanding opportunities available via electronic media.

19. The digital age has also presented new challenges to photographers and other Visual Arts Rights Holders with respect to the growing and widespread infringement facilitated by the Internet. Even before the proliferation of infringement on the Internet, they generally found it impractieal and beyond their means to file copyright infringement actions in the federal courts. They often lacked the resources to register their substantial bodies of works in the Copyright Office on a regular basis, which resulted in the unavailability of statutory damages under the Copyright Act.[1]. Aside

[1] Under § 412 of the Act, registration of a work in the Copyright Office prior to the commencement of infringement has been and remains a prerequisite to entitlement for statutory

from the limited damages available to photographers and other Visual Arts Rights Holders, they did not have the staff or resources, financial or otherwise, to sustain lengthy and frequently complex copyright battles, particularly against corporate infringers. Other factors have made it almost impossible for them to find copyright attorneys who are willing to accept representations in infringement actions on a contingent fee basis. As a result, photographers and other Visual Arts Rights Holders lack any effective remedy to stop traditional forms of copyright infringement, much less to address the ubiquitous infringement of copyrights via electronic means (such as by digitizing photographs with a scanner) that have been greatly facilitated by the Internet.

20. At the same time, the new and innovative uses of images and other copyrighted works in Internet publications has opened up potentially lucrative new opportunities for electronic licensing. But photographers and other Visual Arts Rights Holders, like other individual and small business owners, have lacked the resources and infrastructure to take advantage of these opportunities—a plight worsened by the Fifth Circuit's retrenchment in *Greenberg* from freelancers' success in the Supreme Court in the *Tasini* case. Ironically, it is the Internet that presents both the greatest dangers to the value of Visual Arts Rights Holders' copyrights and the greatest opportunities for creating and exploiting new markets for digital uses of copyrighted materials. Thus far, photographers and other Visual Arts Rights Holders have suffered the consequences associated with widespread infringement on the Internet and have been

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damages of $ 750 to $ 30,000 per work infringed, which can be increased to a maximum of $150,000 per work infringed. *See* 17 U.S.C. §§ 412, 504(c)(1),(2). Photographers filing an infringement action usually register their photographs shortly before commencing the action, thereby limiting damages to actual damages or the defendant's profits attributable to unauthorized use of the work. *Id.* § 504(b).

unable to benefit from new potential licensing opportunities that medium presents.

Other Organizations Joining in ASMP's Objections

21. The other organizations joining in ASMP's objections, which include the Graphic Artists Guild ("GAG"), the Picture Archive Council of America ("PACA"), and the North American Nature Photography Association ("NANPA"), also represent the interests of freelance creators facing a challenging digital environment. I am authorized to submit this declaration on their behalf, and on behalf of their members, as well as on behalf of ASMP and its members.

22. The negotiating positions of the members of GAG, PACA and NANPA are as weak as those of ASMP members. The members of those organizations face similar legal and business challenges and uncertainties to those faced by ASMP's members. Their members often struggle merely to survive in this economic climate.

23. Facing similar challenges and uncertainties to those confronting ASMP, GAG, PACA and NANPA share ASMP's concerns about the potentially disastrous impact of the Proposed Settlement upon Visual Arts Rights Holders working in any media. As discussed below, the combination of the exclusion of many Visual Arts Rights Holders from the Proposed Settlement with the enormous market impact that would result from the new business model it would establish, suggest that its approval would damage their negotiating position, suppress price competition and establish market "norms" that would be both adverse and difficult to avoid for all of them.

The Authors Guild Class Action Against Google

24. ASMP first learned that Google was digitizing thousands of books without the authorization of copyright owners when announcements about the Google "Book

Project" became public in 2004. ASMP had no specific knowledge that photographs in the digitized books were also being copied by Google, which we later found out was indeed occurring.

25. With the public announcement of the filing of the class action by the Authors Guild, ASMP became aware that authors were challenging the legality of Google's "Book Project" and were seeking both injunctive relief and damages for Google's unauthorized digitization of their works. At about the time that I became aware that the class action would be or had been filed, I contacted Paul Aiken, Executive Director of the Authors Guild, to see whether and how ASMP and its members could be involved in the litigation. He informed me that the class action was limited to texts and text authors because he and/or class counsel wanted to keep an already complex situation as comparatively simple as possible.

26. Shortly after the announcement of the Proposed Settlement, ASMP's Executive Director Eugene Mopsik, GAG's Executive Director Tricia McKiernan, and I had a meeting in November 2008 with class counsel Michael Boni about the Proposed Settlement and how it might affect the interests of photographers. Among the matters discussed was the possibility that ASMP would make direct contact with Google for the purpose of undertaking face-to-face negotiations to resolve photographers' concerns about the Google "Book Project." In fact, we had scheduled a meeting with Google in order to explore resolution of our concerns.

27. Shortly thereafter, I received a request from Mr. Boni to participate in a conference call with him and Paul Aiken. On or about December 19, 2008, ASMP Executive Director Eugene Mopsik and I joined them in a conference call. During that

conference call, Mr. Boni discouraged us from engaging in any direct discussions with Google. He advised us that any such discussions at that point could taint the propriety of any settlement into which ASMP and Google might enter in connection with any class action that ASMP might file. Based on Mr. Boni's advice, we canceled our meeting with Google.

28. At no time during these conversations was I informed by the Authors Guild or by class counsel that during the course of the lawsuit, indeed while the Proposed Settlement was being negotiated, the class definition had been expanded to include all copyright owners, including photographers, owning the copyrights to works in the University of Michigan library. *See* First Amended Class Action Complaint, filed July 24, 2006, ¶ 22. To the contrary, class counsel and the Authors Guild affirmatively misled us by failing to advise us that the class had previously been expanded to encompass photographers and other copyright owners.

29. From July 2006, when the class was expanded to include photographers and other Visual Arts Rights Holders, until the Proposed Settlement was made public in October 2008, ASMP was unaware that the class had been increased to encompass them. To my knowledge, no one at ASMP and not a single one of our members, was ever informed about, or was aware of, this significant—and to Visual Arts Rights Holders critically important--expansion of the class.

30. ASMP was also unaware, prior to the October 2008 announcement of the Proposed Settlement, that settlement discussions were underway among authors, publishers and Google. We were never contacted by Mr. Boni or any class representative informing us that photographers were included in the class or soliciting

our input or participation in the settlement discussions, which I understand went on for over two years.

31. Lacking notice that the class had been expanded to include photographers and other Visual Arts Rights Holders and lacking any knowledge of the existence or substance of the settlement negotiations, ASMP was unable to protect the interests of its members in the negotiations. This is a particularly disturbing consequence, given that it is now abundantly clear that class counsel and the class representatives apparently had no intention of including most photographers' works in the Proposed Settlement, despite their expansion of the class definition in July of 2006. The same lack of knowledge was true of other organizations, such as GAG, PACA and NANPA, whose members were also added by the expanded definition of the class effectuated in July of 2006. In reality, class counsel and the class representatives not only failed to represent the interests of photographers and other Visual Arts Rights Holders in the class action litigation and in the settlement discussions, they affirmatively sacrificed those interests in order to promote the interests of a subset of class plaintiffs—authors—and class counsel's own interests in the attorneys' fees that would be paid under any class action settlement approved by the Court.

32. ASMP had no notice or knowledge that the class definition had been expanded to include photographers and other Visual Arts Rights Holders, and then narrowed to exclude most of their works, until well after the Proposed Settlement was announced -- when ASMP retained special counsel with class action expertise to review the pleadings and advise ASMP as to its rights and potential courses of action. Only then did ASMP discover the existence of the First Amended Complaint, filed on July 24,

2006, in which the class was expanded to include "all persons or entities that hold the copyright in a work that is contained in the library of the University of Michigan." *See* First Amended Class Action Complaint, ¶ 22. The definition of "works" in that pleading did not exclude photographs and was not limited to books; to the contrary, "works" were defined simply as "those works that are not in the public domain...." *Id.* § 3.

33. We further discovered that in connection with the Proposed Settlement and the new "Settlement Class" of authors and publishers only, class counsel had filed (and Google and the publishers had approved) a Second Amended Class Complaint on October 28, 2008. In that pleading, the "class" was both narrowed and expanded; it was narrowed to include only authors and publishers, thereby excluding most photographers and other Visual Arts Rights Holders, and it was expanded to apply far beyond the scope of the University of Michigan collection. In fact, the new class was unlimited with respect to the "books" and "inserts" as to which the provisions of the Proposed Settlement would apply: "[A]ll persons or entities that have a United States copyright interest in one or more Books or Inserts." *See* Second Amended Complaint, filed Oct. 28, 2008, ¶ 34.

34. Thus, remarkably, the newly narrowed and yet widened class applied to any "book" (as defined in the Proposed Settlement) regardless of where it was located, thereby giving Google the right to digitize any "book" far beyond the confines of the University of Michigan collection. However, "inserts" were defined narrowly to specifically exclude photographs, graphic arts and illustrations, while inexplicably including such works as "children's Book illustrations" in that definition (along with tables, charts, graphs, musical notations. Settlement Agreement ("S.A."), ¶ 1.72.

The Impact of the Proposed Settlement on Photographers and Other Visual Arts Rights Holders

35. The Proposed Settlement, if approved, will likely have a profoundly negative impact on the interests of photographers and other Visual Arts Rights Holders who are both excluded from the settlement terms and yet will be adversely affected by them.

36. First, and most obvious, Google has committed wholesale, willful copyright infringement of photographs and other visual copyrighted works such as illustrations published in "books", and yet photographers and other Visual Arts Rights Holders will be paid nothing for past infringement. By its own admission, Google "has already digitized over seven million books", all without authorization of the copyright owner(s). *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Settlement Approval ("Pls. Mem."), at 4. Many of those books contain photographs, graphic art or other non-text works which the copyrights were retained by their creators, and the publishers were granted one-time publication rights. Yet not a cent of the $45 Million set aside by the Proposed Settlement for payment of compensation for past infringements would be paid to photographers or other Visual Arts Rights Holders, with the narrow exception of those who themselves (rather than the publisher or author) own the copyrights in the "books" that were scanned by Google.

37. There are, of course, many published books of photographs and graphic art in existence and some of them, presumably, have already been digitized by Google. But the vast majority of books have copyright owners other than photographers or other Visual Arts Rights Holders. That is true even for those books (in fact most books) that contain photographs or graphic art in which the copyrights to those photographs are not

owned by the authors or publishers, but rather by the creators of those work. For these books, even though the entire contents therein have been digitized by Google, the copyright owners of those photographs and visual art receive zero compensation under the Proposed Settlement. There is no conceivable justification for this unjust result that deprives a significant subset of the class of any compensation for past infringement.

38. Second, under the Proposed Settlement, Google would have an unlimited license to digitize and commercialize "books" in the future, and yet photographers and other Visual Arts Rights Holders would be excluded from the revenue-sharing formula specified for "Google's future commercial uses of the Settlement Class members' works." Pls. Mem. 2. Thus, one of the principal benefits of the Proposed Settlement for Settlement Class members would not benefit most photographers or other Visual Arts Rights Holders. Potentially millions of "books" include photographs, graphic art or other non-text works in which the copyrights are owned by their creators. Yet, when Google digitizes these "books" and commercializes their contents in the future, photographers and other Visual Arts Rights Holders would receive no compensation for either the digitization itself (indeed, they would have no advance knowledge that such unauthorized digitization was about to occur), or for the subsequent commercialization of the "books."

39. The granting of a virtually unlimited license to Google to commercialize books, together with the complete lack of compensation for past infringement and future unauthorized uses of non-text works in those books, would be manifestly unfair to photographers and other Visual Arts Rights Holders. It is undisputed that Google has already digitized millions of "books" from the University of Michigan library and other

library collections that contain photographs, graphic art and other non-text works in which authors and publishers are not the copyright owners. Google has made clear its intention to continue this massive digitization effort in the future, which the Proposed Settlement would purport to authorize. Pls Mem. at 8. But the owners of the copyrights in those works have not authorized either the past or future digitization of them, and would receive no compensation for such willful infringement.[2]

40. Under the Proposed Settlement, "Google is authorized to, in the United States, sell subscriptions to the Institutional Subscription Database, sell individual Books. . . and make other commercial uses of Books. . . . " S.A. § 2.1(a). Presumably, Google intends to remove, or otherwise block the display of, photographs, graphic art and other non-text works in a "Book" before they are sold or displayed to subscribers or other Google customers. We have serious reservations as to how successful any such efforts would be, and believe that it is likely that many "Books" will be sold or displayed in their entireties, including photographs, graphic art and other non-text works.[3] For those photographs, graphic art and other non-text works included in the sale or display of "Books," Google would, in effect, acquire a royalty-free license for the use and display of those works. Convincing others to pay fair compensation for other uses or displays of these works will be a difficult proposition at best.[4]

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[2] Under the Proposed Settlement, to "digitize" a work involves the act of copying that work "into an electronic representation." S.A. § 1.46. This constitutes a violation of the copyright owner's exclusive right "to reproduce the copyrighted work in copies. . . ." 17 U.S.C. § 106(1). The subsequent acts of distributing and/or displaying digitized photographs to the public would constitute additional, separate acts of infringement. *Id.* § 106(2), (5).

[3] As the Settling Parties state, "the value of the Subscription Database is enhanced by the extent to which it is comprehensive. . . . " Pls. Mem. at 12, n.8.

[4] The Proposed Settlement provides that "[e]xcept as expressly permitted. . . Google shall not (i) display any Expression from Books or Inserts. . . . " S.A. § 3.10(a). This prohibition

41. Third, the valuation scheme provided for in the Proposed Settlement, while not specifically applicable to photographs, graphic art and most other non-text works, would very likely become the "market standard" if the Proposed Settlement is approved. The payment by Google of a mere $15 per "insert" or $60 per "book" for past infringement is woefully inadequate and comes nowhere close to approximating the true market value of any particular copyrighted work, which is often dictated by the stature and reputation of the photographer or Visual Arts Rights Holder, the quality of the image, graphic art or illustration and the proposed uses that the licensee contemplates. Such paltry amonnts surely would not fairly compensate photographers or other Visual Arts Rights Holders, even if they were included in the Proposed Settlement.

42. Ironically, having been excluded from the terms of the Proposed Settlement and without class counsel, class representatives, or anyone else representing their interests in the litigation or the settlement negotiations, photographers and other Visual Arts Rights Holders would be victimized by its consequences. This is because the market power of Google and the publishers is such that any negotiations for fair compensation for the use of a Visual Arts Rights Holders work in the future is likely to be circumscribed—that is, capped--by the nominal amounts to be paid for "books" and "inserts" under the Proposed Settlement. There would be a "market standard" in place

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addresses only "Books" and "Inserts" as defined, and the definition of the latter (as discussed above) excludes photographs, graphic art and most illustrations. S.A. § 1.72. Thus, the prohibition against the display of the contents of "Inserts" except as authorized by the Proposed Settlement is meaningless for most photographers and other Visual Arts Rights Holders. More importantly, for those photographs, graphic art and other non-text work included in "Books" of which the photographers and other Visual Arts Rights Holders are not the copyright owners, they nevertheless have no "standing" under the Proposed Settlement to object to the display of their copyrighted material by Google because they are not "Rightsholders" as defined therein. *See* S.A. §1.132 (defining "Rightsholders" as "a member of the Settlement Class which does not opt out of the Settlement by the Opt-Out Deadline.")

that valued past infringement, and arguably future infringement, at extraordinary low levels of compensation. And for those photographers and other Visual Arts Rights Holders seeking to license their works for future uses, especially in the digital context, this Proposed Settlement is likely to dominate the marketplace to such an extent that they will be unable to obtain fair compensation in such licensing transactions.

43. Photographers and other Visual Arts Rights Holders would thereby suffer the worst of both worlds---cut out of almost all of the potential benefits flowing from the Proposed Settlement (however meager they may be), and yet permanently and adversely affected by the marketplace impact of the *de minimus* valuations reflected in the settlement terms. Further, if the Proposed Settlement --- and new definition of the narrowed and yet expanded "Settlement Class" --- were to be approved by the Court, it would serve *de facto*, and perhaps *de jure*, as a limiting factor if photographers or other Visual Arts Rights Holders were to attempt to file a separate class action against Google.

44. Finally, and going right to the heart of the fairness issue, photographers and other Visual Arts Rights Holders were deprived of a seat at the negotiating table, and their interests as class members were unprotected---indeed, as noted above, they were sacrificed. Class counsel and class representatives abandoned the interests of identically situated members of the class in order to strike a deal with Google that stands to richly reward themselves and/or their members ($125 Million, including fees to class counsel of $30 Million, is a very rich reward, indeed).

45. In my view, the sordid record of this litigation starkly demonstrates the dangers of one subgroup of class members acting for their own benefit (and facilitated by class counsel) and to the detriment of other class members. Photographers and other

Visual Arts Rights Holders were used in order to enhance the bargaining position of the authors and then cast adrift. Photographers and other Visual Arts Rights Holders were added to the class in the First Amended Complaint, thereby benefiting the negotiating position of the authors. Photographers and other Visual Arts Rights Holders were then unceremoniously dumped overboard by class counsel and class representatives in the Second Amended Complaint – but only after that enhanced bargaining position had succeeded in driving a settlement between authors, publishers (who were not even part of this class action until they were added in the Second Amended Class Complaint) and Google.

46. I submit to the Court that this brazen and unjustified abuse of the class action process should not be ignored, condoned or rewarded. I further submit to the Court, on behalf of the members of ASMP, GAG, PACA, NANPA and Visual Arts Rights Holders everywhere, that approval of the Proposed Settlement, as currently constituted, would be a grave injustice to the interests of photographers and all other Visual Arts Rights Holders around the world, and to the public interest in a fair and reasonable resolution of this unprecedented dispute.

I declare under penalty of perjury the foregoing is true and correct.

Dated: September 2, 2009

Victor S. Perlman

EXHIBIT B

The American Society of Media Photographers, Inc. ("ASMP") is the nation's preeminent organization representing the work of photographers working in the field of publication photography. Founded in 1944 by a group of highly accomplished photographers, ASMP has long included in its membership the world's leading photographers. Their photographs have been published in magazines, newspapers and books all over the world for over 60 years. ASMP's mission is to protect the interests of publication photographers in Congress, the courts, the Copyright Office and other forums, and to educate its members and the public with respect to the rights of photographers and the best business practices to preserve and protect those rights.

The Graphics Artists Guild ("GAG") is a national union of graphic artists dedicated to promoting and protecting the social, economic and professional interests of its members. GAG's members include graphic designers, Web designers, digital artists, illustrators, cartoonists, animators, art directors, surface designers and various combinations of these disciplines.

The Picture Archive Council of America ("PACA") is the trade association of North America that represents the vital interests of stock archives of every size, from individual photographers to large corporations, who license images for commercial reproduction. Founded in 1951, PACA's membership includes over 100 companies in North America and over 50 international members. Through advocacy, education and communication, PACA strives to foster and protect the interests of the picture archive community.

The North American Nature Photography Association, Inc. ("NANPA") promotes the art and science of nature photography as a medium of communication, nature appreciation and environmental protection. NANPA provides information, education, inspiration and opportunity for all persons interested in nature photography.

EXHIBIT C

SANFORD P. DUMAIN (SD-8712)
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119-0165
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

MICHAEL J. BONI
KATE REZNICK
KOHN SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Counsel for Plaintiffs

JUDGE SPRIZZO

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Author's Guild, Associational Plaintiff, Herbert Mitgang, Betty Miles and Daniel Hoffman, Individually And On Behalf Of All Others Similarly Situated, Plaintiffs, v. Google Inc., Defendant.	**CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiffs, by their attorneys, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are published authors and The Authors Guild, the nation's largest organization of book authors, which has as its primary purpose to advocate for and support the copyright and contractual interests of published writers. The authors' works are contained in certain public and university libraries, and have not been licensed for commercial use.

2. Defendant Google Inc. ("Google") owns and operates a major Internet search engine that, among other things, provides access to commercial and other sites on the Internet. Google has contracted with several public and university libraries to create digital "archives" of the libraries' collections of books, including that of the University of Michigan library. As part of the consideration for creating digital copies of these collections, the agreement entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries' archives.

3. By reproducing for itself a copy of those works that are not in the public domain (the "Works"), Google is engaging in massive copyright infringement. It has infringed, and continues to infringe, the electronic rights of the copyright holders of those works.

4. Google has announced plans to reproduce the Works for use on its website in order to attract visitors to its web site and generate advertising revenue thereby.

5. Google knew or should have known that the Copyright Act, 17 U.S.C. § 101 et seq. ("the Act") required it to obtain authorization from the holders of the copyrights in these literary works before creating and reproducing digital copies of the Works for its own

commercial use and for the use of others. Despite this knowledge, Google has unlawfully reproduced the Works and has announced plans to reproduce and display the Works without the copyright holders' authorization. Google intends to derive revenue from this program by attracting more viewers and advertisers to its site.

6. By this action, plaintiffs, on behalf of themselves and all others similarly situated, seek damages, injunctive and declaratory relief with respect to Google's present infringement, and declaratory and injunctive relief with respect to Google's planned unauthorized commercial use of the Works.

JURISDICTION AND VENUE

7. This copyright infringement action arises under 17 U.S.C. § 101 et seq. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1338 (acts of Congress related to copyright).

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because one of the named plaintiffs resides in this district and because defendant conducts business in this district.

PARTIES

THE NAMED PLAINTIFFS

9. The individual plaintiffs ("Named Plaintiffs") are published, professional authors who created literary works for which the copyrights have been registered with the United States Copyright Office.

10. Plaintiff Herbert Mitgang ("Mitgang") is a published author of numerous nonfiction books, novels and plays. Mr. Mitgang resides in New York, New York. He is the

holder of the copyright in the published works The Fiery Trial: A Life of Lincoln (registration number A536977) published by Viking Press, and other works contained in the library of the University of Michigan.

11. Plaintiff Betty Miles ("Miles") resides in Shelburne, Vermont. She is the author of several works of children's and young adult fiction and is a holder of copyright in the work Just Think (registration number A330604), published by Alfred A. Knopf. This work is contained in the library of the University of Michigan.

12. Plaintiff Daniel Hoffman ("Hoffman") resides in Swarthmore, Pennsylvania. He is the author and editor of many volumes of poetry, translation, and literary criticism, and of a memoir. He is the holder of copyright in the works Barbarous knowledge: Myth in the Poetry of Yeats, Graves, and Muir (registration number A896931 and registration renewal number RE-696-986) and Striking the Stones (registration number on A985815 and registration renewal number RE-730-198), both published by Oxford University Press. These works are contained in the library of the University of Michigan.

13. The Named Plaintiffs are the exclusive owners of the copyrights for their Works listed above. None of the Named Plaintiffs has authorized Google to reproduce his or her Works or to display, sell and/or distribute such Works on its website or anywhere else.

ASSOCIATIONAL PLAINTIFF

14. Plaintiff The Authors Guild, Inc. ("the Guild") is a not-for-profit corporation organized under New York law and having its place of business at 31 East 28th Street, New York, New York. The Guild and its predecessor organization, the Authors League of America ("the League"), have been leading advocates for authors' copyright and contractual

interests since the League's founding in 1912. The Guild, representing more than 8,000 published authors, is the nation's largest organization of authors. The activities of the Guild include reviewing members' publishing and agency contracts; intervening in disputes involving authors' rights; providing advice to members regarding developments in the law and in the publishing industry that affect their rights; and supporting legislation in matters affecting copyright, freedom of expression, taxation and other issues affecting professional writers.

15. The Guild has associational standing to pursue claims for injunctive and declaratory relief on behalf of its members. The member authors would have standing to sue in their own right. The protection of authors' copyrights is germane, indeed central, to the purpose of the Guild. Individual participation of the authors is not required to determine whether Google's copying and planned display of the authors' copyrighted works for commercial use is in violation of the Act and to provide injunctive and declaratory relief to the Guild and the authors.

DEFENDANT

16. Google is a Delaware corporation with its principal place of business located in Mountain View, California. Google owns and operates the largest Internet search engine in the United States, which contains links to more than eight billion commercial and noncommercial Internet pages. Its search engine is available free of charge to Internet users, and is supported in large part by commercial entities' purchase of advertising space on the site.

17. Google posted revenues of more than $3 billion in 2004 and has posted revenues of over $2.6 billion for the first two quarters of 2005. Advertising revenue makes up approximately 98% of Google's earnings.

18. Google made an Initial Public Offering of its stock on August 19, 2004. Google's stock has increased more than 350% in value from its opening price of $85 per share to its current trading price of more than $300 per share.

19. Late last year Google announced the launch of a project it calls the Library Project, which is part of a service it calls Google Print. Google Print is designed to allow users to search the text of books online. The digital archiving of the Works that are the subject of this lawsuit was undertaken by Google as part of its Google Print Library Project.

CLASS ALLEGATIONS

20. The Class is initially defined as all persons or entities that hold the copyright to a literary work that is coutained in the library of the University of Michigan. Excluded from the Class are (a) defendant and any entity in which any defendant has a controlling interest; (b) the employees, officers and directors of those identified in subparagraph (a); and (c) the heirs, successors, assigns and legal representatives of the persons identified in subparagraph (b) above.

21. This action has been brought and may properly be maintained as a Class Action pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

22. Numerosity of the Class – Fed. R. Civ. Proc. 23(a)(1): The persons and/or entities in the Class are so numerous that their joinder is impractical, and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the Court. The exact number of members of the Class is not known to plaintiffs, but plaintiffs reasonably estimate that there are at least thousands of class members.

23. Existence and Predominance of Common Question of Law and Fact -- Fed. R. Civ. Proc. 23(a)(2) & 23(b)(3): There is a well-defined community of interest in the questions of law and fact involved affecting the Class. Questions of law and fact common to the Class include, but are not limited to, the following:

a. Whether Google reproduced for its own commercial use copies of the Works from the University of Michigan library;

b. Whether the reproduction by Google of such copies constitutes copyright infringement;

c. Whether Google's announced plan to display the Works on its commercial website Google Print infringes the copyrights of the Named Plaintiffs and the Class;

d. Whether Google acted willfully with respect to the acts complained of herein;

e. Whether the Named Plaintiffs and the Class have sustained damages and, if so, the proper measure of such damages;

f. Whether injunctive relief is appropriate.

These questions of law and fact predominate over questions that affect only individual Class members.

24. Typicality – Fed. R. Civ. Proc. 23(a)(3): The claims of the Named Plaintiffs are typical of those of the Class. The Named Plaintiffs own copyrights in literary works that have been copied by Google without authorization. The claims of the Named Plaintiffs and all members of the Class depend on a showing of the acts of Google complained of herein.

25. Adequacy of Representation – Fed. R. Civ. Proc. 23(a)(4): Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class. Plaintiffs' interests do not in any way conflict with the interests of the members of the Class that they seek to represent. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in complex class action litigation and experienced in copyright actions to represent them.

26. Injunctive Relief – Fed. R. Civ. Proc. 23(b)(2): Google has acted or refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

27. Superiority – Fed. R. Civ. Proc. 23(b)(3): A class action is the best available method for the fair and efficient adjudication of this controversy. Since the damages suffered by individual class members, while not inconsequential, may be relatively small, the expense and burden of individual litigation make it impractical for members of the Class to seek redress individually for the wrongful conduct alleged herein. Should separate actions be required to be brought by each individual member of the Class, the resulting multiplicity of lawsuits would cause undue hardship and expense on the Court and the litigants. A class action is therefore the best method to assure that the wrongful conduct alleged herein is remedied, and that there is a fair, efficient, and full adjudication of this controversy. Plaintiffs anticipate no undue difficulty in the management of this litigation as a class action.

GENERAL ALLEGATIONS

28. Google is in the business of providing Internet search services to the public. It derives approximately 98% of its revenues directly from the sale of advertising, and

would likely be unable to offer its search engine and other services to the public free of charge without a continued stream of advertising revenues.

29. On December 14, 2004, Google announced in a press release that it has entered into agreements with four university libraries and one public library to "digitally scan books from their collections so that users worldwide can search them in Google." According to Google's release, this is to be an "expansion of the Google Print program, which assists publishers in making books and other offline information searchable online. Google is now working with libraries to digitally scan books from their collections, and over time will integrate this content into the Google index, to make it searchable for users worldwide." Google's press release also claimed that it would make "brief excerpts" of copyrighted material available but that its use of these works would comport with copyright law.

30. Google plans to use the Works from the library of the University of Michigan in order to attract visitors and, thereby, advertisers, to its website

31. Google has already copied some of the Works in the University of Michigan library and has announced that it will soon resume copying the Works as part of its contractual relationship with the University. In so doing, Google has reproduced a digital copy of the Works without the copyright holders' permission and in violation of the authors' rights under the copyright laws. Google has also announced plans to display the Works on its commercial website, Google.com.

32. Further, Google has announced plans to include in its Google Library Project the literary works contained in four other libraries: Harvard University, Stanford

University, Oxford University and the New York Public Library. Google intends to copy these Works without seeking authority from the copyright owners.

33. Google continues to reproduce digitized copies of Plaintiffs' and the Class's Works without their authorization. Google continues to plan to display the Works on its website for the commercial purposes detailed above.

34. Google's acts have caused, and unless restrained, will continue to cause damages and irreparable injury to the Named Plaintiffs and the Class through:

a. continued copyright infringement of the Works and/or the effectuation of new and further infringements;

b. depreciation in the value and ability to license and sell their Works;

c. lost profits and/or opportunities; and

d. damage to their goodwill and reputation.

35. Google acted willfully or knew or should have known that its actions constitute infringement.

36. The Named Plaintiffs and members of the Class have suffered damages and/or are in imminent danger of suffering further damages from Google's unlawful practices.

COUNT ONE - Copyright Infringement
(by Named Plaintiffs Only)

37. The Named Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

38. The Named Plaintiffs and the Class own a valid copyright in and to at least one Work that has been copied by Google. They, not Google, have the exclusive rights to,

among other things, reproduce their Works, distribute copies of their Works to the public, display their Works, and to authorize such reproduction, distribution and display of their Works.

39. Google has made and reproduced for its own commercial use a copy of some of the literary works contained in the University of Michigan library, which contains the Works that are the subject of this action, and intends to copy most of the literary works in the collection of that library.

40. Google's conduct is in violation of the copyrights held by the Named Plaintiffs and other members of the Class.

41. Google's infringement of the copyrights of the Works was willful.

42. As a result of Google's acts of copyright infringement and the foregoing allegations, the Named Plaintiffs and the Class have suffered damages.

COUNT TWO - Injunctive Relief
(by All Plaintiffs)

43. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

44. Google has already begun reproducing Works contained in the library of the University of Michigan. In addition, Google has announced plans to expand its Google Library Project to include the libraries of Harvard, Oxford, Stanford, and the New York Public Library.

45. Google has also announced plans to launch a program by which it will place the unlawfully copied Works from the University of Michigan and the other libraries on its website Google Press, in order to generate consumer traffic and advertising revenues.

46. Google's planned imminent commercial use of the Works would constitute additional wholesale copyright infringement.

47. Unless enjoined from doing so, Google's planned imminent commercial use of the Works will cause the plaintiffs and the Class irreparable harm by depriving them of both the right to control the reproduction and/or distribution of their copyrighted Works and to receive revenue therefrom.

48. Plaintiffs and the Class are likely to succeed on the merits of their copyright infringement claim because Google's existing and planned use of the Works does not fall within any of the statutory exceptions to copyright infringement and is in violation of the copyright laws.

49. The balance of hardships tips in favor of plaintiffs and the Class, because Google's massive earnings will not be severely damaged by its inability to create a new stream of advertising revenues and because other comprehensive electronic literary databases exist for public use.

50. Plaintiffs are therefore entitled to an injunction barring Google from continued infringement of the copyrights of the Named Plaintiffs and the Class, and other equitable relief as more fully set forth in the Prayer for Relief.

COUNT III – Declaratory Relief
(by All Plaintiffs)

51. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

52. An actual controversy exists between The Authors Guild, the Named Plaintiffs and the Class on one hand, and Google on the other hand, by reason of Google's announced present and continuing infringement of the Named Plaintiffs' and the Class's copyrights, and announcement that it will uot cease and desist from, or remedy, its wholesale infringement of the Works.

53. Plaintiffs are entitled to a judgment declaring that Google's actions are unlawful and, specifically, that Google infringed and continues to infringe the Named Plaintiffs' and the Class's copyrights in violation of the Copyright Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief and that judgment be entered against defendant as follows:

A. For certification of the Class;

B. For an award of statutory damages, plaintiffs' actual damages, and/or defendant's profits;

C. For an injunction (a) barring Google from continued infringement of the copyrights of the Named Plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

D. For (a) permanent injunctive and declaratory relief barring Google from continued infringement of the copyrights of the Named Plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

E. For costs and attorneys' fees; and

F. For such other and further relief as the Court finds just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs, as provided by Rule 38 of the Federal Rules of Civil Procedure, request trial by jury in the above-captioned matter.

Dated: September 20, 2005
New York, New York

MILBERG WEISS BERSHAD
& SCHULMAN LLP

By: _____
Sanford P. Dumain (SD-8712)
One Pennsylvania Plaza
New York, NY 10119-0165
Telephone: (212) 594-5300
Facsimile: (212) 868-1229

KOHN, SWIFT & GRAF, P.C.
Michael J. Boni
Kate Reznick
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Counsel For Plaintiffs

EXHIBIT D

OFFICE COPY

Michael J. Boni (pro hac vice)
J. Kate Reznick (pro hac vice)
KOHN SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Counsel for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Associational Plaintiff, and Herbert Mitgang, Betty Miles, Daniel Hoffman, Paul Dickson and Joseph Goulden, individually and on behalf of all others similarly situated, Plaintiffs, v. Google Inc., Defendant.	**FIRST AMENDED CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

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U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiffs, by their attorneys, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are published authors and The Authors Guild, the nation's largest organization of book authors, which has as its primary purpose to advocate for and support the copyright and contractual interests of published writers. The authors' works are contained in certain public and university libraries, and have not been licensed for commercial use.

2. Defendant Google Inc. ("Google") owns and operates a major Internet search engine that, among other things, provides access to commercial and other sites on the Internet. Google has contracted with several public and university libraries to create digital "archives" of the libraries' collections of books, including that of the University of Michigan library. As part of the consideration for creating digital copies of these collections, the agreement entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries' archives.

3. By creating for the University of Michigan library a digital copy of those works that are not in the public domain (the "Works"), by reproducing for itself a digital copy of the Works, and by distributing and publicly displaying those Works, Google is engaging in massive copyright infringement. It has infringed, and continues to infringe, the electronic rights of the copyright holders of the Works.

4. Google has announced plans to reproduce the Works for use on its website in order to attract visitors to its web site and generate advertising revenue thereby.

5. Google knew or should have known that the Copyright Act, 17 U.S.C. § 101 *et seq.* ("the Act") required it to obtain authorization from the holders of the copyrights in these works before creating, distributing and reproducing digital copies of the Works for the University of Michigan library, for its own commercial use and for the use of others. Despite this knowledge, Google has unlawfully reproduced, distributed and publicly displayed the Works, and intends to continue to do so, without the copyright holders' authorization. Google has derived, and intends to continue to derive, revenue from this program by attracting more viewers and advertisers to its website.

6. By this action, plaintiffs, on behalf of themselves and all others similarly situated, seek damages, injunctive and declaratory relief with respect to Google's present infringement, and declaratory and injunctive relief with respect to Google's planned unauthorized commercial use of the Works.

JURISDICTION AND VENUE

7. This copyright infringement action arises under 17 U.S.C. § 101 *et seq*. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1338 (acts of Congress related to copyright).

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because one of the named plaintiffs resides in this district and because defendant conducts business in this district.

PARTIES

THE NAMED PLAINTIFFS

9. The individual plaintiffs ("named plaintiffs") are published, professional authors who created works for which the copyrights have been registered with the United States Copyright Office.

10. Plaintiff Herbert Mitgang ("Mitgang") is a published author of numerous nonfiction books, novels and plays. Mr. Mitgang resides in New York, New York. He is the holder of the copyright in the published works *The Fiery Trial: A Life of Lincoln* (registration number A536977) published by Viking Press, and other works contained in the library of the University of Michigan.

11. Plaintiff Betty Miles ("Miles") resides in Shelburne, Vermont. She is the author of several works of children's and young adult fiction and is a holder of copyright in the work *Just Think* (registration number A330604), published by Alfred A. Knopf. This work is contained in the library of the University of Michigan.

12. Plaintiff Daniel Hoffman ("Hoffman") resides in Swarthmore, Pennsylvania. He is the author and editor of many volumes of poetry, translation, and literary criticism, and of a memoir. He is the holder of copyright in the works *Barbarous knowledge: Myth in the Poetry of Yeats, Graves, and Muir* (registration number A896931 and registration renewal number RE-696-986) and *Striking the Stones* (registration number on A985815 and registration renewal number RE-730-198), both published by Oxford University Press. These works are contained in the library of the University of Michigan.

13. Plaintiff Paul Dickson ("Dickson") resides in Garrett Park, MD. He is a full-time writer and the author of 46 books, including *There Are Alligators in Our Sewers, and Other American Credos*, Nos. TX-1-086-226 and VA-123-147, co-authored with plaintiff Joseph Goulden; *Family Words: The Dictionary for People Who Don't Know a Frone from a Brinkle*; No. TX-2-427-193; and *The Official Rules*, No. TX-166-929. This work is contained in the library at the University of Michigan and has been digitally copied by Google.

14. Plaintiff Joseph Goulden ("Goulden") resides in Washington, D.C. He is the author of several books, including *There Are Alligators in Our Sewers, and Other American Credos*, Nos. TX-1-086-226 and VA-123-147, co-authored with plaintiff Paul Dickson. This work is contained in the Library at the University of Michigan and has been digitally copied by Google.

15. Named plaintiffs are the exclusive owners of the copyrights for their Works listed above. None of the named plaintiffs has authorized Google to reproduce his or her Works or to display, sell and/or distribute such Works on its website or anywhere else.

ASSOCIATIONAL PLAINTIFF

16. Plaintiff The Authors Guild, Inc. ("the Guild") is a not-for-profit corporation organized under New York law and having its place of business at 31 East 28th Street, New York, New York. The Guild and its predecessor organization, the Authors League of America ("the League"), have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. The Guild, whose membership includes more than 8,000 published authors, is the nation's largest organization of authors. The activities of the Guild include reviewing members' publishing and agency contracts; intervening in disputes involving authors' rights; providing advice to members regarding developments in the law and in the publishing industry that affect their rights; and supporting legislation in matters affecting copyright, freedom of expression, taxation and other issues affecting professional writers.

17. The Guild has associational standing to pursue claims for injunctive and declaratory relief on behalf of its members. The member authors would have standing to sue in their own right. The protection of authors' copyrights is germane, indeed central, to the purpose of the Guild. Individual participation of the authors is not required to determine whether Google's copying and planned display of the authors' copyrighted works for commercial use is in violation of the Act and to provide injunctive and declaratory relief to the Guild and the authors.

DEFENDANT

18. Google is a Delaware corporation with its principal place of business located in Mountain View, California. Google owns and operates the largest Internet search engine in the United States, which contains links to more than eight billion commercial and noncommercial Internet pages. Its search engine is available free of charge to Internet users, and is supported in large part by commercial entities' purchase of advertising space on the site.

19. Google posted revenues of more than $3 billion in 2004 and over $6 billion in 2005. Advertising revenue makes up almost 99% of Google's earnings.

20. Google made an Initial Public Offering of its stock on August 19, 2004. Google's stock has increased more than 400% in value from its opening price of $85 per share to its current trading price of more than $380 per share.

21. Late in 2004 Google announced the launch of a project it calls the Google Library Project, which was part of a service it called Google Print and now calls Google Book Search. Google Book Search is designed to allow users to search the text of books online. The digital archiving of the Works that are the subject of this lawsuit was undertaken by Google as part of its Google Book Search Library Project.

CLASS ALLEGATIONS

22. The Class is initially defined as all persons or entities that hold the copyright in a work that is contained in the library of the University of Michigan. Excluded from the Class are (a) defendant and any entity in which any defendant has a controlling interest; (b) the employees, officers and directors of those identified in subparagraph (a); and (c) the heirs, successors, assigns and legal representatives of the persons identified in subparagraph (b) above.

23. This action has been brought and may properly be maintained as a Class Action pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

24. Numerosity of the Class – Fed. R. Civ. Proc. 23(a)(1): The persons and/or entities in the Class are so numerous that their joinder is impractical, and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the Court. The exact number of members of the Class is not known to plaintiffs, but plaintiffs reasonably estimate that there are at least thousands of class members.

25. Existence and Predominance of Common Question of Law and Fact – Fed. R. Civ. Proc. 23(a)(2) & 23(b)(3): There is a well-defined community of interest in the questions of law and fact involved affecting the Class. Questions of law aud fact common to the Class include, but are not limited to, the following:

a. Whether Google created a digital copy of the Works for the University of Michigan library;

b. Whether the creation of a digital copy of the Works for the University of Michigan library constitutes copyright infringement;

c. Whether Google reproduced for its own commercial use copies of the Works from the University of Michigan library;

d. Whether the reproduction by Google of such copies constitutes copyrigbt infringement;

e. Whether Google's public display of the Works on its commercial website infringes the copyrights of named plaintiffs and the Class;

f. Whether Google's copying and display of the Works on its commercial website is a "fair use" of the Works;

g. Whether Google acted willfully with respect to the acts complained of herein;

h. Whether plaintiffs Dickson and Goulden and the Class have sustained damages and, if so, the proper measure of such damages;

i. Whether injunctive relief is appropriate.

These questions of law and fact predominate over questions that affect only individual class members.

26. Typicality -- Fed. R. Civ. Proc. 23(a)(3): The claims of the named plaintiffs are typical of those of the Class. Named plaintiffs own copyrights in works that have been copied by Google without authorization. The claims of the named plaintiffs and all members of the Class depend on a showing of the acts of Google complained of herein.

27. Adequacy of Representation – Fed. R. Civ. Proc. 23(a)(4): Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class. Plaintiffs' interests do not in any way conflict with the interests of the members of the Class that they seek to represent. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in complex class action litigation and experienced in copyright actions to represent them.

28. Injunctive Relief -- Fed. R. Civ. Proc. 23(b)(2): Google has acted or refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

29. Superiority – Fed. R. Civ. Proc. 23(b)(3): A class action is the best available method for the fair and efficient adjudication of this controversy. Since the damages suffered by individual class members, while not inconsequential, may be relatively small, the expense and burden of individual litigation make it impractical for members of the Class to seek redress individually for the wrongful conduct alleged herein. Should separate actions be required to be brought by each individual member of the Class, the resulting multiplicity of lawsuits would cause undue hardship and expense on the Court and the litigants. A class action is therefore the best method to assure that the wrongful conduct alleged herein is remedied, and that there is a fair, efficient, and full adjudication of this controversy. Plaintiffs anticipate no undue difficulty in the management of this litigation as a class action.

GENERAL ALLEGATIONS

30. Google is in the business of providing Internet search services to the public. It derives approximately 99% of its revenues directly from the sale of advertising, and would likely be unable to offer its search engine and other services to the public free of charge without a continued stream of advertising revenues.

31. On December 14, 2004, Google announced in a press release that it has entered into agreements with four university libraries and one public library to "digitally scan books from their collections so that users worldwide can search them in Google." According to Google's release, this is to be an "expansion of the Google Print program, which assists publishers in making books and other offline information searchable online. Google is now working with libraries to digitally scan books from their collections, and over time will integrate

this content into the Google index, to make it searchable for users worldwide." Google's press release also claimed that it would make "brief excerpts" of copyrighted material available.

32. Google is providing the scanning technology that allows the library books to be copied.

33. Google plans to use the Works from the library of the University of Michigan in order to attract visitors and, thereby, advertisers, to its website.

34. Google has already copied some of the Works in the University of Michigan library, including the book co-authored by plaintiffs Dickson and Goulden and at least two other books authored by plaintiff Dickson, as part of its contractual relationship with the University. In so doing, Google has reproduced at least two digital copies of the Works – one for the University of Michigan library and the other for Google's own commercial use – without the copyright holders' permission and in violation of their rights under copyright. Google has also announced plans to publicly display the Works on its commercial website.

35. Further, Google has announced plans to include in its Google Library Project the works contained in four other libraries: Harvard University, Stanford University, the University of Oxford, and the New York Public Library. Google intends to copy those Works that are in the libraries of Harvard and Stanford without seeking authority from the copyright owners. (Oxford and the New York Public Library have indicated that Google will be limited to copying only works that are in the public domain.)

36. Google continues to reproduce digitized copies of the Class's Works without their authorization. Google continues to display the Works on its website for the commercial purposes detailed above.

37. Google's acts have caused, and unless restrained, will continue to cause damages and irreparable injury to plaintiffs and the Class through:

a. continued copyright infringement of the Works and/or the effectuation of new and further infringements;

b. depreciation in the value and ability to license and sell their Works;

c. lost profits and/or opportunities; and

d. damage to their goodwill and reputation.

38. Google acted willfully or knew or should have known that its actions constitute infringement.

39. Named plaintiffs and members of the Class have suffered damages and/or are in imminent danger of suffering further damages from Google's unlawful practices.

COUNT ONE - Copyright Infringement
(by Named Plaintiffs Dickson and Goulden Only)

40. Named plaintiffs Dickson and Goulden reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

41. Named plaintiffs Dickson and Goulden and certain members of the Class own a valid copyright in and to at least one Work that has been copied by Google. They, not Google, have the exclusive rights to, among other things, reproduce their Works, distribute copies of their Works to the public, publicly display their Works, and authorize such reproduction, distribution and display of their Works.

42. Google has made and reproduced for its own commercial use at least one copy of some of the works contained in the University of Michigan Library, which contains the

Works that are the subject of this action, and Google has stated that it intends to copy most, if not all, of the works in the collection of that library.

43. Google's conduct is in violation of the copyrights held by named plaintiffs Dickson and Goulden and other members of the Class.

44. Google's infringement of the copyrights of the Works was willful.

45. As a result of Google's acts of copyright infringement and the foregoing allegations, named plaintiffs Dickson and Goulden and certain members of the Class have suffered damages.

COUNT TWO - Injunctive Relief
(by All Plaintiffs)

46. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

47. Google has already begun reproducing Works contained in the library of the University of Michigan. In addition, Google has announced plans to expand its Google Library Project to include the libraries of Harvard, Oxford, Stanford, and the New York Public Library.

48. Google has also announced plans to launch a program by which it will place the unlawfully copied Works from the University of Michigan and the other libraries on its website in order to generate consumer traffic and advertising revenues.

49. Google's commercial use of the Works would constitute additional wholesale copyright infringement.

50. Unless enjoined from doing so, Google's commercial use of the Works will cause plaintiffs and the Class irreparable harm by depriving them of both the right to control the reproduction and/or distribution of their copyrighted Works and to receive revenue therefrom.

51. Plaintiffs and the Class are likely to succeed on the merits of their copyright infringement claim because Google's and the University of Michigan's existing and planned uses of the Works do not fall within any of the statutory exceptions to copyright infringement and are in violation of copyright.

52. The balance of hardships tips in favor of plaintiffs and the Class, because Google's massive earnings will not be severely damaged by its inability to create a new stream of advertising revenues and because other comprehensive electronic databases exist for public use.

53. Plaintiffs are therefore entitled to an injunction barring Google from continued infringement of the copyrights of named plaintiffs and the Class, and other equitable relief as more fully set forth in the Prayer for Relief.

COUNT THREE – Declaratory Relief
(by All Plaintiffs)

54. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

55. An actual controversy exists between The Authors Guild, named plaintiffs and the Class on one hand, and Google on the other hand, by reason of Google's announced present and continuing infringement of named plaintiffs' and the Class's copyrights as alleged herein, and announcement that it will not cease and desist from, or remedy, its wholesale infringement of the Works.

56. Plaintiffs are entitled to a judgment declaring that Google's actions are unlawful and, specifically, that Google infringed and continues to infringe Named Plaintiffs' and the Class's copyrights in violation of the Copyright Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief and that judgment be entered against defendant as follows:

A. For certification of the Class;

B. For an award of statutory damages, plaintiffs' actual damages, and/or defendant's profits;

C. For an injunction (a) barring Google from continued infringement of the copyrights of named plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

D. For (a) permanent injunctive and declaratory relief barring Google from continued infringement of the copyrights of Named Plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

E. For costs and attorneys' fees; and

F. For such other and further relief as the Court finds just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs, as provided by Rule 38 of the Federal Rules of Civil Procedure, request trial by jury in the above-captioned matter.

Dated: June 19, 2006

Michael J. Boni / JKR

Michael J. Boni (pro hac vice)
J. Kate Reznick (pro hac vice)
KOHN SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Sanford P. Dumain (SD-8712)
Shannon M. McKenna (not yet admitted in SDNY)
Milberg, Weiss, Bershad & Schulman LLP
One Pennsylvania Plaza
New York, New York 10119
Tel: (212) 594-5300
Fax: (212) 868-1229

Counsel for Plaintiffs and the Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Author's Guild, Associational Plaintiff, Herbert Mitgang, Betty Miles, Daniel Hoffman, Paul Dickson and Joseph Goulden, Individually And On Behalf Of All Others Similarly Situated, Plaintiffs, v. Google Inc., Defendant	**NO. 05 CV 8136-JES** **CERTIFICATE OF SERVICE**

I, J. Kate Reznick, hereby certify that on June 19, 2006 the foregoing Notice of Motion for an Order Pursuant to Rule 15(a), Plaintiffs' Memorandum in Support of Motion to Amend the Complaint, Proposed Order, Declaration of J. Kate Reznick, and Amended Complaint were electronically filed with the Clerk of Court using the CM/ECF system that will automatically send electronic copies to the following counsel of record:

Joseph M. Beck
Alex S. Fonoroff
Ronald L. Raider
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 1100
Atlanta, GA 30309
Tel. (404) 815-6406
Fax (404) 541-3126

Adam H. Charnes
Kilpatrick Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101
Tel. (336) 607-7382
Fax (336) 734-2602

Jeffrey A. Conciatori

Quinn Emanuel Urquhart Oliver & Hedges
335 Madison Avenue, 17th Floor
New York, NY 10017
Tel. (212) 849-7000
Fax (212) 849-7100

Bruce P. Keller
James J. Pastore, Jr.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
Tel. (212) 909-6000
Fax (212) 909-6836

Kate Reznick, Esq.

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EXHIBIT E

Michael J. Boni (pro hac vice)
Joanne Zack
Joshua Snyder
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Telephone: (610) 822-0200
Facsimile: (610) 822-0206

Bruce P. Keller (BK 9300)
Jeffrey P. Cunard
James J. Pastore, Jr. (JP 3176)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000
Facsimile: (212) 909-6836
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American Publishers, Inc., Associational Plaintiffs, and Herbert Mitgang, Betty Miles, Daniel Hoffman, Paul Dickson, Joseph Goulden, The McGraw-Hill Companies, Inc., Pearson Education, Inc., Penguin Group (USA) Inc., Simon & Schuster, Inc., and John Wiley & Sons, Inc., individually and on behalf of all others similarly situated, Plaintiffs, v. Google Inc., Defendant.	Case No. 05 CV 8136-JES **SECOND AMENDED CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED** **FILED ELECTRONICALLY**

Plaintiffs, by their attorneys, allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are published authors, book publishing companies, The Authors Guild, Inc. ("Authors Guild") and the Association of American Publishers, Inc. ("AAP"). Plaintiffs other than the Authors Guild and the AAP have United States copyright interests in books and other writings that are contained in public libraries, university libraries and elsewhere in the United States.

2. The Authors Guild is the nation's largest organization of book authors, which has as its primary purpose to advocate for and support the copyright and contractual interests of published writers.

3. The Association of American Publishers, which has over three hundred publisher members, represents the interests of the American book publishing industry and has, among its central purposes, the protection and strengthening of intellectual property rights for publishers, especially copyright.

4. Defendant Google Inc. ("Google") owns and operates a major Internet search engine that, among other things, provides access to commercial and other sites on the Internet. Google has contracted with several public and university libraries to create digital "archives" of the libraries' collections of books, including those of the University of Michigan, the University of California and Stanford University. As part of the consideration for creating digital copies of these collections, the agreement entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries' archives.

5. By creating for these and other libraries a digital copy of those books that are not in the public domain ("Books," further defined below at paragraph 35), by reproducing for itself a digital copy of the Books, and by distributing and publicly displaying those Books, Google is engaging in massive copyright infringement. It has infringed, and continues to infringe, the electronic and other rights of the copyright holders of the Books.

6. Google plans to reproduce the Books for use on its website in order to, among other things, attract visitors to its web site and generate advertising revenue thereby.

7. Google knew or should have known that the Copyright Act, 17 U.S.C. § 101 *et seq.* ("the Act") required it to obtain authorization from the holders of the copyrights in these Books before creating, distributing and reproducing digital copies of the Books for the University of Michigan library and other libraries providing Books to Google, for its own commercial use and for the use of others. Despite this knowledge, Google has unlawfully reproduced, distributed and publicly displayed the Books, and intends to continue to do so, without the copyright holders' authorization. Google has derived, and intends to continue to derive, revenue from this program by attracting more viewers and advertisers to its website.

8. By this action, plaintiffs, on behalf of themselves and all others similarly situated, seek damages, injunctive and declaratory relief with respect to Google's present infringement, and declaratory and injunctive relief with respect to Google's planned unauthorized commercial and other use of the Books.

JURISDICTION AND VENUE

9. This copyright infringement action arises under 17 U.S.C. § 101 *et seq.* This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1338 (acts of Congress related to copyright).

10. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because several of the named plaintiffs reside in this district and because defendant maintains offices and conducts business in this district.

PARTIES

11. The individual plaintiffs are (a) published, professional authors who created Books for which the copyrights have been registered with the United States Copyright Office ("Author Plaintiffs"), and (b) book publishing companies, which hold exclusive licenses and United States copyright interests in Books for which the copyrights have been registered with the United States Copyright Office ("Publisher Plaintiffs").

AUTHOR PLAINTIFFS

12. Plaintiff Herbert Mitgang ("Mitgang") is a published author of numerous nonfiction Books. Mr. Mitgang resides in New York, New York. He is the holder of the copyright in the published Books *The Fiery Trial: A Life of Lincoln* (registration number A536977) published by Viking Press, and other Books contained in the library of the University of Michigan.

13. Plaintiff Betty Miles ("Miles") resides in Shelburne, Vermont. She is the author of several Books of children's and young adult fiction and is a holder of copyright in the

Books *Just Think* (registration number A330604), published by Alfred A. Knopf. This Book is contained in the library of the University of Michigan.

14. Plaintiff Daniel Hoffman ("Hoffman") resides in Swarthmore, Pennsylvania. He is the author and editor of many volumes of poetry, translation, and literary criticism, and of a memoir. He is the holder of copyright in the Books *Barbarous knowledge: Myth in the Poetry of Yeats, Graves, and Muir* (registration number A896931 and registration renewal number RE-696-986) and *Striking the Stones* (registration number on A985815 and registration renewal number RE-730-198), both published by Oxford University Press. These Books are contained in the library of the University of Michigan.

15. Plaintiff Paul Dickson ("Dickson") resides in Garrett Park, MD. He is a full-time writer and the author of 46 Books, including *There Are Alligators in Our Sewers, and Other American Credos*, Nos. TX-1-086-226 and VA-123-147, co-authored with plaintiff Joseph Goulden; *Family Words: The Dictionary for People Who Don't Know a Frone from a Brinkle*, No. TX-2-427-193; and *The Official Rules*, No. TX-166-929. This Book is contained in the library at the University of Michigan and has been digitally copied by Google.

16. Plaintiff Joseph Goulden ("Goulden") resides in Washington, D.C. He is the author of several Books, including *There Are Alligators in Our Sewers, and Other American Credos*, Nos. TX-1-086-226 and VA-123-147, co-authored with plaintiff Paul Dickson. This Book is contained in the library at the University of Michigan and has been digitally copied by Google.

17. Author Plaintiffs are the exclusive owners of the copyrights for their Books listed above. None of the Author Plaintiffs has authorized Google to reproduce his or her Books or to display, sell and/or distribute such Books on its website or anywhere else.

PUBLISHER PLAINTIFFS

18. Plaintiff The McGraw-Hill Companies ("McGraw-Hill") is a New York corporation with its principal place of business in New York, New York. Through its Education segment, McGraw-Hill is a leading publisher of educational materials, information and solutions for the Pre-K through 12th grade, Assessment & Instruction, Higher Education and Professional markets. McGraw-Hill is the owner or exclusive licensee of, among others, copyrights in *Computer Telephony Demystified: Putting CTI, Media Services, and IP Telephony to Work*, No. TX 5-161-011 and *Basic Concepts in Embryology: A Student's Survival Guide*, No. TX 4-732-805. These Books are contained in the library at the University of Michigan and have been digitally copied by Google.

19. Plaintiff Pearson Education, Inc. ("Pearson Education"), formerly named Prentice-Hall, Inc., is a Delaware corporation that is a subsidiary of Pearson plc and has its principal place of business in Upper Saddle River, New Jersey. Together with its corporate affiliates, Pearson Education is one of the leading educational publishers in the world, educating more than 100 million people worldwide. Its college and professional imprints include Prentice-Hall, Addison-Wesley, Allyn & Bacon, Benjamin Cummings, Longman, Que, Sams and New Riders. Pearson Education is the owner or exclusive licensee of, among others, copyrights in *Classical and Contemporary Cryptology*, No. TX 6-010-384 and *Dental Health Education:*

Lesson Planning and Implementation, No. TX 6-560-288. These Books are contained in the library at the University of Michigan and have been digitally copied by Google..

20. Plaintiff Penguin Group (USA) Inc. ("Penguin") is a Delaware corporation that is the United States affiliate of the Penguin Group and is a subsidiary of Pearson plc. It has its principal place of business in New York, New York. In addition to its Penguin imprint, Penguin publishes under famous imprints and trademarks, such as Viking, Penguin Classics, Penguin Press, G. P. Putnam & Sons (founded 1836), Dutton, and Riverhead. Penguin is the owner or exclusive licensee of, among others, copyrights in *Now Sheba Sings The Song*, Nos. TX 2-124-052 and VA 270-350 and *Ironweed*, No. TX 1-107-738. . These Books are contained in the library at the University of Michigan and have been digitally copied by Google.

21. Plaintiff Simon & Schuster, Inc. ("Simon & Schuster"), a subsidiary of Viacom, Inc., is a New York corporation with its principal place of business in New York, New York. Founded in 1924, Simon & Schuster's prominent imprints include Simon & Schuster, Scribner and Free Press. Simon & Schuster is the owner or exclusive licensee of, among others, copyrights in *Hello, Darkness*, No. TX 0-005-832-501 and *Girl: A Novel*, No. TX 0-004-647-723. These Books are contained in the library at the University of Michigan and have been digitally copied by Google.

22. Plaintiff John Wiley & Sons, Inc. ("John Wiley") is a New York corporation with its principal place of business in Hoboken, New Jersey. Founded in 1807, John Wiley is a leading publisher for the higher education, professional, trade, scientific, technical, and medical communities worldwide. It is, along with its wholly-owned subsidiaries, the owner or exclusive licensee of, among others, copyrights in *Smith, Currie & Hancock's Common Sense*

Construction Law, No. TX 4-504-656 and *The Nonprofit Handbook: Fundraising*, No. TX 4-504-827.. These Books are contained in the library at the University of Michigan and have been digitally copied by Google.

23. Publishers invest a great deal of time and money to acquire rights to and publish their Books, which reflect not only the creative efforts of individual authors, but also the substantive and creative review, input and organization of editors employed by Publishers, as well as significant expenditures on the printing, marketing and distribution of those Books. Publishers have vigorously sought to protect, defend and enforce their exclusive rights in and to their Books, including those identified in this complaint.

24. In order to profitably publish their Books and continue in business, Publishers depend on initial and backlist sales of copies of Books and the licensing revenue from these Books. Particularly with respect to Books that are not intended for the mass market, the sale of every additional copy – in whatever medium – is significant, as is each source of ancillary revenue, such as licensing fees received for granting permission to make copies of and prepare and use excerpts of such Books in hard copy and in electronic form.

25. It has long been the case that, due to the exclusive rights enjoyed by Publishers under the Copyright Act, both for-profit and non-profit entities provide royalties or other consideration to Publishers in exchange for permission to copy, even in part, Publishers' Books.

26. Collectively, the Publishers have registered many more copyrights than those set forth in this complaint and, collectively, many more of Publishers' Books than those set forth in this complaint are among the Books that the University of Michigan, University of

California, Stanford University libraries and other libraries have provided or plan to provide to Google for digital scanning and display as part of the Google Library Project.

ASSOCIATIONAL PLAINTIFFS

27. Plaintiff The Authors Guild, Inc. ("the Guild") is a not-for-profit corporation organized under New York law and having its place of business at 31 East 28th Street, New York, New York. The Guild and its predecessor organization, the Authors League of America ("the League"), have been leading advocates for authors' copyright and contractual interests since the League's founding in 1912. The Guild, whose membership includes more than 8,000 published authors, is the nation's largest organization of authors. The activities of the Guild include reviewing members' publishing and agency contracts; intervening in disputes involving authors' rights; providing advice to members regarding developments in the law and in the publishing industry that affect their rights; and supporting legislation in matters affecting copyright, freedom of expression, taxation and other issues affecting professional writers.

28. The Guild has associational standing to pursue claims for injunctive and declaratory relief on behalf of its members. The member authors would have standing to sue in their own right. The protection of authors' copyrights is germane, indeed central, to the purpose of the Guild. Individual participation of the authors is not required to determine whether Google's copying and planned display of the authors' copyrighted works for commercial use is in violation of the Act and to provide injunctive and declaratory relief to the Guild and the authors.

29. AAP is the national trade association of the U.S. book publishing industry, with offices in Washington, D.C. and New York City. Its membership of over 300 companies

and organizations includes most of the major commercial book and journal publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish literary works in hardcover and paperback formats in every field of human interest, including trade books of fiction and non-fiction; textbooks and other instructional materials for the elementary, secondary, and postsecondary educational markets; reference works; and scientific, technical, medical, professional and scholarly books and journals. In addition to publishing in print formats, AAP members are active in the ebook and audiobook markets, and also produce computer programs, databases, Web sites and a variety of multimedia works for use in online and other digital formats.

30. AAP advocates the public policy interests of its members, including the protection of intellectual property rights in all media; the defense of both the freedom to read and the freedom to publish at home and abroad; the advancement of education; and, the promotion of literacy and reading.

31. The AAP has associational standing to pursue claims for injunctive and declaratory relief on behalf of its member publishers. The member publishers would have standing to sue in their own right. The protection of publishers' copyrights is germane, indeed central, to the purpose of the AAP. Individual participation of the publishers is not required to determine whether Google's copying and planned display of the publishers' copyrighted works for commercial use is in violation of the Act and to provide injunctive and declaratory relief to the AAP and its publisher members.

DEFENDANT

32. Google is a Delaware corporation with its principal place of business located in Mountain View, California. Google owns and operates the largest Internet search engine in the United States, which contains links to more than eight billion commercial and noncommercial Internet pages. Its search engine is available free of charge to Internet users, and is supported in large part by commercial entities' purchase of advertising space on the site.

33. Late in 2004, Google announced the launch of a project it calls the Google Library Project, which was part of a service it called Google Print and now calls Google Book Search. Google Book Search is designed to allow users to search the text of books online. The digital archiving of the Books that are the subject of this lawsuit was undertaken by Google as part of Google Book Search.

CLASS ALLEGATIONS

34. The Class is defined as all persons or entities that have a United States copyright interest in one or more Books (defined in paragraph 35) or Inserts (defined in paragraph 35). All members of the Class are either a member of the Author Sub-Class (defined in paragraph 35) or the Publisher Sub-Class (defined in paragraph 36). Excluded from the Class are Google, the members of Google's Board of Directors and its executive officers.

35. "Author Sub-Class" means members of the Class who are authors, their heirs, successors and assignees, and other owners of a United States copyright interest in one or more Books or Inserts, but who are not members of the Publisher Sub-Class.

36. "Publisher Sub-Class" means members of the Class that are Book publishing companies, and companies that publish periodicals and are rightsholders of Inserts, and all such companies' successors, exclusive licensees and assignees.

37. "Book" means a written or printed work that (a) if a "United States work," as defined in 17 U.S.C. § 101, has been registered with the United States Copyright Office, and (b) was published or distributed to the public or made available for public access as a set of written or printed sheets of paper bound together in hard copy form under the authorization of the work's U.S. copyright owner, and (c) is subject to a United States copyright interest. This definition of Book does not include (i) periodicals, (ii) personal papers (*e.g.*, unpublished diaries or bundles of notes or letters), (iii) sheet music and other writings that are primarily used to play music, (iv) written or printed works in, or as they become in, the public domain under the Copyright Act, and (v) government works.

38. "Insert" means the following content, if and to the extent such content is (a) independently protected by the Copyright Act and, (b) if a "United States work" as defined in 17 U.S.C. § 101, is covered by a registration with the United States Copyright Office, and (c) is contained in a Book if the person who has a United States copyright interest in such content is not the same as the person who has a United States copyright interest in the Book itself: (1) text, such as forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other Books, periodicals or other works; (2) children's Book illustrations; (3) musical notation (*i.e.*, notes on a staff or tablature); and (4) tables, charts and graphs. The term "Insert" does not include pictorial works, such as photographs, illustrations

(other than children's Book illustrations), maps, paintings, and works that are in, or as they become in, the public domain in the United States.

39. This action has been brought and may properly be maintained as a Class Action pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure.

40. Numerosity of the Class – Fed. R. Civ. Proc. 23(a)(1): The persons and/or entities in each of the Author Sub-Class and Publisher Sub-Class are so numerous that their joinder is impractical, and the disposition of their claims in a class action rather than in individual actions will benefit the parties and the Court. The exact number of members of each of the Author Sub-Class and Publisher Sub-Class is not known to plaintiffs, but plaintiffs reasonably estimate that there are at least thousands of Author Sub-Class members and at least hundreds of Publisher Sub-Class members.

41. Existence and Predominance of Common Question of Law and Fact – Fed. R. Civ. Proc. 23(a)(2) & 23(b)(3): There is a well-defined community of interest in the questions of law and fact involved affecting the Class. Questions of law and fact common to the Class include, but are not limited to, the following:

a. Whether Google has digitized and plans to continue to digitize Books and Inserts from the University of Michigan, University of California and Stanford University libraries and other sources;

b. Whether such digitization constitutes copyright infringement;

c. Whether Google reproduced and plans to continue to reproduce for its own commercial use copies of such Books and Inserts;

d. Whether the reproduction by Google of such copies constitutes copyright infringement;

e. Whether Google's public display of portions of such Books and Inserts on its commercial website infringes the copyrights of the Class;

f. Whether Google's copying and display of such Books and Inserts on its commercial website is a "fair use" of the works;

g. Whether Google acted willfully with respect to the acts complained of herein;

h. Whether members of the Class have sustained damages and, if so, the proper measure of such damages;

i. Whether injunctive relief is appropriate.

These questions of law and fact predominate over questions that affect only individual class members.

42. Typicality – Fed. R. Civ. Proc. 23(a)(3): The claims of the Author Plaintiffs are typical of those of the Author Sub-Class, and the claims of the Publisher Plaintiffs are typical of those of the Publisher Sub-Class. All plaintiffs own copyrights in works that have been copied by Google without authorization. The claims of the Author Plaintiffs, Publisher Plaintiffs and all members of the Class depend on a showing of the acts of Google complained of herein.

43. Adequacy of Representation – Fed. R. Civ. Proc. 23(a)(4): Author Plaintiffs are adequate representatives of the Author Sub-Class and will fairly and adequately protect the interests of the Author Sub-Class. Publisher Plaintiffs are adequate representatives of

the Publisher Sub-Class and will fairly and adequately protect the interests of the Publisher Sub-Class. Plaintiffs' interests do not in any way conflict with the interests of the members of the Sub-Class that they seek to represent. Plaintiffs are committed to the vigorous prosecution of this action and each Sub-Class has retained separate competent counsel experienced in complex class action litigation and experienced in copyright actions.

44. Injunctive Relief – Fed. R. Civ. Proc. 23(b)(2): Google has acted or refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

45. Superiority – Fed. R. Civ. Proc. 23(b)(3): A class action is the best available method for the fair and efficient adjudication of this controversy. Since the damages suffered by individual class members, while not inconsequential, may be relatively small, the expense and burden of individual litigation make it impractical for members of the Class to seek redress individually for the wrongful conduct alleged herein. Should separate actions be required to be brought by each individual member of the Class, the resulting multiplicity of lawsuits would cause undue hardship and expense on the Court and the litigants. A class action is therefore the best method to assure that the wrongful conduct alleged herein is remedied, and that there is a fair, efficient, and full adjudication of this controversy. Plaintiffs anticipate no undue difficulty in the management of this litigation as a class action.

GENERAL ALLEGATIONS

46. Google is in the business of providing Internet search services to the public. It derives approximately 99% of its revenues directly from the sale of advertising, and

would likely be unable to offer its search engine and other services to the public free of charge without a continued stream of advertising revenues.

47. On December 14, 2004, Google announced in a press release that it has entered into agreements with four university libraries and one public library to "digitally scan books from their collections so that users worldwide can search them in Google." According to Google's release, this is to be an "expansion of the Google Print program, which assists publishers in making books and other offline information searchable online. Google is now working with libraries to digitally scan books from their collections, and over time will integrate this content into the Google index, to make it searchable for users worldwide." Google's press release also claimed that it would make "brief excerpts" of copyrighted material available.

48. Google is providing the scanning technology that allows the library books to be copied.

49. Google plans to use the Books and Inserts obtained from various libraries and other sources in order to attract visitors and, thereby, advertisers, to its website.

50. Google has already copied Books from the collections of various libraries, including Books to which the Publisher Plaintiffs own Unites States copyright interests, the Book co-authored by plaintiffs Dickson and Goulden and at least two other Books authored by plaintiff Dickson. In so doing, Google has reproduced at least two digital copies of such Books – one for the library that permitted Google to digitize such Books and the other for Google's own commercial use – without the copyright holders' permission and in violation of their rights under copyright. Google has also announced plans to publicly display the Books on its commercial website.

51. Google continues to reproduce digitized copies of the Class's Books and Inserts without their authorization. Google continues to display the Books and Inserts on its website for the commercial purposes detailed above.

52. Google's acts have caused, and unless restrained, will continue to cause damages and irreparable injury to plaintiffs and the Class through:

a. continued copyright infringement of the Books and Inserts and/or the effectuation of new and further infringements;

b. depreciation in the value and ability to license and sell their Books and Inserts;

c. lost profits and/or opportunities; and

d. damage to their goodwill and reputation.

53. Google acted willfully or knew or should have known that its actions constitute infringement.

54. Plaintiffs and members of the Class have suffered damages and/or are in imminent danger of suffering further damages from Google's unlawful practices.

COUNT ONE - Copyright Infringement
(By Author Plaintiffs Dickson and Goulden,
Publisher Plaintiffs and Certain Class Members Only)

55. Author Plaintiffs Dickson and Goulden, and the Publisher Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

56. Author Plaintiffs Dickson and Goulden, all Publisher Plaintiffs and certain other members of the Author Sub-Class and Publisher Sub-Class own a valid copyright in and to

at least one Book that has been copied by Google. They, not Google, have the exclusive rights to, among other things, reproduce their Books, distribute copies of their Books to the public, publicly display their Books, and authorize such reproduction, distribution and display of their Books.

57. Google has made and reproduced for its own commercial use at least one copy of some of the Books from the University of Michigan library and/or other libraries or sources, and Google has stated that it intends to copy most, if not all, of the Books in the collection of the University of Michigan library and other libraries.

58. Google's conduct is in violation of the copyrights held by named Author Plaintiffs Dickson and Goulden, the Publisher Plaintiffs and certain other members of the Author Sub-Class and Publisher Sub-Class.

59. Google's infringement of the copyrights of the Books was willful.

60. As a result of Google's acts of copyright infringement and the foregoing allegations, Author Plaintiffs Dickson and Goulden, Publisher Plaintiffs and certain other members of the Author Sub-Class and Publisher Sub-Class have suffered damages.

COUNT TWO - Injunctive Relief
(By All Plaintiffs)

61. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

62. Google has already begun reproducing Books contained in the University of Michigan, University of California, and Stanford University libraries and other sources.

63. Google has also announced plans to launch a program by which it will place the unlawfully copied Books from the University of Michigan library and other libraries on its website in order to generate consumer traffic and advertising revenues.

64. Google's commercial use of the Books would constitute additional wholesale copyright infringement.

65. Unless enjoined from doing so, Google's commercial use of the Books and Inserts will cause plaintiffs and the Class irreparable harm by depriving them of both the right to control the reproduction and/or distribution of their copyrighted Books and Inserts and to receive revenue therefrom.

66. Plaintiffs and the Class are likely to succeed on the merits of their copyright infringement claim because Google's existing and planned uses of the Books and Inserts do not fall within any of the statutory exceptions to copyright infringement and are in violation of copyright.

67. The balance of hardships tips in favor of plaintiffs and the Class, because Google's massive earnings will not be severely damaged by its inability to create a new stream of advertising revenues and because other comprehensive electronic databases exist for public use.

68. Plaintiffs are therefore entitled to an injunction barring Google from continued infringement of the copyrights of plaintiffs and the Class, and other equitable relief as more fully set forth in the Prayer for Relief.

COUNT THREE – Declaratory Relief
(By All Plaintiffs)

69. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs.

70. An actual controversy exists between the Authors Guild, AAP, the plaintiffs and the Class, on the one hand, and Google, on the other hand, by reason of Google's present and continuing infringement of the Author Plaintiffs', the Publisher Plaintiffs' and the Class's copyrights as alleged herein, and announcement that it will not cease and desist from, or remedy, its wholesale infringement of the Books and Inserts.

71. Plaintiffs are entitled to a judgment declaring that Google's actions are unlawful and, specifically, that Google infringed and continues to infringe the Author Plaintiffs', the Publisher Plaintiffs' and the Class's copyrights in violation of the Copyright Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief and that judgment be entered against defendant as follows:

A. For certification of the Class, the Author Sub-Class and the Publisher Sub-Class;

B. For an award of statutory damages, plaintiffs' actual damages, and/or defendant's profits;

C. For an injunction (a) barring Google from continued infringement of the copyrights of the Author Plaintiffs, the Publisher Plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

D. For (a) permanent injunctive and declaratory relief barring Google from continued infringement of the copyrights of the Author Plaintiffs, the Publisher

Plaintiffs and the Class, and/or (b) other equitable relief to redress any continuing violations of the Act;

E. For costs and attorneys' fees; and

F. For such other and further relief as the Court finds just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs, as provided by Rule 38 of the Federal Rules of Civil Procedure, request trial by jury in the above-captioned matter.

Dated: October 28, 2008

Bruce P. Keller (BK 9300)
Jeffrey P. Cunard
James J. Pastore, Jr. (JP 3176)
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for The Association of American Publishers, Inc., the Publisher Plaintiffs and the Publisher Sub-Class

Michael J. Boni (pro hac vice)
Joanne Zack
Joshua Snyder
BONI & ZACK LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
Telephone: (610) 822-0200
Facsimile: (610) 822-0206

Robert J. LaRocca
KOHN SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Sanford P. Dumain (SD-8712)
MILBERG LLP
One Pennsylvania Plaza
New York, New York 10119
Tel: (212) 594-5300
Fax: (212) 868-1229

Counsel for The Authors Guild, Inc., the Author Plaintiffs and the Author Sub-Class

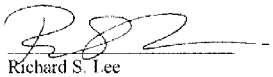
CERTIFICATE OF SERVICE

I, Richard S. Lee, an attorney admitted in the State of New York, caused on this 30th day of October, 2008 a copy of the Second Amended Class Action Complaint to be served, by first class mail, upon:

Joseph M. Beck
Kilpatrick Stockton LLP
1100 Peachtree Street, Suite 1100
Atlanta, GA 30309-4530
Attorneys for Defendant Google Inc.

I certify under the penalty of perjury that the foregoing is true and correct.

Dated: October 30, 2008
New York, New York



Richard S. Lee

Börsenverein des Deutschen Buchhandels

Börsenverein des Deutschen Buchhandels e. V.
Großer Hirschgraben 17–21 60311 Frankfurt am Main

Der Vorsteher

Prof. Dr. Gottfried Honnefelder
Großer Hirschgraben 17–21
60311 Frankfurt am Main
Postfach 10 04 42
60004 Frankfurt am Main
Telefon: +49 (0)69-13 06-316
Telefax: +49 (0)69-13 06-300
E-Mail: vorsteher@boev.de
www.boersenverein.de

The Honorable John Conyers, Jr.
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Lamar S. Smith
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

By Facsimile and Hand Delivery

1 September 2009

Dear Chairman Conyers and Congressman Smith:

My name is Prof. Dr. Gottfried Honnefelder and I am President ("Vorsteher") of the Börsenverein des Deutschen Buchhandels (the German Publishers and Booksellers Association) located in Frankfurt, Germany. I write this letter in connection with the hearing you are holding on 10 September 2009 on the proposed settlement of the class-action copyright infringement litigation brought by the U.S. Authors Guild and others against Google's Book Search service.[1] I am providing this letter to you in English, for your convenience, and note that it was translated for us.

The Börsenverein represents approximately 6000 publishing companies, bookshops, antiquarian booksellers, intermediate book traders and publishing representatives doing business in Germany. Because several of our members own rights in books that are protected by U.S. copyright law, these members fall within the putative class defined in the proposed settlement. This means that the settlement, if approved, would give Google broad rights to copy, distribute, and commercialize our members' books without their consent—despite the fact that our members did not participate in any way in the underlying litigation, were not invited to participate in the negotiation of the proposed settlement, and are not represented by any of the named class members or their representatives. The only means our members have to avoid ceding their U.S. property rights to Google is to undertake the onerous task of "opting out" of the proposed settlement with respect to each of the hundreds or even thousands of their books covered by the proposed settlement.

This use of U.S. class action law to abrogate the exclusive rights of copyright owners located outside the United States, to the unilateral commercial benefit of a single U.S. company, violates fundamental principles of international copyright law—principles that the United States in other contexts has vigorously urged other countries to respect. This case also establishes a dangerous precedent, one that ultimately could harm the interests of the United States' own creative industries. In this regard, we respectfully urge you to consider whether it would be acceptable, in the Committee's view, for a foreign court to grant a non-U.S. entity the unilateral

[1] *The Authors Guild, Inc. et al v. Google Inc.*, Case No. 05 CV 8136 (S.D.N.Y.).

right to copy, distribute, or otherwise exploit works owned by U.S. copyright owners without their consent. We imagine that many U.S. copyright owners would object vigorously to such a scheme. If the proposed settlement with Google is approved, however, this will be precisely the situation that European and other non-U.S. copyright owners will face in the United States.

Based on these and other concerns, the Börsenverein, joined by several European publishers, has filed objections to the proposed settlement. Apart from the concerns described above, our principal objections to the settlement are as follows:

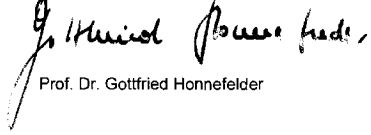
First, the Parties to the proposed settlement failed to provide legally adequate notice of the proposed settlement to non-U.S. class members. Specifically, the Parties' failure to translate the proposed settlement violated the rights of non-U.S. class members under Rule 23 of the Federal Rules of Civil Procedure and the Due Process clause of the U.S. Constitution, as well as the Court's own order in the case. Non-U.S. class members also did not receive adequate notice of the proposed settlement due to fundamental translation errors in the notice documents.

Second, the manner in which works owned by non-U.S. rights holders are affected by the proposed settlement conflicts with the United States' obligations under the Berne Convention and other international treaties. The settlement abrogates exclusive rights guaranteed under Berne to non-U.S. rights holders, imposes formalities on such rights holders that are unlawful under Berne, and also violates the United States' national treatment obligations under Berne because it treats non-U.S. rights holders less favorably than it treats U.S. rights holders.

Third, the proposed settlement fails to satisfy rule 23 of the Federal Rules of Civil Procedure because it is not fair, reasonable, or adequate, and because the named Plaintiffs, all of whom are U.S. entities or authors, do not adequately represent non-U.S. class members.

Thank you in advance for your consideration of this letter. Please do not hesitate to contact me if you have any questions regarding this letter or the Börsenverein's views on the proposed settlement.

Respectfully yours,



Prof. Dr. Gottfried Honnefelder

cc: Members of the Committee on the Judiciary, U.S. House of Representatives
Hon. Howard Berman, Chairman, Foreign Affairs Committee, U.S. House of Representatives
Hon. Ileana Ros-Lehtinen, Foreign Affairs Committee, U.S. House of Representatives
Secretary Hillary Rodham Clinton, U.S. Secretary of State
Secretary Gary Locke, U.S. Department of Commerce
Amb. Ron Kirk, United States Trade Representative
Hon. Marybeth Peters, Register of Copyrights, Library of Congress

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American Publishers, Inc., et al.,	
Plaintiffs,	
v.	Case No. 05 CV 8136-DC
Google Inc.,	
Defendant.	

SUPPLEMENTAL LIBRARY ASSOCIATION COMMENTS ON THE PROPOSED SETTLEMENT

The American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries (the Library Associations) submit these comments to address developments relating to the proposed Settlement that have arisen since the Library Associations filed their initial comments with this Court on May 4, 2009. In particular, these comments discuss the amendment Google and the University of Michigan (Michigan) entered into on May 20, 2009 that expanded the 2004 agreement that allowed Google to scan books in the Michigan library for inclusion in Google's search database. These developments have not changed the Library Associations' position on the Settlement: to prevent the possible negative effects the Settlement may have on equity of access to information, patron privacy, and intellectual freedom, this Court must regulate the conduct of the Book Rights Registry (Registry) and Google under the Settlement.

I. Summary of May 4 Comments

In their May 4 comments, the Library Associations stated that they do not oppose this Court's approval of the Settlement. The Settlement has the potential to provide unprecedented public access to a digital library containing millions of books. Thus, the Settlement could advance the core mission of the Library Associations and their members: providing patrons with access to information in all forms, including books.

The Library Associations expressed their belief that but for the Settlement, the services it enables would not come into existence in the near term. A class action Settlement provides perhaps the most efficient mechanism for cutting the Gordian knot of the huge transaction costs of clearing the copyrights in millions of works whose ownership often is obscure.

At the same time, the Library Associations recognized that the digital library enabled by the Settlement would be under the control of Google and the Registry. The cost of creating such a library and Google's significant lead time advantage suggest that no other entity would create a competing digital library for the foreseeable future. In the absence of competition for the services it will enable, the Settlement could compromise fundamental library values such as equity of access to information, patron privacy, and intellectual freedom.[1]

In order to mitigate the possible negative effects the Settlement may have on libraries and the public at large, the Library Associations requested this Court to exercise

[1] The Urban Library Council (ULC) and the International Federation of Library Associations and Institutions (IFLA) have expressed similar concerns in their filings with this Court. ULC, for example, identified problems of implementation and principle (such as the implications for first sale, fair use, and public domain) relating to the fee for printing out pages from the free Public Access Service terminals in public libraries.

its jurisdiction vigorously over the interpretation and implementation of the Settlement. In the Settlement Agreement itself, the parties acknowledged this Court's authority to regulate their conduct under the Settlement.

II. Pricing Review

In the May 4 comments, the Library Associations observed that the institutional subscription service enabled by the Settlement could evolve into an essential research facility. However, in the absence of meaningful competition, the Registry and Google could set the price of the subscription at a profit maximizing point beyond the reach of many libraries. To address this concern, the Library Associations stated that "any library or other possible institutional subscriber must have the ability to request this Court to review the pricing of an institutional subscription."[2]

On May 20, 2009, Google and Michigan entered into an amendment that expanded the 2004 agreement that allowed Google to scan books in the Michigan library for inclusion in Google's search database.[3] The Amendment is followed by an Attachment A, which sets forth provisions that will apply to all of Google's partner libraries.[4] Attachment A establishes a "pricing review" mechanism that allows those libraries partnering with Google to challenge the price of the institutional subscription. Although this new pricing review could be helpful to libraries, it contains several significant limitations.

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[2] Library Association Comments at 19.
[3] In July, two other libraries partnering with Google, the University of Wisconsin-Madison and the University of Texas-Austin, also entered into amended agreements.
[4] Attachment A is titled "Collective and Certain Settlement Agreement Related Terms." Google's partner libraries are those libraries that will provide Google with in-copyright books for scanning (*i.e.*, Fully Participating and Cooperating Libraries under the Settlement).

To understand this new procedure, one must first review how the price of the institutional subscription gets set under the Settlement. Google has the responsibility of proposing to the Registry an initial pricing strategy consistent with these objectives: "1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and 2) the realization of broad access to the Books by the public, including institutions of higher education."[5] The Registry and Google can then negotiate terms of the pricing strategy for up to 180 days. If Google and the Registry do not reach agreement, the dispute will be submitted to binding arbitration.[6] Only Google and the Registry would be parties to this arbitration.

The new procedure described in Attachment A of the Amendment would occur after the price-setting process set forth in the Settlement. Sixty days after Google first offers an institutional subscription to the higher education market, and every two years thereafter, a partner library can initiate a review of the pricing of the institutional subscription to determine whether the price properly meets the objectives set forth in the settlement agreement. Only one review can be conducted per two-year period, so if several partner libraries seek to review the price, they must do so jointly through a "designated representative." The pricing review will be conducted by "an independent, qualified third party" designated by the initiating library, subject to Google's approval.[7] Google will pay up to $100,000 of the reviewer's fees and costs for the first two reviews.[8]

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[5] Settlement Agreement at 4.1(a)(i).
[6] *Id.* at 4.1(a)(iv)(4)a).
[7] Attachment A at 3.c(1).
[8] The potential cost to libraries of challenging the price of the institutional subscription, either through the pricing review established by Attachment A or directly before this Court, underscores the importance of the Antitrust Division of the U.S. Department of

Google must provide to the reviewer specified categories of information, some of which the reviewer cannot make directly available to the partner libraries.[9] The reviewer will prepare a Pricing Review Report, which he or she will provide to Google and all partner libraries.

Ninety days after receipt of the Pricing Review Report, any partner library can initiate an arbitration with Google. The arbitration will be subject to the dispute resolution procedures in the Settlement Agreement, meaning that the arbitrator's decision will be final and non-appealable. Additionally, "[a]ny such arbitration will be the exclusive mechanism to resolve disputes between Google and the Initiating Libraries with respect to whether Google is pricing the Reviewable Subscriptions in accordance with the objectives set forth in … the Settlement Agreement."[10] Thus, if a partner library agrees to Attachment A, then it is forgoing the ability to request this Court to review the institutional subscription price.

If the arbitrator determines that the price is too high or that Google is not achieving the broad access required by the settlement, he or she can order Google to adjust the price. The adjustment amount is limited to Google's net revenue (in essence, 37% of the subscription price).[11]

While this new pricing review could benefit libraries, it contains several significant limitations. First, only Google's partners can initiate the review. If these

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Justice closely monitoring implementation of the Settlement – particularly the pricing of the institutional subscription. *See* Section VI below.

[9] This information includes the number of institutions that have institutional subscriptions; a histogram showing the percentage of institutions that pay each price within a pricing category; and Google's list price for each pricing category. Attachment A at 3.c(1).

[10] Attachment A at 3.c(2).

[11] Attachment A at 3.c(3).

partner libraries receive large discounts on the institutional subscription, they may not have the financial incentive to pursue this new procedure.[12] Second, while the procedure allows the arbitrator to order Google to adjust the price downwards, the adjustment amount is limited to Google's net revenue – 37% of the subscription price.[13] Thus, the subscription price might remain beyond the means of many libraries. Third, as noted above, the arbitrator's decision is final and unappealable. This could be problematic to the extent that the arbitrator just "splits the baby" and does not engage in a thorough review of the pricing.

Given these limitations, libraries not partnering with Google must retain the ability to request this Court to evaluate whether the pricing of the institutional subscription meets the objective of "the realization of broad access to the Books by the public, including institutions of higher education." Moreover, this Court should have access to all the pricing information provided by Google or the Registry under the pricing review procedure.[14]

III. Intellectual Freedom

In their May 4 comments, the Library Associations expressed concern that in response to political pressure, Google may exclude entire categories of books from the services permitted under the Settlement. This, in turn, could deprive students, scholars, journalists, and policymakers of access to historically important materials. To address this problem, the Library Associations argued that "[a]ny user must have the ability to request this Court to direct Google to provide the user with a list of books excluded from

[12] Michigan, for example, will receive a free institutional subscription in perpetuity.
[13] Attachment A at 3.c(3).
[14] *See* note 9, *supra*.

any of its services for editorial or non-editorial reasons, and an explanation of why it was excluded."[15]

Attachment A to the Michigan Amendment takes a step towards resolving this issue by requiring Google to provide to the partner libraries' designated representative information concerning whether a book is being excluded from any display uses for editorial or non-editorial reasons, and if for non-editorial reasons, whether the exclusion was for quality, technical, or legal reasons. However, a partner library may disclose to the public only the identity of books excluded for editorial reasons – not the rest of the information about excluded books that Google provides the partner libraries.[16] The Library Associations continue to believe that public disclosure of all this information is the strongest deterrent against censorship. Accordingly, as the Library Associations previously requested, any user must have the ability to request the Court to direct Google to provide a list of excluded books with an explanation for each exclusion.

IV. Privacy

In their May 4 comments, the Library Associations noted that the Settlement Agreement was silent on the issue of user privacy. To address this concern, the Library Associations asserted that "any user must have the ability to request this Court to direct Google and the Registry to disclose their policies for collecting, retaining, disseminating, and protecting personally identifiable information."[17] Moreover, "any user must have

[15] Library Association Comments at 20.
[16] Attachment A at 10.e.
[17] Library Association Comments at 20.

the ability to request this Court to review whether Google and the Registry are complying with their privacy policies."[18]

On July 23, 2009, Google issued a statement about privacy and the Settlement. Google stated that because the Settlement had not yet been approved, and the services authorized by the agreement had not yet been built or even designed, "it's very difficult (if not impossible) to draft a detailed privacy policy."[19] Google added that

> [w]hile we know that our eventual product will build in privacy protections – like always giving users clear information about privacy, and choices about what if any data they share when they use our services – we don't yet know exactly how all this will work. We do know that whatever we ultimately build will protect readers' privacy rights, upholding the standards set long ago by booksellers and by libraries whose collections are being opened to the public through this settlement.[20]

The statement linked to an "FAQ" which provided additional detail. In the FAQ, Google stated that "[i]mportant principles from our Google Privacy Policy would apply to this service, as with every Google service. For example, we will never sell personal information about our users. In fact, we will never share individual users' information at all unless the user tells us to ...."[21] Google made clear that it would not provide individual user data to the Registry. Google explained that is not required under the Settlement Agreement to provide individual user data to the Registry; to the contrary, "the settlement specifies that in circumstances where the Registry seeks this data, it

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[18] *Id.*
[19] The Google Books settlement and privacy, http://googlepublicpolicy.blogspot.com/2009/07/google-books-settlement-and-privacy.html.
[20] *Id.*
[21] The Google Books settlement and privacy: Frequently asked questions, http://booksearch.blogspot.com/2009/07/google-books-settlement-and-privacy.html

should use legal processes to do so."[22] The Registry would receive aggregate usage data that is needed for the allocation of revenues under the Settlement, but this data would not include information specific to individual users.

According to the FAQ, users of the preview function will not be required to have a Google account nor to provide personal information to Google; thus, "[a]nyone can freely search Google Books and preview up to 20% of most books without logging into Google."[23] With the institutional subscription, "users will be authenticated either using the student's or the institution's [Internet Protocol] address, or using other methods such as Shiboleth -- a technology that lets Google confirm that a user is part of a subscribing institution without knowing who that user is."[24] Likewise, for the free Public Access Service terminals in public libraries, "authentication will be based upon IP and Google will not have information about the individual user."[25] Accordingly, unless a user "chooses to log in to use a Google account, [Google] will not have any information that would uniquely identify them when they access Google Books from a public access terminal in a public library."[26]

The Library Associations welcome the issuance of the FAQ as a positive first step towards Google explaining how it will treat user privacy. At the same time, the FAQ is no substitute for a detailed privacy policy. While the Library Associations agree with Google that "it's very difficult (if not impossible) to draft a detailed privacy policy" before a service is designed and built, Google already is in a position to make more

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

specific and enforceable commitments than those in the FAQ. Many of Google Book Search's privacy features do not turn on detailed engineering and design decisions.

The Center for Democracy and Technology has issued a paper listing many such important privacy features.[27] At this time, Google could make commitments concerning: the posting of a dedicated Google Book Search privacy policy; limiting collection of usage data; having institutional subscribers authenticate their own users; limiting use of users' book annotation; providing users with access to account data; allowing users to delete purchase histories and annotations; seeking a probable cause standard for disclosure of user data to the government and a compelling-interest standard for civil litigant access to user data; releasing aggregate information about requests for user data; disclosing only aggregate data to the Registry; retaining identifying data no longer than necessary; and securing user data. Privacy protections should be addressed before product design is completed so that privacy decisions guide product design, rather than the opposite.

The Library Associations hope that Google, prior to the fairness hearing, will issue a more specific and enforceable statement concerning the privacy measures it intends to take. For example, Google should state explicitly the conditions under which it would disclose an individual's reading history to government entities – an issue the FAQ does not address. If this Court approves the Settlement, Google should continue to consult on privacy issues with the Library Associations and other representatives of user interests as it refines its offerings under the Settlement. When Google completes designing and building these services, it must disclose a detailed privacy policy.

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[27] Center for Democracy and Technology, *Privacy Recommendations for the Google Book Settlement*, July 27, 2009, http://cdt.org/copyright/20090727_GoogleRecs.pdf.

Thereafter, users must have the ability to request this Court to require Google to comply with this privacy policy, as well as Google's previous commitments concerning privacy.

V. Diversity on the Registry Board

In their May 4 comments, the Library Associations argued that many class members, such as the Library Associations themselves, "will not want the Registry to maximize its profits; rather, they will want the Registry to maximize public access to books."[28] To ensure that the Registry's board reflects this diversity of perspectives, the Library Associations stated that "[a]ny class member must have the ability to request this Court to review the procedures by which the Registry selects members of its board of directors, and to evaluate whether the Registry properly considers the interests of all class members in its decision-making."[29]

Google is building its institutional subscription database (ISD) by scanning books found in the collections of major research libraries. The ISD, therefore, will reflect the nature of the research libraries' collections. The collections of research libraries are fundamentally different from the collection of a typical public library or the types of books sold in bookstores. Research libraries contain primarily scholarly books. Research libraries acquire popular books only if they are of scholarly interest. Thus, of the 45,429 titles a major distributor sold to research libraries in North America between July 1, 2007 and June 30, 2008, the distributor categorized only 1,572 as "popular:" "a work intended for a public library or a browsing collection."[30] The distributor labeled none of these

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[28] Library Association Comments at 18.
[29] *Id.* at 20.
[30] *See* Blackwell, North American Approval Coverage and Cost Study, http://www.blackwell.com/librarian_resources/coverage_and_cost.

45,429 titles as "geared toward a wide readership," and classified 32,009 titles as aimed at "specialists:" "those who have a familiarity with the subject matter and knowledge of the conventions of the field." Similarly, 12,297 of these titles were published by university or other non-profit publishers. While these books are all in print, the proportions likely are similar for the older, out-of-print books in the research libraries' collections. That is, probably less than 10% of the books are of a popular nature, and more than 25% of the books were published by university or other non-profit publishers.

The precise composition of the ISD cannot be determined until after Google has completed its scanning and those rightsholders who do no not want Google to distribute their books have removed their books from under the Settlement. Nevertheless, based on the composition of the collections of research libraries, it is safe to assume that a very large percentage of the books in the ISD – probably an overwhelming majority – were written by scholars and specialists for other scholars and specialists. It is further safe to assume that these scholars and specialists are more interested in the broad availability of their out-of-print books, and their increased access to the out-of-print books of other scholars and specialists, than in maximizing their royalties from Google Book Search. In other words, these class members would want the price of the institutional subscription set well below the profit maximizing point. Indeed, they might want the price of the institutional subscription just to cover the operating costs of the institutional subscription service.

In public fora since May 4, representatives of the Authors Guild have stated that the Registry will have advisory committees, which will provide various stakeholders such as libraries and scholars with a mechanism for expressing their views to the Registry's

board and management. Advisory committees, however, simply are not an adequate substitute for actual representation of scholarly rightsholders on the Registry board. The board will set Registry policy on a wide range of issues, particularly the pricing of the institutional subscription, and the perspectives of the rightsholders of the majority of the books in the ISD must be reflected on the board itself. Accordingly, the Library Associations' earlier request that this Court oversee the Registry's selection of board members remains unchanged.[31]

VI. Communication with the Antitrust Division

On July 29, 2009, the Library Associations sent William F. Cavanaugh, Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice, a letter to follow-up on a meeting the Library Associations had with Antitrust Division staff on May 27, 2009. The letter stated that the Division should join the Library Associations in urging this Court to supervise the Settlement closely, particularly with respect to the pricing of the institutional subscription and the composition of the Registry board of directors.

Furthermore, the Library Associations urged the Division to take a proactive role in the implementation of the Settlement:

> During our meeting, we mentioned that the settlement agreement was in essence a "*de facto* consent decree." We now believe that the Division should treat the settlement, if approved, as a consent decree to an antitrust action it brought. It should monitor the parties' compliance with the settlement's provisions as it would monitor the conduct of parties under an antitrust consent decree, and it should request the court to take action

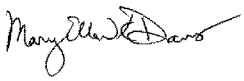
[31] The Library Associations believe that there would be a diversity of rightsholder interests with respect to Registry policy if the Settlement were approved. Nonetheless, class certification is appropriate because the requirements of Rule 23(a) and (b) have been met.

> when it concludes that the parties have not met their obligations under the settlement.
>
> In particular, the Division should ask the court to review the pricing of an institutional subscription if the Division concludes that the price does not meet the economic objectives set forth in the settlement, *i.e.*, "(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education." Settlement Agreement at 4.1(a)(i). To assist the Division in evaluating the price of the institutional subscription, the Division should have access to all relevant price information from Google and the Registry.
>
> The Division should also request the court to review any refusal by the Registry to license copyrights on books on the same terms available to Google. Finally, if necessary, the Division should ask the court to review the procedures by which the Registry selects members to its board of directors, and to evaluate whether the Registry properly considers the interest of all rightsholders in its decision-making.
>
> [...]Additionally, the Division should ask the court, in its order approving the settlement, to confirm the Division's standing to request the court to enforce the settlement's provisions.

VII. Conclusion

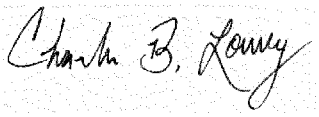
The likely demand among academic libraries for an institutional subscription is high; faculty and students performing serious research will insist on the ability to search and read the full text of out-of-print books. This means that libraries probably will be among the primary fee-paying users of the services enabled by the Settlement. Accordingly, this Court should pay special attention to the perspectives of libraries on the approval and implementation of the Settlement.

Respectfully submitted,



Mary Ellen K. Davis
Executive Director
Association of College and Research Libraries
50 East Huron Street
Chicago, IL 60611
(312) 280-3248
mdavis@ala.org

Keith Michael Fiels
Executive Director
American Library Association
50 East Huron Street
Chicago, IL 60611
(312) 280-1392
kfiels@ala.org



Charles B. Lowry
Executive Director
Association of Research Libraries
21 Dupont Circle NW, Suite 800
Washington, D.C. 20006
(202) 296-2296
clowry@arl.org

September 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2009, I caused true and correct copies of the foregoing comments to be delivered by overnight courier to the Clerk for the U.S. District Court for the Southern District of New York and to be served electronically on the following counsel of record:

Michael J. Boni, Esq.
Joanne Zack, Esq.
Joshua Snyder, Esq.
Boni & Zack LLC
15 St. Asaphs Road
Bala Cynwyd, PA 19004
bookclaims@bonizack.com

Jeffrey P. Cunard, Esq.
Bruce P. Keller, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
bookclaims@debevoise.com

Daralyn J. Durie, Esq.
David J. Silbert, Esq.
Joseph C. Gratz, Esq.
Keker & Van Nest LLP
710 Sansome Street
San Francisco, CA 94111
bookclaims@kvn.com

Jonathan Band
21 Dupont Circle NW, Suite 800
Washington, D.C. 20006
(202) 296-5675
jband@policybandwidth.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

The Authors Guild, Inc., Association of American Publishers, Inc., et al.,	
Plaintiffs,	
v.	Case No. 05 CV 8136-DC
Google Inc.,	
Defendant.	

LIBRARY ASSOCIATION COMMENTS ON THE PROPOSED SETTLEMENT

I. Description of Class Members and Introduction.

The American Library Association (ALA) is a nonprofit professional organization of more than 67,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of College and Research Libraries (ACRL), the largest division of the ALA, is a professional association of academic and research librarians and other interested individuals. It is dedicated to enhancing the ability of academic library and information professionals to serve the information needs of the higher education community and to improve learning, teaching, and research.

The Association of Research Libraries (ARL) is a nonprofit organization of 123 research libraries in North America. ARL's members include university, public, governmental, and national libraries. ARL influences the changing environment of

scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

Collectively, these three library associations (the Library Associations) represent over 139,000 libraries in the United States employing over 350,000 librarians and other personnel. The Library Associations are both authors and publishers of books, and thus fall within both sub-classes of plaintiffs.

The Library Associations do not oppose approval of the Settlement. The Settlement has the potential to provide unprecedented public access to a digital library containing millions of books. Thus, the Settlement could advance the core mission of the Library Associations and their members: providing patrons with access to information in all forms, including books. However, the digital library enabled by the Settlement will be under the control of Google and the Book Rights Registry. Moreover, the cost of creating such a library and Google's significant lead time advantage suggest that no other entity will create a competing digital library for the foreseeable future.

The Settlement, therefore, will likely have a significant and lasting impact on libraries and the public, including authors and publishers. But in the absence of competition for the services enabled by the Settlement, this impact may not be entirely positive. The Settlement could compromise fundamental library values such as equity of access to information, patron privacy, and intellectual freedom. In order to mitigate the possible negative effects the Settlement may have on libraries and the public at large, the Library Associations request that this Court vigorously exercise its jurisdiction over the interpretation and implementation of the Settlement. Indeed, in its order approving the Settlement, the Court should make clear that it intends to oversee the Settlement closely.

Below, the Library Associations explain their concerns with the Settlement, and how the Court's oversight can ameliorate those concerns.

II. The Settlement Creates An Essential Facility With Concentrated Control.

The Settlement allows Google to offer services that appear to further the mission of libraries by providing people in the United States with unprecedented online access to books. At no cost, and from the convenience of her home, school, or workplace, a Google user will be able to search millions of books for responsive terms. Depending on the nature of the book, the user will see up to fifteen continuous pages each time the term appears, and up to 20% of the entire book.[1] The Settlement also allows Google to sell to consumers perpetual online access to the full text of individual books, with at least 80% priced below $10 for an initial period.[2] Additionally, the Settlement permits Google to offer institutional subscriptions, which would provide authorized users within an institution full text access to millions of books.[3]

The institutional subscription is the feature of the Settlement most relevant to the broad range of libraries. College and research libraries, for example, are a target market for the institutional subscriptions because faculty and students performing serious research are among the largest and most likely populations to demand the ability to search and read the full text of not commercially available books.[4]

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[1] Settlement Agreement at § 4.3(b)(i)(1).
[2] *Id.* at § 4.2(c).
[3] *Id.* at § 4.1.
[4] Google is obtaining the copyrighted books that it is scanning from major U.S. research libraries, and these collections were originally assembled to support the teaching and research missions of affiliated institutions of higher education. This underscores the probable high demand at academic libraries for institutional subscriptions. Additionally, this emphasizes that Google will be able to offer the service permitted by the Settlement

In the extensive discussion about the Settlement since it was announced, many observers have noted possible deficiencies with the institutional subscription database (ISD), the set of books available through the institutional subscription. Because the Settlement allows the rightsholder of a work contained within another rightholder's book to exercise his rights under the Settlement independently, a book in the ISD may lack important parts of the printed book.[5] A book in the ISD might be missing an essay, poem, short story, foreword, chart or table that appears in the printed version. Similarly, because the Settlement does not apply to pictorial works, Google will black out photographs and illustrations with a different rightsholder from the book's rightsholder.

Moreover, a rightsholder can remove a book from Google Book Search, or exclude it from the ISD.[6] Likewise, Google is obligated to include in the ISD only 85% of the books it scans into the ISD.[7] Thus, the ISD will not include a complete set of in-copyright, not commercially available works.[8]

Notwithstanding these deficiencies in the ISD, an institutional subscription will provide an authorized user with online access to the full text of as many as 20 million books. Students and faculty members at higher education institutions with institutional subscriptions will be able to access the ISD from any computer -- from home, a dorm room, or an office. Accordingly, it is possible that faculty and students at institutions of higher education will come to view the institutional subscription as an indispensable

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only because research libraries have invested significant resources in preserving out of print books.

[5] Settlement Agreement at § 3.5(b)(i).

[6] *Id.* at § 3.5.

[7] *Id.* at § 7.2(e)(i).

[8] Under the Settlement's default rule for commercially available books, Google cannot include them in the ISD unless their rightsholders permit Google to do so.

research tool. They might insist that their institution's library purchase such a subscription. The institution's administration might also insist that the library purchase an institutional subscription so that the institution can remain competitive with other institutions of higher education in terms of the recruitment and retention of faculty and students.

The settlement of copyright class action litigation might well have been the only feasible way this research tool could have been created. A class action settlement provided perhaps the most efficient mechanism for cutting the Gordian knot of the huge transactions costs of clearing the rights of millions of works whose ownership often is obscure.[9] However, the class representatives and Google structured the Settlement in such a manner as to give them enormous control over this essential facility.[10] This is not surprising, given their economic interests. Indeed, precisely because of their economic interests, it is unlikely that they would have agreed to a structure that did not grant them such control.

To be sure, nothing in the Settlement prevents another entity from undertaking a mass digitization effort similar to Google's. But given the enormous cost of such an effort, and Google's significant lead time advantage (Google has been digitizing in-copyright books since 2004), no other entity is likely to so in the near future.[11] Hence,

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[9] Many of these books are "orphan" works – works whose rightsholders cannot be identified or located even after a diligent search by a potential user.

[10] Technically, there are two related essential facilities: Google's ISD and the block of copyrights managed by the Registry. The Registry enables the creation of the ISD by licensing the copyrights to Google.

[11] In theory, another entity could embark on a library project like Google's, precipitating a class action that could be settled on terms like this Settlement. Alternatively, Congress could enact a compulsory license, and appropriate funding to a consortium of libraries to launch a mass digitization undertaking. Neither of these are scenarios are likely. If

there is no foreseeable threat to the control Google and the Registry have over this essential research facility.

It is entirely possible that the Registry and Google will not abuse their control over the market for institutional subscriptions. In fact, the differing business models of Google and the Registry suggest that the two might exist in competitive tension with one another. However, as likely consumers of this essential research facility, the Library Associations cannot overlook the possibility that the Registry or Google might abuse the control the Settlement confers upon them. Abuse of this control would threaten fundamental library values of access, equity, privacy, and intellectual freedom.[12]

III. The Settlement Could Limit Access to the ISD.

The institutional subscription could evolve into an essential research facility, but in the absence of any meaningful competition, the Registry and Google can set the price of the subscription at a profit maximizing point beyond the reach of many libraries.

The Settlement establishes detailed procedures by which Google and the Registry will set the price for institutional subscriptions. The Settlement provides that the economic terms for the institutional subscriptions will be governed by two objectives: "(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education."[13] Moreover, "Plaintiffs and Google view

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Google continues on its current path with the Library Project, other entities will have little incentive to enter the market so far behind Google. And if Google abandons the Library Project, other entities will question the economic viability of such an endeavor.

[12] Although some of the libraries partnering with Google in the Library Project participated in some of the Settlement discussions, this handful of libraries did not represent that larger the library community.

[13] Settlement Agreement at § 4.1(a)(i).

these two objectives as compatible, and agree that these objectives will help assure both long-term revenue to the Rightsholders and accessibility of the Books to the public."[14]

The Settlement also contains "parameters" Google and the Registry will use to determine the price of institutional subscriptions: the pricing of similar products and services available from third parties; the scope of the books available in the ISD; the quality of the scan; and the features offered as part of the subscription.[15]

Pricing will be based on the number of full-time equivalent (FTE) users.[16] The FTE pricing can vary across different categories of institutions. These categories include: (1) corporate; (2) higher education institutions; (3) K-12 schools; (4) government; and (5) public libraries. Lower prices can be charged for discipline-based subsets of the ISD.[17]

Google has the responsibility for proposing an initial pricing strategy consistent with the objectives outlined above that will include target retail prices for each class of institution for access to the entire ISD and the discipline-based collections. Prices in the initial pricing strategy period will be based on "then-current prices for comparable products and services, surveys of potential subscribers, and other methods for collecting data and market assessment."[18] Google will collect data comparing the target retail prices with the prices for comparable products and services, and will provide this data to the Registry. After Google submits the initial pricing strategy to the Registry, Google and

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[14] *Id.*
[15] *Id.* at § 4.1(a)(ii).
[16] For higher education institutions, FTE means full-time equivalent students. *Id.* at § 4.1(a)(iii).
[17] *Id.* at § 4.1(a)(v).
[18] *Id.* at § 4.1(a)(vii).

the Registry will negotiate its terms for up to 180 days. If Google and the Registry do not reach agreement, the dispute will be submitted to binding arbitration.[19]

The Library Associations appreciate that the Settlement identifies "broad access to the Books by the public, including institutions of higher education" as one of the two objectives of the economic terms for the institutional subscription. Moreover, Google's current business model, based on advertising revenue, suggests that Google will have the incentive to negotiate vigorously with the Registry to set the price of the institutional subscription as low as possible to maximize the number of authorized users with access to the ISD. Nonetheless, Google's business model, at least with respect to the institutional subscription, may change, and at some point in the future it may seek a profit maximizing price structure that has the effect of reducing access.

Significantly, the predominant model for pricing of scientific, technical, and medical journals in the online environment has been based on low volume and high prices. Major commercial publishers have been content with strategies that maximize profits by selling subscriptions to few customers at high cost. Typically these customers are academic and research libraries. Therefore, the Registry and Google may seek to emulate this strategy in the market for institutional subscriptions.

The Settlement's provisions concerning the pricing of the institutional subscription contain several other troubling features that increase the likelihood of this outcome. First, the Settlement states that the price of the institutional subscription will be based in part on the prices of "comparable products and services…." Although there are no comparable products or services to an online database of in-copyright, not

[19] *Id.* at § 4.1(a)(vi)(4).

commercially available books, the Registry or the arbitrators might erroneously treat online journals as comparable products. In this event, the institutional subscription would become cost prohibitive for most libraries. The annual subscription for some scientific, technical, and medical journals can exceed $20,000 per journal. A university library spends an average total of $ 4.3 million a year for online journal subscriptions.[20] If journal subscriptions are "comparable" to the institutional subscription, and a library pays $ 4.3 million for access to 31,000 journals,[21] one can only imagine the price the Registry might insist upon for a subscription to millions of books.

Second, the Settlement provides for a dispute resolution mechanism with respect to the pricing of the institutional subscription only to Google and the Registry. The Settlement does not explicitly set forth a process by which a library or other potential purchaser of an institutional subscription can challenge whether the pricing of this essential facility created by the Settlement meets the objective of "broad access to the Books by the public."

IV. The Settlement Will Heighten Inequalities Among Libraries.

The "digital divide" in this country is already too deep, and the pricing of the institutional subscriptions could make it even deeper. In the absence of the price discipline afforded by competition, only those higher education institutions with the greatest resources would be able to afford an institutional subscription without dramatically cutting other library services.

Compounding this inequity is the differential pricing the Settlement allows for different categories of institutions. While this price discrimination could promote

[20] Association of Research Libraries, *ARL Statistics 2006-2007* 50-51 (2008).
[21] *Id.* at 31.

economic efficiency by setting the price at the point that meets the demand within that category, it could lead to bizarre results from a societal perspective. Google will conduct surveys among potential subscribers,[22] and might learn that the higher education institutions have a much stronger demand for institutional subscriptions than K-12 schools. The low demand for institutional subscriptions at K-12 schools might cause the price of an institutional subscription for that category to fall so low that many K-12 schools could afford to purchase the subscription. Meanwhile, higher education institutions in the same communities might not have the resources to pay the higher demand-driven prices charged to that category.

Similarly, the public access service terminals that provide free access to the ISD could exacerbate inequalities. A single public access service terminal may satisfy the needs of a lightly trafficked branch of a public library system. But a single terminal would be insufficient for colleges and most library branches. If those colleges and libraries could not afford the institutional subscription, their users would be worse off than the patrons of the lightly trafficked branch.

To be clear, the Library Associations are not objecting to Google's offer to provide free public access service terminals. Rather, we are pointing out the disparities in access that might emerge if institutional subscriptions are too expensive.[23]

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[22] *Id.* at § 4.1(vii).

[23] The Settlement heightens inequalities among libraries in other ways. It makes a free public access service terminal available at public libraries and higher education institutions, but not K-12 libraries. *Id.* at § 4.8(a)(i). Additionally, remote access to the ISD without special Registry approval is available only to higher education institutions, not other categories of institutional subscribers, including public libraries. *Id.* at § 4.1(a)(iv). Finally, 83% of public libraries do not have sufficient terminals to meet existing needs; they certainly will not have enough terminals to access the ISD effectively, either through an institutional subscription or the public access service. *See*

V. The Settlement Does Not Protect User Privacy.

Privacy is one of libraries' core values; libraries do not monitor the reading habits of their patrons. Indeed, 48 states and the District of Columbia have statutes that protect library records from undue intrusion at the expense of privacy, requiring in general a subpoena before a publicly funded library can disclose records with personally identifiable information.[24] The Settlement, by contrast, does not specify how Google and the Registry will protect user privacy. Because Google will provide consumers who have purchased a book with perpetual online access to the book,[25] it must keep records to ensure that the consumer's access persists over time, particularly as the consumer uses different computers to access the book. But the Settlement is silent concerning what information Google will retain concerning the consumer, how it will use the information, and what measures it will take to protect the information's security.

The Settlement also contains few details about user information in the institutional subscription context. Because only authorized users will be able to access the ISD, Google may have the ability to determine which user is accessing which book in the ISD. Moreover, the Settlement states that when a user prints out pages of a book in the ISD, Google will include a visible watermark which displays encrypted session identifying information "which could be used to identify the authorized user that printed the material or the access point from which the material was printed."[26] Here, too, the

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Denise M. Davis, et al., *Libraries Connect Communities: Public Library Funding & Technology Access Study 2007-2008* 29 (2008).
[24] *See* http://www.library.cmu.edu/People/neuhaus/state_laws.html.
[25] Settlement Agreement at § 4.2.
[26] *Id.* at § 4.1(d).

Settlement does not indicate whether Google will retain this information, how it will use the information, and what measures it will take to protect the information's security.[27]

The Settlement's silence concerning user privacy stands in stark contrast to its detail with respect to the measures Google and fully participating libraries[28] must take to protect the security of their digital copies of books. Google and fully participating libraries must develop a security implementation plan that meets the requirements of the Security Standard set forth in an attachment to the Settlement Agreement.[29] The seventeen-page Security Standard addresses topics such as: (1) security management, including security awareness, designation of a security representative, and incident response; (2) identification and authentication, including user identification and authentication, and authentication and password management; (3) access controls, including account management, access approval process, and access control supervision; (4) audit and accountability, including logging and audit requirements, marking of image files, and forensic analysis; (5) network security, including electronic perimeter, network firewall, device hardening, network security testing, remote network accessing, and encryption of digitized files; (6) media protection, including media access, media inventory, media storage, and media sanitization and disposal; (7) physical and

[27] Likewise, the Settlement says nothing about user privacy in the public access service context.
[28] Fully participating libraries are libraries that will provide Google with in-copyright books to scan in exchange for a receiving from Google a digital copy of each book the library provides. A fully participating library must sign an agreement with the Registry that releases the library from copyright infringement liability for participating in the Library Project and that restricts what the library can do with the digital copies it receives from Google. Settlement Agreement at § 1.58.
[29] *Id.* at § 8.2(a).

environmental protection, including physical access authorizations, physical access control, visitor control, and access records; and (8) risk assessment.[30]

Google and the fully participating libraries must submit their security implementation plans to the Registry for approval. If Google or the fully participating library and the Registry cannot resolve disagreements as to whether the security implementation plan complies with the Security Standard, the parties must submit the disputes to binding arbitration.[31] Google and the fully participating libraries must permit a third party to conduct an annual audit of their security and usage to verify compliance with their security implementation plan.[32] Upon learning of a prohibited or unauthorized access to the digital copies, Google and the fully participating library must notify the Registry of the breach and attempt to cure it, *e.g.*, block the unauthorized access.[33] The Settlement establishes a detailed schedule of monetary remedies up to $5 million, depending on the harm caused by the breach of the security plan, the recklessness or willfulness of the breaching conduct, the promptness of the cure, and the number of breaches with the same root cause.[34]

Evidently, in the Settlement negotiations the class representatives insisted on these measures to protect the security of digital copies of their books; but no one demanded protection of user privacy. Users of the services enabled by the Settlement also cannot rely on competitive forces to preserve their privacy. In the online environment, competition is perhaps the most powerful force that can help to insure user

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[30] *See* Attachment D to Settlement Agreement.
[31] Settlement Agreement at § 8.2(a)(iv).
[32] *Id.* at § 8.2(c).
[33] *Id.* at § 8.3.
[34] *Id.* at §§ 8.4-8.7.

privacy. If a user does not like one search engine firm's privacy policy, he can switch to another search engine. Similarly, a user has many choices among online retailers, email providers, social networks, and Internet access providers. The competitive pressure often forces at least a minimal level of privacy protection.[35] However, with the services enabled by the Settlement, there will be no competitive pressure protecting user privacy.

In response to concerns raised by libraries and others, Google has stated that it will take appropriate measures to protect user privacy. The Library Associations expect Google, in consultation with the Library Associations and other representatives of user interests, to meet this commitment. Google and the Registry should develop strong policies to protect personally identifiable information, and provide users with clear notice describing those policies.

VI. The Settlement Could Limit Intellectual Freedom.

The absence of privacy protection discussed in the previous section could have a chilling effect on a user's right to read because the user might fear the third party monitoring of his or her lines of inquiry. But the Settlement could stifle intellectual freedom in another way as well. The Settlement requires Google to provide free search (including the permitted previews), the public access service, and institutional subscriptions for only 85% of the in-copyright, not commercially available books it has scanned.[36] This requirement in effect allows Google to exclude over a million books

[35] To be sure, there are switching costs, and many service providers have adopted a "lowest common denominator" approach to user privacy.

[36] If Google fails to meet this requirement within five years of the Settlement's effective date, the participating libraries and the Registry may engage a third party to provide these services, using the digital copies Google provided to the libraries. Settlement Agreement at § 7.2(e)(i). This provision is intended to force Google to roll out the services under the Settlement in a timely manner.

from the ISD. While Google on its own might not choose to exclude books, it probably will find itself under pressure from state and local governments or interest groups to censor books that discuss topics such as alternative lifestyles or evolution. After all, the Library Project will allow minors to access up to 20% of the text of millions of books from the computers in their bedrooms and to read the full text of these books from the public access terminals in their libraries. Although public libraries have often contended with demands to eliminate or restrict access to specific books, any collection management decision by a particular librarian affected only that community. Here, by contrast, if Google bends to political pressure to remove a book, it will suppress access to the book throughout the entire country.

Similarly, foreign governments probably will attempt to coerce Google to exclude books the governments consider embarrassing or threatening. On numerous occasions, foreign governments have pressured Google and other search engine firms to remove links to websites to which the governments objected. For example, China has demanded the removal of links to sites promoting free speech and civil liberties in Tibet; Thailand has required the removal of websites critical of the King of Thailand; and Turkey has requested the removal of sites that discuss the Armenian genocide. It is safe to assume that these governments might attempt to pressure Google to exclude politically offensive books from the ISD.[37] To preempt anticipated complaints, Google might err on the side of caution and proactively suppress entire categories of books. This, in turn, could

[37] Even though Google may provide access to the services permitted under the Settlement only to users in the United States, users in other countries can employ technologies to deceive Google's servers concerning their location. Thus, foreign governments would seek to eliminate certain books from the ISD to prevent their citizens from reading them.

deprive students, scholars, journalists and policymakers of access to historically significant materials.[38]

The Settlement also may not sufficiently safeguard intellectual freedom with respect to the Research Corpus. The Settlement allows Google and two institutions to host the set of all digital copies made by Google in the Library Project for purposes of "non-consumptive research" by "qualified users." Non-consumptive research involves computational analysis of the books, and does not include research relating to the intellectual content of the books. The host site has the authority to determine whether a person meets the criteria for a qualified user, and whether her research meets the standards for non-consumptive research.[39] However, the Settlement does not provide a mechanism for a researcher to challenge a host site's rejection of her qualifications or her proposed research agenda. Thus, the host sites could privilege particular lines of inquiry while hampering others, thereby shaping the direction of scholarly research in certain disciplines.

VII. The Settlement Could Frustrate the Development of Innovative Services.

The Settlement specifically provides that the Registry will have the power, "to the extent permitted by law, [to] license Rightsholder's U.S. copyrights to third parties."[40] This provision permits the Registry to license parties other than Google to provide

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[38] The Library Associations recognize that it is not a search engine firm's responsibility to uphold the First Amendment, particularly when its employees are threatened with imprisonment by oppressive regimes. The U.S. government should play a much more vigorous role promoting free speech internationally. In particular, the U.S. government should aggressively support U.S. search engines against foreign governmental pressure, and communicate unambiguously that it will not tolerate any attempts to intimidate search engine firms into censoring politically sensitive material.
[39] *Id.* at § 7.2(d)(xi).
[40] *Id.* at § 6.2(b)(iii).

services relating to books. However, as a practical matter, the Registry can grant licenses only with respect to rightsholders that register with it and grant it the authority to act as their agent with respect to parties other than Google. The class action mechanism cannot bind absent rightsholders with respect to third parties not participating in the Settlement.

Still, this provision could permit the development of competitive and innovative services. For example, if the rightsholders of 1 million books register with the Registry, the Registry would be able to license to Amazon.com the right to sell access to the 1 million books. To be sure, the Registry would not be able to license to Amazon the rights to the other 20+ million books that would be in Google's ISD.[41] Still, Amazon in one agreement with the Registry would be able to increase by 500% the titles available through the Kindle.[42] Moreover, it is possible that these 1 million titles would include many of the most useful books to researchers, because their rightsholders are the most likely to make the effort to register with the Registry. Thus, an institutional subscription to the 1 million books could be valuable to some libraries, and could offer competition to Google's larger ISD.

Although the Settlement permits the Registry to license the rights it possesses to third parties such as Amazon, the Settlement does not require it to do so. Nor does it provide standards to govern the terms by which the Registry would license these rights. This means that the Registry could refuse to license the rights to Google competitors on

[41] Google's ability to use these works could provide it with a significant competitive advantage over other firms.
[42] Currently consumers can purchase 200,000 titles for download onto the Kindle e-book. Under this arrangement, Amazon would still have to digitize the 1 million titles.

terms comparable to those provided to Google under the Settlement.[43] The Registry, therefore, could prevent the development of competitive services.

Likewise, the Registry could inadequately represent the true interests of many class members. The Settlement stipulates that the Author Sub-Class and the Publisher Sub-Class will have equal representation on the Board of Directors, but the Settlement is silent on who will select these board members and how class members can ensure that the Registry will in fact advance their objectives.[44] As noted above, the Library Associations are both authors and publishers of books, and thus fall within both sub-classes of plaintiffs. However, writing and publishing books is ancillary to the core mission of libraries – to provide the public with access to information. Tens of thousands of members of the Author Sub-Class are similarly situated to the Library Associations: teachers at all levels write books not for financial gain, but to support their core missions of education and scholarship. Many, if not most, of these class members care far more about the potential impact of the Settlement on the advancement of knowledge than about the modest license fees they may receive under the Settlement.[45]

In other words, many class members will not want the Registry to maximize its profits; rather, they will want the Registry to maximize public access to books. Additionally, they will want the Registry to provide broad access to all the data the Registry collects concerning copyright ownership, thereby minimizing the orphan works problem. Unfortunately, the Registry's board may not reflect this diversity of perspectives.

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[43] The Settlement contains a "most-favored-nation" clause, but this clause benefits Google, not its competitors. *See* Settlement Agreement at § 3.8(a).
[44] *Id.* at § 6.2(b).
[45] *See* Pamela Samuelson, et al., Letter to the Honorable Denny Chin (April 27, 2009).

VIII. This Court Can Address The Library Associations' Concerns Through Rigorous Oversight of the Implementation of the Settlement.

The concerns discussed above all flow from the concentration of power over the two related essential facilities -- the ISD and the block of copyrights managed by the Registry. Fortunately, the Settlement that created these essential facilities also contains a means of addressing the possible abuses of the control the Registry and Google possess over them. Specifically, the Settlement provides that this Court "shall retain jurisdiction over the interpretation and implementation of the Settlement Agreement."[46] Thus, the parties acknowledge this Court's authority to regulate their conduct under the Settlement. The Library Associations urge the Court to exercise this authority vigorously to ensure the broadest possible public benefit from the services the Settlement enables.

In particular:

- Any library or other possible institutional subscriber must have the ability to request this Court to review the pricing of an institutional subscription. The Court's standard of review should be whether the price meets the economic objectives set forth in the Settlement, *i.e.*, "(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education."[47]

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[46] Settlement Agreement at § 17.23.

[47] *Id.* at § 4.1(a)(i). The proposed Book Rights Registry is similar to two organizations that collectively manage performance rights: the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). Both ASCAP and BMI are subject to consent decrees resolving antitrust actions brought by the U.S. Department of Justice. The ASCAP consent decree has existed, with modifications, since 1941; and the BMI consent decree since 1966. Under the consent decrees, ASCAP and BMI must grant, on a non-discriminatory basis, either a blanket license to their entire catalogue, or a license for the performance of a particular work. A court in this district has continuing jurisdiction over the consent decrees, and has established a rate court to resolve disputes concerning license fees. In proceedings before the rate court, ASCAP and BMI have the burden of proving the reasonableness of the rates they seek. Establishment of a rate court in this case is premature. However, this Court has the authority to adopt the procedures necessary to ensure the fairness of the price of the institutional subscription.

- Any entity must have the ability to request this Court to review the Registry's refusal to license copyrights to books on the same terms available to Google.

- Any class member must have the ability to request this Court to review the procedures by which the Registry selects members of its board of directors, and to evaluate whether the Registry properly considers the interests of all class members in its decision-making.

- Any user must have the ability to request this Court to direct Google to provide the user with a list of books excluded from any of its services for editorial or non-editorial reasons, and an explanation of why it was excluded. Google already must provide the Registry with a list of books excluded for editorial reasons.[48]

- Any researcher must have the ability to request this Court to review the reasonableness of a Research Corpus host site's refusal to allow the researcher to conduct a research project at the host site.

- Any user must have the ability to request this Court to direct Google and the Registry to disclose their policies for collecting, retaining, disseminating, and protecting personally identifiable information. Additionally, any user must have the ability to request this Court to review whether Google and the Registry are complying with their privacy policies.

In these comments, the Library Associations have identified certain foreseeable problems that may require this Court's intervention in the future. The Settlement, however, is potentially so far-reaching that its full implications are unknowable at this time. While the Settlement's impact might be limited to the creation of a research tool of use only to serious scholars, the Settlement might also lead to a restructuring of the publishing industry and a dramatic change to the nature of libraries. The Court should be prepared to exercise whatever oversight is necessary, for as long as necessary, to

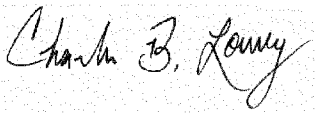
[48] Settlement Agreement at § 3.7(e)(i). The Settlement requires Google and the Registry to compile a variety of databases. *See, e.g., id.* at §§ 3.1(b)(ii), 6.6(c). These databases will have many uses, including assisting in finding the owners of orphan works. Accordingly, Google and the Registry should make these databases publicly available.

maximize the public benefit from the services enabled by the Settlement.

Respectfully submitted,

Mary Ellen K. Davis
Executive Director
Association of College and Research Libraries
50 East Huron Street
Chicago, IL 60611
(312) 280-3248
mdavis@ala.org

Keith Michael Fiels
Executive Director
American Library Association
50 East Huron Street
Chicago, IL 60611
(312) 280-1392
kfiels@ala.org



Charles B. Lowry
Executive Director
Association of Research Libraries
21 Dupont Circle NW, Suite 800
Washington, D.C. 20006
(202) 296-2296
clowry@arl.org

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The Honorable John Conyers, Jr.
Chairman
Committee of the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee of the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

Having fully analyzed the Google Book Search Settlement ("GBS") and considered the arguments of stakeholders who have weighed in on this issue, the Joint Center respectfully submits the following letter to (1) highlight a number of areas and questions for additional consideration regarding potential impacts of the settlement on African Americans and other minority populations and (2) spur a dialogue among stakeholders that ensures that African Americans and other minority populations positively benefit from the proposed settlement.

The Joint Center is one of the nation's leading public policy institutions that focuses on informing and addressing the unique needs of African Americans and other people of color by analyzing key legal, regulatory, and public policy issues impacting these populations. The GBS is of particular interest to the Joint Center because it revolves around one of the most fundamental issues of our time: *access to digital content*. As policymakers and innovators in the private sector consider the GBS and the larger issue of our migration to a fully digital society, they must ensure that all users, regardless of demography, geography or income level, have equal access to vital new content and services. Otherwise, actions intended to promote a digital society and learning environment may have the unintended consequence of furthering the digital divide.

The Google Book Search initiative is admittedly one of the most ambitious efforts to date for making available a body of knowledge that has been largely inaccessible to most people.[1] As such, avoiding consequences that have negative and disparate impacts on African American and other minority communities is of critical importance.

Per the GBS, Google will pursue two interrelated objectives as it moves forward with this project: (1) "the realization of revenue at market rates" for copyright holders; and (2) "the realization of broad access to

[1] One commentator has described the current trend of digitizing books as "arguably the biggest transformation in books since Gutenberg's invention of the printing press." *See* James Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books*, at p. 1, American Constitution Society for Law and Policy (April 2009), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1024&context=james_grimmelmann ("*Future of Books*").

1090 Vermont Avenue, NW, Suite 1100, Washington, D.C. 20005-4928
202-789-3500 • Fax 202-789-6390 • www.jointcenter.org

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[books] by the public."[2] Google will sell access to its library of digital books in a number of ways, including on a per-book basis[3] and via subscriptions to institutions, including public libraries.[4] Since African Americans and other people of color depend on public libraries to access information and other services more than most other populations, provisions in the GBS regarding public library access are of critical importance. The proposed settlement must ensure that the GBS does not unintentionally widen the divide between the digital haves and the digital have-nots by creating policy barriers that prevent public libraries, especially those within lower income minority communities, from reaping the full benefits of the Google service.

* * * *

Recent government data suggests that public libraries are a key institution for the acquisition of knowledge among African Americans and other minority groups. For lower income African Americans, households with children under the age of 18 were more likely to have used a public library in the past month for a school assignment when compared to middle and higher income groups.[5] The same survey also found that black and Hispanic households were more likely than white households to go to the library to use a computer and the Internet.[6] One possible explanation for these higher library usage rates is that minority households, especially African Americans, have lower computer ownership rates[7] and broadband adoption rates[8] than most other households. When considering the issues related to GBS, it will be important to understand how the subscription model for public libraries will impact their ability to purchase these services for use by its patrons, many of whom are people of color.[9]

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[2] Google Book Settlement at § 4.1(a)(i).

[3] *Id.* at § 4.2. According to James Grimmelmann, under the GBS Google will have access to "a truly gigantic backlist: 10 million titles. That will make it the largest bookstore in the world as measured by catalog size, and could well turn into the largest bookstore in the world as measured by sales," *Future of Books* at p. 4.

[4] Google Book Settlement at § 4.2.

[5] *See* American Library Association, Library Fact Sheet No. 6, http://www.ala.org/ala/aboutala/offices/library/libraryfactsheet/alalibraryfactsheet6.cfm (citing an analysis of 2002 data by the National Center for Education Statistics).

[6] *Id.*

[7] According to U.S. Census data from 2005, less than half – 45 percent – of blacks used a computer at home, compared to over 60 percent for both Whites and Asians. *See* U.S. Census Bureau, Computer and Internet Use in the United States: October 2007, Table 4 - Reported Computer and Internet Access for Individuals 15 Years and Older, by Selected Characteristics: 2005, http://www.census.gov/population/socdemo/computer/2007/tab04.xls.

[8] As of April 2009, only 46 percent of African Americans had adopted broadband at home, compared to 65 percent of White non-Hispanics. *See* John Horrigan, *Home Broadband Adoption 2009*, at p. 13, Pew Internet & American Life Project (July 2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/Home-Broadband-Adoption-2009.pdf.

[9] This concern is shared by a number of parties, including the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. In their Amicus Brief to the court regarding the proposed settlement, the libraries worried that "the [GBS] could compromise fundamental library values such as equity of access to information…" *See* Amicus Brief of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries, at p. 2, *available at* http://thepublicindex.org/docs/letters/acrl_ala_arl.pdf ("*ALA Amicus Brief*").

While exact details regarding the pricing of library subscriptions have yet to be determined,[10] the GBS does contain two provisions for potentially addressing some possible inequities. First, Google can provide discounted access to some institutions, including public libraries. Second, Google can also offer free access to its service on one computing terminal per public library.[11] For those groups that rely on the library for Internet access (e.g., school-age minority children), one terminal might be enough, especially for libraries with limited digital resources. And even if a public library could afford multiple subscriptions to Google's service, it is unlikely that there will be enough computer terminals to accommodate this demand.[12] Modifications to the number of public computer terminals should be made to accommodate the increasing demand for access at libraries, especially those that serve lower-income, minority populations.

A thorough analysis of the GBS raises a number of additional questions that the Joint Center would like to highlight and pursue in more detail. These include:

- *Cost Issues.* In addition to the institutional cost issues raised above, will the GBS pricing model for individual users have a disproportionate impact on low-income and minority users in the short- or the long-term?

- *Access Issues.* African Americans access the Internet via wireless connections (e.g., mobile phones) more than any other demographic group.[13] The Google Book Service, however, is optimized for use on traditional computers. Are there plans to modify the service so that it is readily available on mobile phones as well as on computers?

- *Literacy Issues.* The practical value of the Google book service is enormous to all institutions and users. It will make available the full text of roughly 20 million books online.[14] How user-friendly will this service be for library administrators and average users who rely on library staff for assistance. What level of digital literacy is required to effectively use this tool? Are public libraries, particularly those in low-income areas, adequately staffed and equipped to handle the implementation of this new service?

Our society is rapidly adopting digital resources and tools that will improve how citizens live and learn in the 21st century. The challenge, however, is ensuring that all citizens equally progress in their adoption

[10] Per the GBS, pricing will be based on the following parameters: "pricing of similar products and services available from third parties, the scope of Books available, the quality of the scan and the features offered as part of the Institutional Subscription." Google Book Settlement at § 4.1(a)(ii).

[11] Google Book Settlement at § 4.8(a)(i)(3).

[12] A recent study found that 83 percent of public libraries lack sufficient computer terminals to meet existing needs. *See* Denise M. Davis et al., *Libraries Connect to Communities: Public Library Funding & Technology Access Study 2007-2008*, at p. 28 (2008).

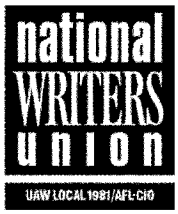
[13] *See* John Horrigan, *Wireless Internet Use*, at p. 32-34, Pew Internet & American Life Project (July 2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/Wireless-Internet-Use.pdf.

[14] *ALA Amicus Brief* at p. 4.

and utilization of new technology. The Joint Center sees value in creating a new ecosystem that changes the way we search and access public content and welcomes the opportunity to further discuss the aforementioned questions in more detail with stakeholders.

Sincerely,

RALPH B. EVERETT
PRESIDENT AND CEO



113 University Place
6th Floor
New York, NY 10003
212-254-0279

The Honorable John Conyers, Jr.
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Lamar Smith
United States House of Representatives
Washington, D.C. 20515

September 9, 2009

Dear Chairman Conyers and Rep. Smith:

As you convene the Competition and Commerce in Digital Books Hearing, I am writing to express the strong opposition of the National Writers Union (UAW Local 1981, AFL-CIO) to the proposed Google Book Settlement as an abuse of the law and grossly unfair to writers.

By scanning and digitally reproducing millions of copyrighted books and articles without permission, Google violated authors' constitutionally protected rights. The Google book-scanning project is one the largest cases of copyright infringement since the United States Constitution was adopted in 1789.

While Google enjoyed a net income of more than $4.5 billion last year, it is offering writers as little as $60 per infringed book and $15 per infringed article. The proposed settlement would give Google a license to reproduce a writer's copyrighted work unless the writer tells Google to remove his or her copyrighted work from the program. This stands copyright law on its head.

The proposed settlement threatens to interfere with the relationship writers have with their publishers. The settlement assumes that writers have assigned electronic rights to publishers and sets up a binding arbitration process to resolve disputes between writers and publishers. The settlement does not allow for writers, who were collectively targeted, to collectively negotiate to settle these disputes.

The Authors Guild does not represent the views of all of its 8,000 members who will be impacted by the settlement, and made no effort to reach out to the like number of authors who are members of other writers' organizations. The National Writers Union, The American Society of Journalists and Authors, the Science Fiction & Fantasy Writers of America, American Independent Writers and numerous individual writers in the U.S., along with many of our fellow writers and writers' organizations around the world, oppose the proposed settlement. This does not even count the tens of thousands of published authors in the U.S. and overseas who do not belong to any authors' organization. As the settlement was entered into before any effort to certify a class, the Authors Guild's ability to represent all affected writers was never demonstrated.

This is not a partisan or ideological issue. Writers, corporations, non-profits and libraries representing a variety of political and ideological viewpoints all agree on one point: The proposed settlement is a bad deal for everyone but Google, the Authors Guild and the large print publishers among whom it was negotiated.

The National Writers Union thanks the Committee for holding this hearing, and we encourage you not to allow this settlement to pre-empt Congressional action to address the urgent need for copyright reform legislation that we have supported and continue to support, that would deal with the issues of writers' rights, "orphan works," and the construction of a digital library under public auspices with fair compensation for the writers whose work would be included in it.

Sincerely,

Larry Goldbetter
President

CC: Judiciary Committee Members

Public Knowledge

September 10, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
2142 Rayburn House Office Building B-351
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

We submit to you for the record the enclosed copy of Public Knowledge's *amicus* brief, filed earlier this week in anticipation of the hearing determining the fairness of the Google Book Search settlement.

While Public Knowledge believes that Google's scanning and indexing of a wide variety of books both in and out of copyright is a valuable, legal, and necessary undertaking, the proposed settlement agreement does a number of things that go beyond the bounds of the litigation at hand and threaten anticompetitive effects in the new market for out-of-print digital books.

Good policy and the law argue against granting any institution holding a monopoly on access to orphan works. If the court finds that Google may legally license the use of all orphan works, it should have the grounds to find that anyone else might have that same legal right. In addition to our concerns with the settlement agreement, we have provided in the brief a few suggestions as to how it might better comport with antitrust and class action law and with a fair copyright policy.

The desire to make books accessible in digital form is a commendable one, and an objective that Public Knowledge shares with the parties to the lawsuit. However, the evidently limited ability of the class action process to create broad copyright policy likely prevents this settlement from achieving that goal.

Respectfully submitted,

/s/

Sherwin Siy
Deputy Legal Director
Public Knowledge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, Associational Plaintiff, and HERBERT MITGANG, BETTY MILES, DANIEL HOFFMAN, PAUL DICKSON, and JOSEPH GOULDEN, Individually and on Behalf of All Others Similarly Situated,	)	Civil Action No. 05-CV-8136
Plaintiffs,	)	
v.	)	
GOOGLE, INC.,	)	
Defendant.	)	

BRIEF OF *AMICUS CURIAE*
PUBLIC KNOWLEDGE
IN OPPOSITION TO THE PROPOSED SETTLEMENT

Jef Pearlman
Sherwin Siy
Public Knowledge
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 518-0020

Sept. 8, 2009

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

I. The settlement as drafted creates antitrust and competition problems in violation of the law and sound policy 4

A. Google will become the sole party able to license orphan books. 5

1. Google's acquisition of a monopoly on orphan works violates Sections 1 and 2 of the Sherman Antitrust Act 6

2. The Book Rights Registry should be subject to antitrust scrutiny. 10

B. The settlement also violates the Sherman Act with regard to non-orphan works 11

1. The opt-out nature of the license unfairly advantages Google in licensing the works of known authors 11

2. The Book Rights Registry should be scrutinized for antitrust violations for claimed works as well. 14

3. The Most Favored Nation clause implicates sections 1 and 2 of the Sherman Antitrust Act 16

i. The MFN clause acts as a contract to restrain trade. 16

ii. The MFN clause serves as an attempt to foreclose competition 18

iii. The prerequisites for triggering the MFN clause do not save it from scrutiny 18

II. A class action settlement is the improper mechanism by which to determine the rights of orphan works authors with regard to a single user. 19

A. The proposed settlement exceeds the scope of a permissible class action release because it releases new, future activities which were not part of the underlying suit. 20

1. Google has never engaged in the unlicensed sale of the full text of books, while the proposed settlement would license that use. 21

2. Class action law does not permit the release of behavior which was not a part of the underlying suit and which has never occurred. 22

3. If the Court concludes that the released claims share the same factual predicate, it should require the release of other potential defendants. 25

B. The provisional plaintiff class can not be certified because orphan authors' interests conflict with named plaintiffs' in violation of F.R.C.P. 23(a)(4). 25

C. The settlement is unnecessary and incompatible with the purpose of class actions. 30

III. The Court should perform additional review before approving a settlement with the above problems. 31

A. The Court should deny class certification and not approve a settlement which distributes the rights of orphan authors to a single party. 31

B. The Court should seek to allow any competitor to license under the same terms as Google. 32

1. Eliminate or alter the MFN clause. 32

2. Allow competitors to obtain licenses to digitize books. 32

C. The Court should consider input from relevant agencies. 33

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 8

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Statutes

15 U.S.C. § 1 6

15 U.S.C. § 2 7

F.R.C.P. 23(a)(4) 26

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U.S. Copyright Office, *Report on Orphan Works*, *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf 5

INTEREST OF *AMICUS CURIAE*

Public Knowledge is a non-profit public interest organization devoted to preserving the free flow of information in the digital age. Through day-to-day policy advocacy, public education, and legal action, Public Knowledge works for a balanced copyright regime that promotes creativity, innovation, competition, and civic discourse, and limits corporate control over the flow of knowledge. Such a regime should ensure that the rights of the artist are protected while providing both artists and users with the most open, competitive artistic marketplace possible.

Among the many copyright issues important to Public Knowledge is the fate of orphan works—works whose copyright holders are unknown or who cannot be found. In such a situation, the work becomes inaccessible for reprinting, adaptation, or other future uses, since the owner is not present to negotiate or grant a license. Despite the owner's absence, potential republishers, adapters, or other users of a work will often decide to let such works lay dormant because of the potential for extensive statutory damages should an owner appear at a later date. Public Knowledge has been involved for years in seeking legislative solutions to this problem, with the goal of enabling broader public access to and use of these works while seeking to find ways for users of orphan works to find their owners.

Google Book Search is an invaluable tool for making knowledge and creative works available to the general public. This service makes it possible for the researchers, readers, and anyone else who is interested to find books on nearly any topic, many of which would have lain dormant in the back of a university library or been otherwise undiscovered by all but the most diligent and resource-endowed researcher. Public Knowledge believes that the uses Google has

made in creating and offering Google Book Search – specifically, the scanning, indexing, and displaying of short excerpts of books – are already lawful, and require no licenses or permission.

While public access to orphan works is a goal towards which *amicus* and the parties all strive, it is necessary that this access be open to all comers on a level playing field. Access through one rights organization governed by non-representative authors and publishers and a single distributor is not truly access at all, and such a solution ultimately benefits neither artists nor the public. Further, because a solution to the problem of orphan works will require changes to the operation of copyright law, those changes must be made by the legislature through a public process involving all stakeholders rather than through a judicial process where both parties stand to gain from licensing the rights of absentees.

The precarious balance of interests involved in debates around orphan works also make it essential that any orphan works solution have a legal basis and integrity that cannot be impugned. Public Knowledge therefore submits this brief in the hope that any settlement will not prejudice a fair and effective solution to the problem of access to orphan works.

INTRODUCTION

Copyright law seeks to strike a balance between the rights of the creators and the rights of users of copyrighted works. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984) (*quoting Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)). The current balance struck by the law likely does not permit commercial entities to digitally display the full text of in-copyright books to the general public without the permission of the rightsholder, even if he or she cannot be found or is unaware of his or her rights. The proposed settlement would constitute an extraordinary shift in this balance for both orphan and non-orphan

books.[1] Should the settlement be approved, books that currently cannot be safely republished or digitally distributed without first acquiring the owner's permission would be made available to both institutions and individual users.

While such a result may benefit the public interest by increasing available access to knowledge, this access will be provided only through a single bottleneck comprising the proposed Book Rights Registry ("BRR") and Google. In essence, the default rules of copyright will be rewritten without the input or consent of Congress, and only for Google and the BRR. The law does not support such an outcome: the mechanism by which the parties currently hope to license the ability to display digitized books exceeds the limits of class action procedure and produces anticompetitive limitations on access to orphan works.

The proposed agreement risks stretching class action procedure too far in its attempt to achieve in a settlement what is impossible in private contract. The settlement's use of class action procedure leads to detrimental, anticompetitive limitations on the availability of orphan works. The sought-after access to orphan works would be provided to the public by only one party, with legal barriers erected against any others attempting to provide access to the public on different terms. Further, the provisional class purports to include members who are defined by their absence and logically defy representation, and the proposed settlement seeks to release liability for future acts not contemplated in the activities leading up to the complaint.

Public Knowledge respectfully requests that the Court not approve the settlement unless its flaws in antitrust effects, class representation, and scope of release can be remedied.

[1] We note that the settlement itself does not specifically reference "orphan works," but divides works only into "claimed" and "unclaimed" categories. Because it is effectively impossible to individually distinguish between rightsholders who are unidentifiable or nonexistent and those who have simply chosen not to participate, the proposed settlement is poised to alter the default rules of copyright for the owners of unclaimed worked as well as true orphans. The arguments presented therefore apply with nearly equal force to those rightsholders.

I. The settlement as drafted creates antitrust and competition problems iu violatiou of the law and sound policy.

This Court should carefully consider the proposed settlement's effects on competition. In approving a settlement, a court must account for the interests of third parties when the settlement will affect their rights. *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1025-26 (2d Cir. 1992) ("[w]here the rights of third parties are affected, . . . their interests too must be considered" during the court's evaluation of "the fairness, reasonableness and adequacy of the settlement[.]"); *quoted in In re Worldcom, Inc. ERISA Litig.*, 339 F. Supp. 2d 561, 567 (S.D.N.Y. 2004). In addition the litigants' interests, the interests of potential competitors, the public at large, and other third parties will be affected by this proposed settlement. If the proposed settlement goes forward, Google will in many cases receive preferential, if not sole, access to licenses for the books of both known and orphan authors, with potentially harmful effects on consumers and competitors. These effects may lead to violations of the Sherman Antitrust Act, requiring the Court to reject the settlement as proposed. *See, e.g., Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("a court cannot lend its approval to any contract or agreement that violates the antitrust laws."); *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 319 (D. Md. 1979) ("no court may lend its approval to an illegal agreement or to one which has an illegal effect."). However, the Court's analysis of competitive effects does not start or end with the letter of that law. The Court's obligations are not merely to prevent explicitly illegal acts in the settlement of a lawsuit, but also to protect the public interest from other harms.

A. Google will become the sole party able to license orphan books.

Orphan works simply cannot be licensed due to the absence of their copyright owners. In this settlement, however, Google proposes to incorporate all registered orphan books into its licensing scheme absent any ability of the absent authors to say otherwise.

As a sub-class of the proposed plaintiff class, orphan rightsholders occupy a distinct legal position. Although some works may become "un-orphaned" as rightsholders emerge, works are not considered orphaned just because their rightsholders fail to find out about their usage, nor simply because rightsholders lack a meager financial incentive to identify themselves. Instead, many rightsholders are unfindable because they *do not know* that they are the proper holders of the rights. There are a number of reasons that a work might be orphaned: a deceased author's beneficiaries may not have been properly notified that they had an ownership interest in a work, or even be aware that a deceased author had created a work; the copyright owner may not have updated the registration; transfer of ownership may not have been properly recorded; or the author may have died without heirs, reverting the copyright to the state. *See* U.S. Copyright Office, *Report on Orphan Works* 21-29, *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

Nor will the BRR or active rightsholders have much of an incentive to alter this state of affairs. Since unclaimed funds for orphan works will, after a time, be distributed among registered rightsholders or used to pay BRR expenses, neither the BRR nor the registered rightsholders will have a financial incentive to encourage orphans to emerge. *See Proposed Settlement* § 6.3(a).

This selective licensing of the orphan authors' rights goes far beyond the standard power of a class action suit to waive the claims of non-present parties. As discussed below, orphan rightsholders are not adequately represented by class counsel or named plaintiffs, and the claims

that absent rightsholders might have against Google for scanning works stem from a different factual predicate than any claims they might have for Google making their works available online. While courts reviewing class action suits and settlements may make certain determinations regarding parties not before the court, the procedural requirements and safeguards surrounding the process prevent the court from usurping the powers of the legislature. Yet the proposed settlement shifts significant issues of copyright policy from the legislative process into this particular lawsuit, deciding that a smaller set of exclusive rights will be granted to the authors of certain books unless they take affirmative action. Those who do not so act (or who cannot act) are compelled to grant a license for the use of their works.

One of the consequences of this is that the landscape of copyright changes, but only for Google and for the BRR. This results in a market for orphan works that becomes the sole province of these two entities. Anyone wishing to enter that market would have to risk extensive copyright liability of a sort no one – including the defendant – ever has. The competitive issues surrounding the parties' ability to use orphan works must therefore be examined closely.

1. Google's acquisition of a monopoly on orphan works violates Sections 1 and 2 of the Sherman Antitrust Act

The settlement agreement constitutes a contract that grants Google the sole right to license orphan (and otherwise unclaimed) works. This agreement thus operates alongside copyright law to restrain trade and maintain Google's monopoly position unfairly, in violation of Sections 1 and 2 of the Sherman Act, respectively.

Section 1 of the Sherman Act prohibits "every contract, combination...or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This requires both the existence of a contract, combination, or conspiracy, and a resulting restraint of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60 (1911).

Section 2 prohibits monopolization and any attempts to monopolize. 15 U.S.C. § 2. Violations of Section 2 require a finding of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 480 (1992) (*quoting United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966)). While Section 2 thus allows for monopolies to exist, exclusionary behavior on the part of the monopolist is prohibited. Exclusionary behavior has been defined as "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (*quoting* 3 P. Areeda & D. Turner, Antitrust Law 78 (1978)).

Since no party other than Google can license the use of orphan works, Google will have an absolute monopoly on selling access to these works. The agreement prevents Google from licensing to others the use of any of the scanned works (*Proposed Settlement* § 2.2), and unless the agreement allows the BRR to license orphan works to other parties, this means no other entity has the legal ability to display or distribute orphan works.While the number of orphan books at stake may be debated,[2] it remains true that for every single work orphaned, Google becomes the only permitted user, insulated from potentially massive copyright liability.

Therefore, the settlement agreement that places Google in its monopoly position violates Section 1 of the Sherman Act by serving as a contract, combination, or conspiracy in restraint of

[2] A study by Carnegie Mellon, based upon a random, statistically significant sample of books in its collection, found that 22% of the time, the publishers of a book could not be located. Of the books whose publishers could be identified, 36% did not respond to letters of inqniry. This suggests that up to 50% of books may have rightsholders who wonld not come forward. Denise Troll Covey, *Comments of Carnegie Mellon University Libraries on Orphan Works* (Mar. 22, 2005), *available at* http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf.

trade. Through its agreement with the plaintiff class, Google is able to circumvent a legal restraint that applies to all other potential licensees. These other licensees, by abiding by the copyright laws, will be laboring under the need to locate potentially unlocatable orphan rightsholders before licensing their works, and will therefore be restrained from even entering the market.[3]

Through this same sidestepping of legal barriers, the settlement agreement allows Google to monopolize illegally in violation of Section 2 of the Sherman Act. Through the settlement, Google's monopoly over orphan works becomes an insurmountable one, maintaining monopoly by means not attributable to competition in the marketplace. If Google is allowed this ability to license orphan works, the only way for a competitor to enter the market would be to (1) get sued by a class of authors broad enough to include orphan authors, and (2) come to a settlement agreement with that class to allow the provision of orphan works to the public. Each of these situations depends upon a set of circumstances so unlikely to occur as to be nearly impossible.

First of all, there are already substantial doubts as to whether a class of plaintiffs suing a hypothetical Google competitor can actually be approved if it is drawn so inclusively as to include orphan authors. As noted above, such a broad class will likely fail to be adequately represented by class counsel. As for a settlement agreement that parallels the present one, plaintiffs would be unlikely to accede to an agreement that would give them no additional advantages. A new licensing scheme with this hypothetical defendant would not be allowed to contain better terms than the agreement with Google, given the proposed settlement's "Most

[3] The *Noerr-Pennington* doctrine, which immunizes from antitrust action efforts to restrain trade through lobbying the government, does not immunize all uses of the law to restrain trade or monopolize. If the restraint results directly from private action, there is no immunity. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Statutes themselves have been held in the Second Circuit to be in furtherance of anticompetitive behavior. *See Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149 (2d Cir. 2004). In this case, the restraint of trade occurs through the private action of the settlement agreement, which allows existing law to restrain others from competing with the parties.

Favored Nation" ("MFN") clause. With Google already providing a market for digital provision of books and little advantage to be gained by having an additional licensee, the plaintiff class, if it ever formed, would likely seek a remedy that would look substantially different from this settlement, and one that may well not include a licensing provision. If indeed such a provision were the aim of the hypothetical defendant, plaintiffs would also have every incentive to advantage themselves in other provisions of the settlement, such as monetary compensation. This likelihood would raise the cost and risk of an already risky strategy for the defendant. All of these factors together make it fanciful to suggest that competitors might enter the market through engineering class action litigation.

Even if the plaintiff class and the hypothetical defendant were to come to an agreement that mirrored the present proposed settlement, such an outcome, unreachable via the remedies available in copyright law and already demonstrated by this litigation, would suggest improper collusion between the parties. As here, the future defendant would receive the right to scan and display orphan works, a right unavailable to it through the normal process of private contracting, while the named plaintiffs would be reaping the benefits of waiving someone else's rights for them. But unlike here, both parties would already be aware of how class action law had been used to strike this otherwise impossible bargain. This Court should be wary of creating a market that can only be entered through mass litigation.

Though Google will be able to offer a new product in a market heretofore unavailable, this situation differs significantly from the monopoly created by the inventor of a new business method or the holder of an enforceable patent or copyright. Here, the barrier to competitors was neither legislatively ordained (as with intellectual property rightsholders), nor the result of historical happenstance (as with monopolists who are business innovators). Instead, competitors

are kept from this market through the operation of copyright law and an overextension of the factual predicate for the proposed releases. Unlike new markets created through innovation and invention, the market in orphan works will suffer from the lack of experimentation and negotiation that accompany the development of new markets. Unlike a monopoly created through the grant of a specific patent or copyright, there will be no bidding for licenses for further use, nor the ability to invent around the monopoly grant. Not only does the settlement attempt to use this Court to create a new market, it asks the Court to now designate that market's structure and operation, naming the parties as the dominant players. Absent an approval of a deal like the one proposed by the settlement, the market would be an illegal one.

By permitting Google to enter a market legally barred to all other competitors, the proposed settlement would restrain trade and allow Google to monopolize the market in orphan books. This Court should not only prohibit the parties from engaging in anticompetitive behavior, it should refrain from acting as the means by which a monopoly is created and maintained.

2. The Book Rights Registry should be subject to antitrust scrutiny.

Google is not the only entity that will amass market power via the proposed settlement; the BRR itself also poses a significant antitrust concern. Just as Google becomes the sole licensee of orphan books, the BRR, created as a means by which to carry out the will of the plaintiffs into the future, will become the assumed representative of the missing authors. While active individual rightsholders can dilute the market power of the BRR by arranging side licenses with distributors and digitizers, orphan works – whose rightsholders are not available to make such alternative licensing agreements – will be licensable only by the BRR. This not only raises many of the same antitrust questions as Google's orphan works monopoly, it also leaves the BRR near complete freedom to engage in price-fixing. Indeed, as prices are by default set by the

settlement agreement, subject to alteration by individual copyright holders, where those copyright holders are unable to make any decision, the prices will default to those specified in the system agreed upon between Google and the BRR. *See Proposed Settlement* § 4.2(b)(i).

The status of orphan works is central to the proper outcome of this litigation. Absent any alteration to the settlement agreement, the result is the creation and maintenance of a new monopoly in orphan works, enforced in part by this Court and in part by copyright law.

B. The settlement also violates the Sherman Act with regard to non-orphan works.

The antitrust implications of the settlement agreement are not restricted to orphan works; the agreement, as it stands, also has powerful market effects on the availability of non-orphan works, whether they are unclaimed or claimed.

1. The opt-out nature of the license unfairly advantages Google in licensing the works of known authors

The anticompetitive facets of the settlement agreement are not limited to orphan works. As noted above, the proposed settlement is structured so as to convert the class action opt-out procedure into a quasi-statutory licensing scheme. This legal alchemy would place the BRR in a singular position of retaining, by default, the digital licensing rights to all in-copyright registered U.S. books published before January 2009 – even works for which direct licensing is not a practical or possible option. *See Proposed Settlement* § 1.16. Beyond the difficulties that this creates for orphan works, the settlement's peculiarities also give Google an outsized market advantage in licenses for works with known rightsholders.

It should first be noted that the market for these works *will* be marginally more competitive than that for orphan works. Authors of known works may choose their level of participation in the settlement and in the ensuing licensing program. Furthermore, the license

granted by the authors to Google will be non-exclusive, allowing authors to license their works to other electronic distributors, or even to alternative licensing pools competing with the BRR.

However, the license to Google possesses an overwhelming advantage over any other agreement that an author might attempt to enter into. Since all class members are assumed to be included in the settlement, only those who actively decide to opt out will be absent from the pool of licenses available to Google. Any other licensee, who did not have the benefit of the class action structure, would need the active approval of each author it wished to include in its pool of licenses. Put another way, because individual licensing is far harder than licensing through the BRR, only the defendant will have effective access to *all* unclaimed works, even those that are not truly orphaned.

The same would be true if the BRR itself, acting on behalf of rightsholders, were to attempt to license works to any other entity. While the proposed settlement contemplates the BRR potentially acting as a rights clearinghouse for other parties (see *Proposed Settlement* § 6.2(b)(iii)), it is doubtful that the BRR would be authorized to represent all class members in negotiations with entities not party to this litigation.

This discrepancy in the pool of licenses available to Google, versus others, creates a considerable, artificial market advantage. Even among the smaller set of rightsholders who exist, know their rights, and have been informed of the settlement, it is highly likely that far more rightsholders will passively choose not to opt out of this arrangement with Google than would actively opt into an agreement with any other party. These rightsholders would then have, through inaction, granted an ongoing, essentially exclusive license to Google. The proposed settlement would thus give Google a sizeable lead in the novel market for the collective licensing and display of digitized books.

This market is so novel as to be created by the parties' very actions in this litigation.[4] Google's proposed offering differs in significant part from the existing market in digital books. Whereas current digital book outlets such as Amazon's Kindle store, Barnes & Noble's eBook store, and Google's own current Book Search product must build their offerings by obtaining rights from each author to be included in their collections, Google's use of the opt-out class action mechanism means the majority of existing U.S. books will automatically be on offer. The nature of this arrangement makes Google not just quantitatively different from any potential competitors in the number of books available, but qualitatively different. Access to an entire body of digital books is valuable beyond the value of the individual books combined, provided that the catalog is large enough. The settlement thus creates a new sort of service—not merely access to discrete texts, but access to a whole body of copyrighted literature. It makes Google a "one-stop shop" for those who wish to find or purchase books, because no other vendor can ever approach the level of coverage that Google will possess.

This makes Google the most powerful, if not the sole, licensee of this corpus and the sole purveyor of the corpus to individuals and institutions alike. The settlement agreement could thus run afoul of Section 2 of the Sherman Act, as Google will be exercising monopoly power in this new market and maintaining that power through means other than standard competition. Those means include the judicially-approved settlement agreement itself. The irony of this is that the mechanism of the class action is invoked precisely because of the difficulty of assembling groups of rightsholders to grant blanket licenses. The same difficulty used to justify the process that creates this new market will serve to exclude competitors.

[4] The fact that this settlement agreement goes so far as to create entirely new types of markets should serve as some indication that the process of class action settlement is performing functions for which it was not designed. See Part II, *infra*.

As with its effects on orphan works, the agreement leverages the class action opt-out structure to act as a barrier to entry for other potential licensees that does not result from the characteristics of the product, acumen in pursuing market competition, or historical accident. Instead, the restriction against competitors results from a mischaracterization of the factual predicate of this litigation. Should the BRR be precluded from licensing to others the works of class members to all interested parties on the same terms as it licenses them to Google, Google will have successfully used this proceeding to maintain its monopoly position in violation of Section 2.

These same features of the settlement are problematic under Section 1 of the Sherman Act as well. The settlement agreement as a whole can also be characterized as a contract, combination, or conspiracy between Google and the collective plaintiff class that operates in restraint of trade. Though a mere refusal to license to others may be permissible under Section 1, *see Buffalo Broad. Co., Inc. v. Am. Soc'y. of Composers, Authors and Publishers*, 744 F.2d 917 (2d Cir. 1984), the present situation involves more than an agreement that simply fails to include competitors. Here, the restraint of trade results from a combination of (1) the advantage granted by the opt-out structure and (2) the copyright laws that simply and logically forbid potential competitors from assuming that authors have agreed to license to them absent affirmative consent. The same advantage manufactured by the use of the class action to maintain monopoly status is thus also used to restrain trade.

2. The Book Rights Registry should be scrutinized for antitrust violations for claimed works as well.

As the future representative of the named plaintiff's interests, the BRR represents a horizontal combination of rightsholders who, separately, might well compete with each other in pricing licenses for the right to digitize and display their works. "[A]greements among

competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* [illegal] category." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979). Instead of an open market between individual authors and potential digitizers, there is instead the BRR, a combination of collective licensing body and collecting society, much in the way that the American Society of Composers, Authors, and Publishers ("ASCAP") or Broadcast Music, Inc. ("BMI") negotiate licenses and collect revenues for the creators of musical works. While those organizations currently operate legally, this Court is no doubt aware that their operation has for the past several decades been contingent upon constant scrutiny. Given the history of antitrust scrutiny leveled at musical collecting societies, it is only natural that the BRR be examined, at the least under the rule of reason. *See Id.* at 24.[5] This Court's inquiry into the BRR's effects should also be more searching due to the fact that unlike the performance rights societies, the BRR would be specifically created under the auspices of this Court, and not merely examined for legality under the antitrust statutes.

As a combination of book copyright holders, the BRR must be carefully scrutinized to ensure that it does not act to restrain trade in licenses to digitize books. As with orphan works, the BRR is the collective body that will be negotiating the prices set for non-orphan works that are bundled into institutional subscriptions. *See Proposed Settlement* § 4.1. Known authors will have little ability, except through representation in the BRR, to determine what prices are set for the subscription licenses. As noted above, the market for Google subscription service is so

[5] The licensing scheme to be employed by the BRR can be compared to that used by the performance rights societies in that just like ASCAP and BMI, the BRR would offer licenses to a vast repertory of works. It is important to recognize that this comparison overlooks one crucial difference: unlike the BRR, ASCAP and BMI do not offer licenses for works whose copyright owners are not their members, and membership is entirely opt-in. See Michael B. Rutner, *The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. Rev. 1061, 1074-1081 (1998); Timothy Wu. *Copyright's Communications Policy*. 103 Mich. L. Rev. 278 (2004)).

differentiated from the sale and licensing of individual books that authors' abilities to conduct side negotiations will have little to no effect on the BRR's price-setting ability.

The problems with the settlement agreement that give rise to monopoly power in orphan works thus also affect the market for works whose authors are known. The anticompetitive effects on the market for these works should also be carefully scrutinized.

3. The Most Favored Nation clause implicates sections 1 and 2 of the Sherman Antitrust Act.

In addition to the inherent market advantages granted to Google and the BRR by the structure of the settlement agreement, section 3.8(a) of the *Proposed Settlement* imposes a "most favored nation" clause.[6] This clause would prevent the BRR (or any other book licensing body) from offering a Google competitor a lower licensing fee. While an innovative product will naturally allow a business to be a legal monopoly, the MFN clause acts as a contract to unfairly restrain trade, and attempt to maintain monopoly status by foreclosing competition.

i. The MFN clause acts as a contract to restrain trade.

The MFN clause in the proposed agreement easily acts as a restraint of trade in violation of Section 1 of the Sherman Act. MFN clauses have come under increasing antitrust enforcement scrutiny, due to their potential for suppressing competition. *See* Jonathan M. Jacobson, *Antitrust Law and Developments* 148 (6th ed. 2007). Antitrust enforcement authorities have, in several cases, used consent decrees to bar the use or enforcement of MFN clauses. *See, e.g.*, *United States v. Delta Dental Plan*, 1995-1 Trade Cas. (CCH) ¶ 71,048 (D. Ariz. 1995); *United States v. Medical Mutual of Ohio*, 1999-1 Trade Cas. (CCH) ¶ 72,465 (N.D. Ohio 1999); *United States v.*

[6] Section 3.8(a) states, in relevant part:
The Registry (and any substantially similar entity organized by Rightsholders...) will extend economic and other terms to Google that, when taken as a whole, do not disfavor or disadvantage Google as compared to any other substantially similar authorizations granted to third parties by the Registry (or any substantially similar entity organized by Rightsholders...) when such authorizations (i) are made within ten (10) years of the Effective Date and (ii) include rights granted from a significant portion of Rightsholders other than Registered Rightsholders.....

Delta Dental, 1997-2 Trade Cas. (CCH) ¶ 71, 860 (D.R.I. 1997); *United States v. Oregon Dental Serv.*, 1995-2 Trade Cas. (CCH) ¶ 71, 062 (N.D. Cal. 1995); *United States v. Lykes Bros. S.S. Co.*, 60 Fed. Reg. 52, 208 (DOJ Oct. 5 1995); *RxCare of Tenn*, 121 FTC 762 (1996). Federal courts have also upheld the notion that MFN clauses may be anticompetitive. In *United States v. Delta Dental of Rhode Island*, a district court agreed with the Department of Justice that it is possible for an MFN clause to trigger a violation of Section 1. 943 F. Supp. 172, 174-5 (D.R.I. 1996). In that case, the government characterized an MFN clause in a contract between an insurance company and its care providers as a "concerted action" in violation of the Sherman Act. *Id.* The clause also threatened a restraint of trade, as it aimed not to lower prices for an insurance firm's customers, but to exclude potential rivals. *Id.* at 177. The court held that that these characterizations could survive a motion to dismiss. *Id.*

In the settlement agreement, the concerted action between the BRR and Google serves to restrain trade by requiring any book licensing collective—even one arising as an alternative or a competitor to the BRR—to offer any later-arising licensees the same or a worse deal than Google's. Google may thus, for the ten years specified in the MFN, preserve its first mover advantage while removing a major incentive for the BRR to deal with alternative digital distributors.

It should also be noted that the MFN purports to apply not only to the BRR, but to "any substantially similar entity" organized by rightsholders. Not only does the settlement disadvantage potential licensees, it also forecloses an offer of competitive rates by any collective licensing bodies that might arise as alternatives to the BRR. Thus, any authors who fail to opt out of the settlement entirely—even those authors who do not register with the BRR and do not enter into the profit-sharing agreement—will be bound by this clause even if they create a separate

collective to compete with the BRR. In effect, the MFN makes such attempts at competition with the BRR futile, unless the competing registry is to consist entirely of the limited number of rightsholders who opt out of the whole settlement.

ii. The MFN clause serves as an attempt to foreclose competition.

The MFN clause also acts as an attempt at monopolization in violation of Section 2 of the Sherman Act. Google's position as a monopoly power in the relevant market for mass digital access to books is clear.

The MFN clause maintains that power beyond what Google would be normally entitled to based on its innovation in creating its digital book products. The MFN clause artificially heightens existing barriers to entry into the market for digital access to books. It also reduces incentives for any other competitors to attempt to deal with the BRR or any similarly situated licensing collective, ensuring that consumers will have fewer choices for access to these works. MFN clauses are typically allowed when they can be seen as a pro-competitive means for lowering the costs passed on to consumers. Here, however, the absence of any existing competition makes the MFN clause function far more like an exclusionary measure than as a cost-reducing measure.

iii. The prerequisites for triggering the MFN clause do not save it from scrutiny.

The MFN clause in the settlement agreement contains two conditions that must be met before its restrictions are triggered. However, their presence does not prevent the MFN clause from operating to restrain trade or exclude competition.

The first condition – that less than ten years have elapsed from the time of the Effective Date – merely allows the MFN provision to sunset after a lengthy period of time. Ten years is an

eternity in the context of online, digital access to information – over a third the lifetime of the commercially-available Internet.

The second condition requires the license to include a "significant" number of rightsholders who have not registered with the Registry. Although this limitation means that the MFN clause will only apply to certain competitors, its nature ensures that only those competitors who pose a more serious threat to Google's dominance—by offering books that are unavailable to Google—will be targeted by the MFN. Whether such an anticipated competing agreement contains a "substantial" number of non-Registered Rightsholders because it involves orphan works or Rightsholders who have decided for other reasons not to actively register with the BRR, the MFN clause's structure still operates to ensure that Google will retain an advantage not only among competing licensees, but that that advantage will extend to other licensors competing with the BRR.

II. A class action settlement is the improper mechanism by which to determine the rights of orphan works authors with regard to a single user.

The very fact that this settlement, if approved, will create an entirely new market, resolve the rights of parties not present, allocate payment for those rights to the present parties, and license uses which where never contemplated prior to the suit should put the Court on alert that this is not a traditional class action settlement. The proposed settlement stands poised to effectively alter the rights of authors – especially those rightsholders of orphan works – indefinitely. As described above, the result will be a legal regime in which only one party can lawfully offer a large library of books to the public. It accomplishes this through two legally impermissible class action mechanisms. First, even though to date Google has engaged only in the non-infringing scanning, indexing, and excerpting of books, the proposed settlement purports to release it from liability for the entirely new activities of full-text display and sale of those

books. Second, the provisional class includes many orphan rightsholders who are not only poorly represented by the named plaintiffs, but have interests antagonistic to those professing to represent them.

The antitrust problems described above illustrate exactly why class action law does not permit releases of this type. If the law were to allow a class, represented by only a few named plaintiffs, to go beyond redress of harms and license entirely new activities, then parties will have the incentive to use class actions as an easy mass licensing tool rather than a method for aggregating and redressing group harm. With this tool, named plaintiffs will be able to benefit from the mass licensing of others' rights without any actual pre-existing harm, proper notice, adequate representation, or consent of absent class members. Such suits will almost inevitably create monopolies because, as here, other parties will not be able to directly license rights from the entire class, and replicating a class action lawsuit as a defendant would be difficult or impossible. It is difficult to see where the limit of such a class action mechanism would lie.

The proper place both for changes to the defaults of copyright laws and the balancing of interests of parties who are unable to protect their own interests in court is the legislature, not class action law. The Court should therefore not approve a settlement that shifts the balance of copyright in favor of a lone party by mass licensing new uses of rights belonging to an inadequately represented subclass of artists to create a single point of access and distribution for their works.

A. The proposed settlement exceeds the scope of a permissible class action release because it releases new, future activities which were not part of the underlying suit.

Because the defendant has never sold or otherwise granted full-text access to books without first obtaining a license, a settlement that releases them for liability for these activities is impermissible under Second Circuit law.

1. Google has never engaged in the unlicensed sale of the full text of books, while the proposed settlement would license that use.

The proposed settlement licenses works – including unclaimed works – for institutional and individual sale, allowing Google to provide access to the entire text of those books. *See, e.g.*, *Proposed Settlement* § 3.3(a). The complaint, however, contemplates only the "public display of *portions* of such Books and Inserts on its commercial website." Second Amended Complaint at 14, *Authors Guild et al. v. Google* (S.D.N.Y. Oct. 30, 2008) (No. 05-CV-8136).[7] In fact, Google has never provided and does not currently provide the full text of works unless it has acquired a full display license, and nothing in the record indicates otherwise.

The final notice of proposed settlement provides further evidence of this disconnect between the scope of the claims and the scope of the settlement. The notice describes only "claims that Google violated the copyrights of authors, publishers and other owners of U.S. copyrights in books and other writings by digitizing (scanning) them, creating an electronic database of books, and *displaying short excerpts* without the copyright owners' permission." *Final Notice of Class Action Settlement, available at* http://www.googlebooksettlement.com/intl/en/Final-Notice-of-Class-Action-Settlement.pdf (emphasis added). And while it lists a "benefit" of the settlement as a portion of the revenues from "sale of online access to Books uses" and says that rightsholders may "determine whether and to what extent Google may use their work," there is nothing in the notice to suggest that those uses will go far beyond the "short excerpts" underlying the suit. *See id.*[8]

[7] Notably, among the amendments made to Plaintiffs' complaint was the addition of the word "portions" to its description of Google's display of works on its website. *Cf.* Amended Complaint ¶ 25(c), *Authors Guild et al. v. Google* (S.D.N.Y. Oct. 30, 2008) (No. 05-CV-8136); Second Amended Complaint ¶ 41(e), *Authors Guild et al. v. Google* (S.D.N.Y. Oct. 30, 2008) (No. 05-CV-8136).

[8] We have not analyzed legally significance of the language in the notice, since when the underlying settlement is impermissible, the notice is irrelevant. However, the lack of clarity about the difference between the scope of the settlement and the scope of the claims suggests that notice may be inadequate.

The settlement thus proposes to release future claims against the defendant based on actions the defendant has never taken.

2. Class action law does not permit the release of behavior which was not a part of the underlying suit and which has never occurred.

Because the Second Circuit does not allow releases of claims for future activities which are not part of an 'identical factual predicate,' much less those that have never occurred at all, the Court cannot approve a settlement which authorizes these new activities on behalf of class members.

In the Second Circuit, for a class action release to include claims not presented, the conduct must "arise[] out of the 'identical factual predicate' as the settled conduct." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 107 (2d Cir. 2005). That court has "previously 'assumed that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon *the very same set of facts*.'" *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) (emphasis added) (citing *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 n.7 (2d Cir. 1981)). This condition is not met in the instant case; plaintiffs could not have brought a claim for the offering of full books based on the facts as they exist today. Such a claim was not and could not have been presented because it is not part of an "identical factual predicate" or "the very same set of facts," as indexing and display of excerpts, and therefore may not be released.

In *TBK Partners*, the court explained the reason a court might allow release of unpresented claims: "[I]n order to achieve a comprehensive settlement that would *prevent relitigation of settled questions at the core of a class action*, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class

action even though the claim was not presented and might not have been presentable in the class action." *TBK Partners* 460 (emphasis added). Were the instant case to be litigated to completion, a later case involving claims for the full text display of books would raise no settled questions. There is no question raised by the current case regarding the full-text display of books. The record points only to legal claims about scanning and short excerpts of books. Even in listing questions common to the class, the amended complaint raises no questions about whether Google had engaged in the display or sale of the full text of books or whether such activities constitute copyright infringement. *See* Second Amended Complaint at 13-14, *Authors Guild et al. v. Google* (S.D.N.Y. Oct. 30, 2008) (No. 05-CV-8136).

Were this suit to be pursued to completion, the only questions settled would be whether defendant's previous activities of scanning, indexing, and displaying "short excerpts" were infringing. A later suit alleging infringement for full display as well as consumer and institutional sale of online book access would raise wholly different legal questions and a determination of legality would have to be based on specific factual circumstances – circumstances which could not have been litigated in this action because they have not occurred. *See, e.g.*, *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (explaining that in copyright litigation, "fair use analysis must always be tailored to the individual case"); H.R. Rep. No. 94-1476, at 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5679 ("the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. . . . the courts must be free to adapt the doctrine to particular situations on a case-by-case basis").

When the Second Circuit has approved settlements releasing additional claims, they have been based on events which had already occurred, and would have merely have provided

alternate venues or formulations of the claims. For instance, in *Wal-Mart*, the additional claims released were alternate legal theories based on the same set of exclusionary rules which credit card companies had been sued for using. *Wal-Mart* 107-08. Similarly, in *TBK Partners*, the court allowed the release of state court claims in a federal suit because those claims "hinge[d] on the identical operative factual predicate: the correct valuation of whatever reversionary interest was owed to . . . shareholders." *TBK Partners* 460.

Neither example approaches the factual disparity present here, as both were based on different ways of litigating the same, pre-existing facts. Offering the full text of a book is a different activity and would provide a wholly different set of facts than scanning, indexing, or presenting short "snippets" of books. Allowing purchase of full access to those books, either individually by consumers or in bulk by institutions is even farther from the events which have actually occurred. None of these proposed uses are part of the "identical factual predicate" as the existing uses.

The instant case also fails tests announced in other circuits but cited for support by the Second Circuit. *See, e.g.*, *Wal-Mart* 460 n.13 ("The Fifth Circuit has noted, 'The weight of authority establishes that . . . a court may release not only those claims alleged in the complaint and before the court, but also claims which could have been alleged by reason of or *in connection with any matter or fact set forth or referred to in the complaint.*'") (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. Apr.1981) (emphasis added)). And as discussed above, none of the potential facts including sale and display of full works were "set forth or referred to in the complaint." This Court therefore may not release those additional claims here, licensing future uses of orphan works which were never described in the complaint or executed in fact.

3. If the Court concludes that the released claims share the same factual predicate, it should require the release of other potential defendants.

It is worth noting that if the Court concludes that the release and the complaint do share the same factual predicate, then the Court may also be able to approve a settlement which releases non-parties from liability. *See Wal-Mart* 109 (approving the release of "claims against non-parties where . . . the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled" when released non-parties were corporate members of defendants' organization and contributed to the settlement.).

Allowing other providers to license orphan and unclaimed works under the same or similar terms as the defendant will result in broader access to books and the reduction of the concerns surrounding a single party being the only legally protected source for those books. Such an outcome, while still problematic, would be far better for the public good and the goals of competitive, open access to creative works and protection of orphan authors from the will of a single distributor, and would prove less troubling than the settlement as it stands today. Therefore, if the Court finds that offering the full text of books falls within the same factual predicate as scanning, indexing, and excerpts, it should only approve a settlement which releases other potential users of plaintiffs' books from liability under the same or similar or similar terms.

B. The provisional plaintiff class can not be certified because orphan authors' interests conflict with named plaintiffs' in violation of F.R.C.P. 23(a)(4).

The rights of orphan authors are not well-protected when the named plaintiffs, plaintiff organizations, and defendant all stand to directly and continually benefit from the licensing of rights belonging to others.

Because the provisional class contains a significant subset of "orphan rightsholder" members who have interests antagonistic to those of the named plaintiffs, the class does not meet

the statutory requirements of F.R.C.P. 23(a)(4). Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class" before a class may be certified. The Second Circuit has "provisionally certified for settlement purposes only" a class comprising "All Persons that, as of January 5, 2009, have a Copyright Interest in one or more Books or Inserts." Order Granting Preliminary Settlement Approval at 2, *Authors Guild et al. v. Google* (S.D.N.Y. Nov. 11, 2008) (No. 05-CV-8136).

As described above, this class contains an unknown, but significant number of "orphan rightsholders" – owners of copyright interests who are unidentified and potentially unidentifiable. Named plaintiffs, on the other hand, comprise several individual, non-orphan authors, as well as membership organizations covering a very small fraction of book rightsholders. These named plaintiffs stand to continually financially benefit from licensing of the rights belonging to owners of orphans and unclaimed works. Because there is a large subclass with fundamentally different interests from the named plaintiffs and because the presence of these class members undermines the typicality and commonality requirements for a class certification, a class containing orphan rightsholders should not be certified.

To ensure adequate representation under F.R.C.P. 23(a)(4), "a district court must determine whether plaintiff's interests are antagonistic to the interest of other members of the class." *Cent. States Southeast and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007) (internal quotation omitted). Here, orphan rightsholders have interests directly opposed to those of named plaintiffs, who have updated their registrations, are represented by the Authors Guild or the Association of American Publishers, are actively licensing and exploiting their works, or have claimed their works directly, especially in light of the revenue structure dictated by the proposed settlement.

In the proposed settlement, rightsholders who register with the BRR ("registered rightsholders") will receive both a portion of the revenues from subscriptions (which include access to unclaimed works) and a portion of the revenues directly attributable to both sale of and the advertising placed around them. *See* Proposed Settlement § 6.3(a). Thus, registered rightsholders and named plaintiffs will financially benefit if the orphan works remain orphaned, and if the class members who are orphan rightsholders are not found and do not claim their works, either before or after the settlement is approved. And unlike most class actions, where compensation is either shared at the time of settlement or dispersed from a fund for later-discovered harms, this fund contains a continuing incentive for current beneficiaries to reduce the compensation to later ones. Because those who register with the BRR will continue to receive payments for use of unclaimed works, they will benefit indefinitely from those books remaining unclaimed. Orphan authors, however, are in the opposite situation, and will receive no benefit at all unless they are located and given the chance to exercise their rights and claim compensation.

A unitary class such as this one, with conflicting subclasses, is therefore improper. For example, in *Amchem Products v. Windsor*, the Supreme Court analyzed a proposed settlement for asbestos exposure to determine, *inter alia*, whether class members who are already injured had sufficiently overlapping interests with those who were merely exposed to meet the requirements of Rule 24(a)(4). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626-28 (1997). The Court concluded that because there were "discrete subclasses" with conflicting interests, a settlement could not be approved without separate subclasses with corresponding representatives. *Id.* 627. Because "for the currently injured, the critical goal [was] generous immediate payments" while "the interest of exposure-only plaintiffs [was] ensuring an ample, inflation-protected fund for the future," a unitary class was improper. *Id.* 627.

The conflict of interest present in the instant case is even more direct. In *Amchem*, as in most class actions, both the immediate payment and the fund could be evaluated at the time of settlement. Those already injured would receive payment immediately, and would not have future incentives to reduce the fund's size. Those governing the fund would not receive any benefit if those who later discovered harms stepped forward to claim their share. Here, the opposite is true. Although the proposed settlement proposes that the BRR "will attempt to locate Rightsholders with respect to Books and Inserts," *Proposed Settlement* § 6.1(c), the author and publisher rightsholders who govern the BRR (*see Proposed Settlement* § 6.2(b)) will have a continuing, perpetual, and opposite incentive *not* to find orphan rightsholders who would then claim a portion of the fund.

Cases where the Second Circuit has found adequate representation when two different subclasses are inapposite. For instance, in *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124 (2d Cir. 2001) (superseded by statute on other grounds), the court found that where methods of calculating damages would result in differing recovery amounts for plaintiff class members, interests were not sufficiently antagonistic to deny certification. Here, however, the conflict of interest goes far beyond an initial allocation of money, and is neither "speculative" nor "hypothetical," but fundamental to the treatment of the orphan rightsholder subclass. *Cf. id.* 145.

Orphan rightsholders' conflicting interests go far beyond purely monetary concerns. Named plaintiffs and other rightsholders who are actively engaged in the licensing and sale of their works gain benefits and abilities under the settlement that orphan rightsholders effectively do not. Long after the chance to opt out of the settlement has passed, named plaintiffs will be able, through the BRR, to control the price, terms of use, and even availability of their works.

Owners of orphan works, by definition, cannot do any of these things. This means that orphan works will continue to be made available perpetually under default terms while those defaults are determined by those who can rest safe in the knowledge that they may change them in the future. In essence, the fate of orphan works and the rights of their owners will be permanently at the mercy of the large publishers, Authors Guild members, and the lone distributor who govern the BRR.

This conflict of interest is problematic for other class certification requirements, as well. "The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Amchem Products* 626 n.20 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).

For the reasons given above, rights of orphan authors are neither fairly nor adequately represented by named plaintiffs who are able to later control the use of their works, restrict the use of their works, and financially benefit from the absence of those orphan rightsholders. As the Second Circuit has observed, even if class representatives believe "that the Settlement serves the aggregate interests of the entire class, [] the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consent given by those who understand that their role is to represent solely the members of their respective subgroups." *In re Joint Eastern and S. Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2d Cir. 1992). Therefore, a singular class with the named representatives, whose interests are antagonistic to orphan rightsholders, should not be certified for this proposed settlement.

C. The settlement is unnecessary and incompatible with the purpose of class actions.

The proposed release of new, unrelated claims runs afoul of the basic purpose of class action law: to aggregate individual claims for past harms. Neither registered nor unregistered rightsholders need this class action settlement to collectively redress past copyright harms, because to date no such harms have occurred. Nor is a class action necessary to enable the future, licensed full-text use of the works of those rightsholders who have made themselves available. Even in the absence of this settlement, Google could fund a Books Rights Registry and license future uses of those rightsholders' works directly. Structured correctly to be open and competitive, such a registry would likely pass antitrust scrutiny. The *only* part of this settlement which could not be accomplished without the aid of a class action is the licensing of future uses of works belonging to rightsholders who are not present to defend their rights, as they have chosen not to register with the BRR or are altogether inaccessible.

"'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" *Amchem Products* 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)). The problem here is not that orphan or unregistered rightsholders lack the incentives to bring solo actions. First, there is as yet no harm for them to seek redress as no infringing uses of any works have been made. Second, with the exception of a 5-year window within which they may be able to claim collected royalties, these people will continue to receive no redress. But unlike most class actions, where this failure to receive compensation for past harms is balanced by the judicial finality and closure of the issue, this settlement contemplates indefinite future uses (and

legal "harms"), making ongoing use of the rights that belong to orphan rightsholders without any real likelihood of compensation for those future uses.

Because the basic purpose of class action law does not support the licensing of new, future uses of underrepresented parties' rights, the Court should not approve the perpetual licensing of orphan authors' rights through this proposed settlement.

III. The Court should perform additional review before approving a settlement with the above problems.

A. The Court should deny class certification and not approve a settlement which distributes the rights of orphan authors to a single party.

A number of the described problems with the proposed settlement and provisional class certification stem from the inclusion of orphan rightsholders in the settlement. Orphan rightsholders' interests are not represented by named plaintiffs, who are actively exploiting their own rights. Further, the distribution of these rights without the permission of the owners and only to a single defendant amounts to a wholesale change to the way copyright law is applied to the defendant with regard to books. This type of broad change to the copyright landscape can and should only be made by the federal legislature, which defines copyright law in the first place, and which has the institutional expertise to both balance the interests of the public and the various stakeholders and create a legitimate, nationwide solution which does not create a new monopoly. Therefore, the simplest solution with regard to the settlement is to deny certification to any class which includes the orphan rightsholders. This may mean that no opt-out class of copyright holders can be certified, or that such a class must be carefully constructed to only include the works belonging to known, identifiable rightsholders.

The Court can also remedy this problem by the equivalent action of leaving the class description broad, but making the class opt-in. In this manner, the settlement will only affect those who have chosen to allocate their rights in this way, effectively removing unclaimed works

and their rightsholders from the settlement. The settlement would then remain as a far more legitimate way to settle the future rights of those who actively want their default rights under copyright law changed in this fashion.

B. The Court should seek to allow any competitor to license under the same terms as Google.

There are two ways in which the Court might improve competition: remove the MFN clause, and expand the settlement to allow licensing to third parties.

1. Eliminate or alter the MFN clause.

The MFN clause presents one of the more easily-solved problems of the settlement. Its removal from the settlement would eliminate any anticompetitive effects. Alternatively, the MFN could simply be made symmetrical, so that no other licensee would be faced with an additional disadvantage to Google as a competitor.

2. Allow competitors to obtain licenses to digitize books.

Even removal or alteration of the MFN clause does not guarantee that potential Google competitors will be able to competitively license the display of books from the BRR. Although the settlement contemplates licenses from the BRR to other parties, there is no indication that either this settlement or copyright law would permit the BRR to issue licenses for a list of books constructed via an opt-out procedure, as it will for Google. Instead, other licensees would only be able to receive licenses for the smaller set of books whose authors have opted in to a licensing agreement. *See* Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, John M. Olin L. & Econ. Working Paper No. 462 at 14 (2009), *available at* http://www.law.uchicago.edu/Lawecon/index.html; Tom Krazit, *Google Pushes for New Law on Orphan Books*, Cnet (July 31, 2009), *at* http://news.cnet.com/8301-1023_3-10300887-93.html.

It is this disparity that creates the antitrust and overall policy questions that are most troubling with the proposed outcome of the settlement. To eliminate this disparity, the settlement agreement should ensure that Google must license works to other book access providers on the same or similar terms as it itself receives. Such an arrangement would simply require the plaintiff class to grant Google an additional ability, and require Google not to abuse its market power. That power should be disciplined by antitrust scrutiny and the threat of antitrust litigation.

A more complete solution to the competition problem would be to allow the BRR to license to other parties the same sets of works that are available to Google. If the factual predicate on which the plaintiffs' claims are based encompasses behavior such as the display of full text by Google, then it may be sufficiently broad as to encompass similar uses by third parties. See *supra* at 25. In such a scenario, Google would be able to provide access to its corpus of scanned works, while other digitizers would also be able to compete with Google in the new market for mass access to books. Existing collections of digitized books could be made available through subscription services by acquiring the appropriate license from the BRR.

C. The Court should consider input from relevant agencies.

The BRR, with or without the ability to license works on an opt-out basis, would still be the most centralized clearinghouse of book rights, and a powerful collective. Its role as a gatekeeper to bulk and blanket licenses of books deserves the same ongoing supervision afforded to the performing rights societies. The BRR should be monitored by the appropriate antitrust authorities under a consent decree, to ensure that licensee and licensors approaching it will be treated fairly, and not solely to the benefit of incumbent parties in its licensing agreements. The Court should also carefully consider the input of federal agencies concerned with competition, consumer protection, and copyright law such as the Department of Justice Antitrust Division,

Federal Trade Commission, and Copyright Office, and seek the input of such agencies where proper.

CONCLUSION

The goal of access to written works is a noble one. However, access by means of judicially-granted monopoly does not comport with the need for access to information to be available through as many avenues as possible. The current structure of the settlement agreement would permit certain forms of access to orphan works through the single channel of Google and the BRR, but truly open access must be granted not by grace, but by right. For the foregoing reasons, the Court should therefore not approve a settlement which creates this forward-looking single-source license for unclaimed and orphan works.

In the alternative, a broad interpretation of the factual predicate underlying the proposed settlement can justify not just the settlement as proposed, but also a settlement that releases third parties from conduct identical to Google's. If this Court allows the release of claims stemming from Google's future offerings of full-text works, other parties should be provided the same latitude to provide access to the public, fueling a freer public discourse in a competitive landscape.

Jef Pearlman

Sherwin Siy

Public Knowledge
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 518-0020

Sept. 8, 2009

CERTIFICATE OF SERVICE

I, Jef Pearlman, hereby certify that the BRIEF OF *AMICUS CURIAE* PUBLIC KNOWLEDGE IN OPPOSITION TO THE PROPOSED SETTLEMENT was transmitted to the chambers of Judge Denny Chin via overnight letter delivery, and is being served by e-mail on:

Michael J. Boni
Counsel for the Author Sub-Class
Boni & Zack LLC
15 St. Asaphs Rd.
Bala Cynwyd, PA 19004
mboni@bonizack@.com

Jeffrey P. Cunard
Counsel for the Publisher Sub-Class
Debevoise & Plimpton LLP
919 Third Ave.
New York, NY 10022
jpcunard@debevoise.com

Daralyn J. Durie
Counsel for Google
Keker & Van Nest LLP
710 Sansome St.
San Francisco, CA 94111
ddurie@durietangri.com

_____
Jef Pearlman
Public Knowledge
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 518-0020

Dated: Sept. 8, 2009

Paul N. Courant
University Librarian and Dean of Libraries
Harold T. Shapiro Collegiate Professor of Public Policy
Arthur F. Thurnau Professor
Professor of Economics and of Information

818 Hatcher Graduate Library South
Ann Arbor, Michigan 48109-1205
734 764-9356 pnc@umich.edu

September 16, 2009

The Honorable John Conyers
Chairman
House Judiciary Committee
2138 Rayburn Building
Washington, DC 20515

Dear Mr. Chairman:

I write on behalf of the University of Michigan, where I am University Librarian and Dean of Libraries, Harold T. Shapiro Collegiate Professor of Public Policy, Arthur F. Thurnau Professor, and professor of economics and of information. The University of Michigan is a comprehensive, Research I, international university that has been in existence longer than Michigan has been a state. We have three campuses in Michigan with a total of over 50,000 students. Annually, our library acquisitions now exceed twenty million dollars and our students purchase approximately thirty-five million dollars in texts for their courses, which makes us one of the largest customers and promoters of authors' and publishers' works in the world.

I am providing the views of the University as they relate to the hearing held by your committee on September 10th, which focused on the competitive and copyright issues of digital books, and would ask that this letter be included in the formal hearing record.

On May 20, 2009 the University of Michigan became the first library to amend its partnership with Google in response to the expanded terms of settlement agreement among authors, publishers, and Google. Other libraries have signed or are in the process of signing similar agreements.

We lend our support for the Google Book Search settlement because its overwhelming benefits to libraries, the academy, and the world hearken back to our fundamental motivations for partnering with Google to digitize the our Library collection.

Preservation: The print collections of the world's libraries are *literally* turning to dust, as hundreds of millions of books printed on acidic paper age and become brittle in library stacks around the globe. The books and the knowledge within them are disintegrating faster than librarians and archivists are able to preserve them, even collectively. The University of Michigan has been one of the most successful academic research libraries in its efforts to preserve its collections in digital formats. Prior to our partnership with Google Inc., we digitized between 5,000 and 10,000 works each year, a rate that put us ahead of other digitizing libraries

and well behind the books, which were already decomposing before we could get to them. At that rate, we estimated that it would take us approximately 900 years to preserve our 2002 collection digitally. Our partnership with Google, which the settlement will preserve, will enable us to preserve approximately eight million works in less than a decade. Given the scope of Google Book Search (GBS), this will mean—despite the ravages of war, weather, neglect, and time—that GBS can preserve for the world in excess of fifty million unique works that comprise the bulk of printed human knowledge. Because they are being digitized *now*, works that would have been lost forever have the opportunity to exist in perpetuity. This settlement will enable preservation of our human heritage to continue at an unprecedented scale.

Access: There was a time when libraries operated akin to mausoleums, allowing few, if any, to view the ossified remains within. Centuries ago, books were so difficult to produce and so expensive that library curators felt little choice but to prioritize preservation and the security of the texts over making the works available for people to read.[1] Today, we realize that access to works of knowledge is fuel for the engine that promotes progress in society; indeed, we preserve works because we want as many people as possible to have access to them. Anyone who comes to our library is welcome to read anything and everything in our collection. GBS enables people to identify works of interest from among the most distinguished libraries in the world and to locate and buy or borrow them. This ability to search and to access the world's great library collections is of extraordinary public value. The settlement goes beyond even this, enabling any postsecondary or public library to provide free access to the entire digitized corpus. Moreover, books long left for dead by their authors or publishers have been maintained by academic libraries and through this settlement can be immediately and broadly available to anyone with an Internet connection anywhere in the United States.

Access for People Who Have Print Disabilities: This settlement, which arose from a dispute that did not center on disability law, is unprecedented in that it overtly and intentionally includes access for people who have disabilities, *as a forethought*. It is likely that this settlement will have its most palpable positive benefit for people who have print disabilities. Migrating the written record to a digital format will make it possible for people with a variety of types of disability to get what most people already have—access to the knowledge within the books that interest them. One of the primary reasons the University of Michigan asked Google to digitize our collection was to enable our patrons who have print disabilities to get the kind of immediate access that our other patrons have. Because it can take weeks to digitize a long text, our students, faculty, and staff who have print disabilities who were studying, conducting research, preparing for classes, and participating in the academic colloquy were forced to lag behind because the majority of our library was not available in a format accessible to them. We have already implemented a mechanism that enables people who have print disabilities to access our digitized books in a manner consistent with the perspectives of the parties in this settlement and disability organizations, such as the National Federal for the Blind. And the settlement will reach far beyond our library. Google Book Search will increase the number of books available

[1] We still have these tendencies. For instance, the first book in the University of Michigan Library's collection, Audubon's Birds of America, is worth millions of dollars and almost no one has access to it. Once it is digitized, however, anyone will be able to virtually leaf through its pages, take in its elegant pictures, and read about the then-proclivities of now-extinct birds.

to people who have print disabilities by three orders of magnitude—from tens of thousands to tens of millions.

Research: Google Book Search has broad appeal because it enables the public to search across millions of books to find pieces of text of interest to them—something the legal world has been accustomed to for some time. To round out the their understanding of their personal pursuits, the weekend genealogist, the baseball enthusiast, and the armchair Harlan Hatcher historian all have the opportunity to unearth the lost, un-indexed treasures buried in the corpus of the human record digitized from our vast collections. People are drawn to GBS because it allows them to visit—for them—uncharted territories and then to either buy or borrow the source materials of interest to them. The settlement will enable the public to find and purchase books that have not been for sale for decades, many of which have only been available to users of a handful of libraries. Moreover, the entire corpus of text can be used for linguistic analysis, natural language processing, and other computationally-intensive research techniques that will enable scholars to learn new things about language, thought, and meaning. We already have a line of scholars who are interested in conducting research that will be made possible by the settlement.

Curation: With the vast bulk of our collections in digital form, we can take much better care of our print collections, because the digital copies can become (subject to appropriate legal arrangements) the principal copies of use. Libraries will be able to collaborate, and to hold securely amongst them the best print copies. This will reduce the costs of higher education and secure for posterity the original versions of the scholarly and cultural records. The settlement will give us the ability to create innovative library finding tools, add metadata to extant records, and transform library research in ways that were heretofore unimaginable.

Additional Benefits of the Settlement: When the University of Michigan began its digitization project with Google, our principal interests were preservation of our collections; instant accessibility for patrons who have print disabilities; the ability to index, search, and conduct linguistic analysis of the works; and the ability to make available works in the public domain - works not protected by copyright - to any and all who wanted to read them.

Currently, the ability to use copyrighted works digitized from our library is limited by the law. We can index them, search them, and determine whether a particular topic or phrase is discussed in a particular book. But to read the book a user must visit the library. The cost in time and effort of traveling to the library to look at the relevant text will be an even more powerful deterrent. Most books published after 1922 are protected by copyright, and hence not available to be read online. Thus, most of the digitized literature of the 20th century - millions of volumes - is not readily usable.

The Google Book Search settlement changes all that. Under the settlement, Google will provide access to a huge digital collection on behalf of the authors and publishers who hold United States copyright to works digitized from participating libraries.

The members of the public will be able to read up to 20 percent of each of the works free and buy online access if they wish to read more. Academic libraries will have the opportunity to purchase site licenses so all of their students, staff, and patrons will have access to the works.

And both postsecondary and public libraries will be able to offer free access to the corpus on a limited basis (generally one terminal per library building), which will be of enormous value to remote communities.

The works of all participating libraries will be available in these services. Thus, Michigan's superb collections will be augmented by those of other great libraries, with the result that all of our students and the general public (including people who have print disabilities) will have more works available to them than any single library can provide.

As a participating library under the settlement, the University of Michigan will provide books for a commercial product that will produce revenue for copyright holders and for Google. I am comfortable with this outcome. We collected these works so that they could be used, and it is completely consistent with our mission and our values that they will be made easily and widely available to readers across the country.

Terms in the settlement and the participation agreement make me confident that access to these works will be broad and affordable. The settlement agreement specifically states among its objectives, "the realization of broad access to the books by the public, including institutions of higher education." The amendment we signed allows libraries to initiate an arbitration procedure with respect to unreasonable prices for institutional licenses. Nothing in the settlement prevents rights holders or participating libraries from digitizing works and disseminating them through other means.

Additionally, large parts of the works will be available for free online, and the originals will still be available in libraries. There will be many ways to look at parts of each book, and some ways (going to the library) to look at all of each book. These conditions are not favorable to the production of monopoly profits.

In sum, we believe that this settlement advances the most noble purposes of our university and other universities, of our libraries and other academic libraries, and of the public at large. Google Book Search is in a position to make the knowledge of the world easily available across the country. It's a remarkable vision, and a remarkable achievement, and we are whole-hearted in our support of it.

Sincerely yours,

Paul N. Courant

UNIVERSITY OF TEXAS LIBRARIES
THE UNIVERSITY OF TEXAS AT AUSTIN
P.O. Box P • Austin, Texas 78713-8916

September 9, 2009

Chairman Conyers, Ranking Member Smith, and
Distinguished Members of the House Judiciary Committee
2138 Rayburn House Office Building,
Washington, DC 20515

Thank you for allowing the University of Texas at Austin Libraries (Libraries) to comment on the proposed settlement in the case of *The Authors Guild, Inc., Association of American Publishers, Inc., et al. v. Google*, now under review by U.S. District Judge Denny Chin in the United States District Court, Southern District of New York. We are a Google Book Search (GBS) Library Partner, planning to contribute approximately one million books to the project that is the subject of the settlement agreement.

The Libraries' assembled collections of almost ten million volumes are one of the world's great treasures. Those collections have advanced teaching and learning at the University of Texas at Austin and attracted the attention of scholars globally for 125 years. Our participation in GBS improves the accessibility and impact of those collections multi-fold, both in Texas and globally.

While many believe that the GBS settlement raises a variety of important concerns, most do not call for an outright rejection of the settlement. Most recognize that even with its flaws, the settlement offers many unique benefits. The Libraries, though cognizant of the settlement's shortcomings, nevertheless join in support of it. The settlement enables Google to go forward with its library scanning projects, like ours at the Libraries, and to include all of the books it scans in a full-text searchable index, enabling anyone to discover them through ordinary searches on Google. The settlement also envisions new, productive uses of the books that Google has scanned, works owned by authors and publishers who come forward affirmatively to take part in such projects, and by owners who do not come forward at all, and whose identities or whereabouts can no longer be ascertained. In this way the settlement begins to address a perplexing copyright problem — how to enable productive use and reuse of copyright "orphans."

Full-text search: For centuries, libraries and librarians have collected, preserved and provided access to their cultures' immense information assets. People used to learn of these works in the catalogs that were the main access point for searching. Now, GBS gives us the opportunity to make widely available not just our collections' catalog information, but to make our collected, preserved and catalogued assets themselves part of the online world. A potential reader of one of our books does not need to come to Austin to learn about a book that might meet her needs. Indeed, she does not even need to know to search in a library catalog at all. She can learn about the book simply by searching Google for information using a few words of text to describe her interest. Her search results page shows her the Websites as well as books that may be relevant, and exactly where in the books the author talks about the topic in which she is interested.

If the settlement were not approved, this ability would disappear because most of our books would disappear from a very important discovery and access tool — full-text searching. The Google Book Search settlement secures for us and our patrons the help we need to make 20th century knowledge and information, most of which will remain protected by copyright for many years to come, part of the world that people turn to for information in the 21st century.

Comprehensive digital collections: In addition to aiding discovery of our works by securing full-text search of our books, the GBS settlement will allow Google to combine our scanned books with other libraries' collections of digital works and provide access to the entire database of works. All residents of Texas as well as all the students, faculty and staff at the University of Texas at Austin will have access to this immense digital library for free at any library, or through individual purchases and institutional subscriptions. Not only will they find and read our works online, but our patrons will access and read works we have not collected, maintained, or catalogued, just as easily as the ones we have.

Orphan works: Many factors that have been well documented brought about our orphan works problem. Nearly every idea for solving the problem raises new questions and poses new problems to solve. While the settlement takes a different approach to the problem from earlier legislative proposals, it does not compete with them. Were the settlement approved, the orphan works problem would still require complementary legislation to address liability concerns of other users of orphan works, including nonprofit users such as the Libraries, and to address the many types of orphan works outside the scope of the settlement. Thus, the GBS settlement ameliorates the orphan works problem, but only to a degree. It is, nevertheless, a very important first step. An appropriate modification of copyright law would enable other commercially viable solutions too. Libraries and their patrons would undoubtedly buy and read orphan works as they become more widely and easily accessible, as well as new works created by re-users.

Of course the GBS settlement could be improved. And it will be improved, as was the printing press over the course of time. We all must know by now that where digital technology affects a process or product, nothing stays the same for long. But no amount of time or effort will ever produce the perfect plan for bringing libraries' book collections fully into the 21st century. GBS advances the human capacity for discovery and access to knowledge; those same technologies likewise have the capacity to protect intellectual property rights and the rights of all stakeholders. The Libraries supports GBS for all these reasons.

Yours most sincerely,

Fred M. Heath
Vice-Provost and Director