

The Case for Regulating Google and the Proposed Book Rights Registry

On October 28, 2008, after several years of legal wrangling, Google, the Association of American Publishers, and the Authors Guild reached a settlement agreement concerning Google's scanning of copyrighted works. The scanning of these works has been performed in cooperation with research libraries throughout the United States. The settlement agreement requires court approval by the presiding judge in the US District Court in New York because the case was brought there as a class action suit on behalf of selected copyright owners.

In large part, the settlement focuses on in-copyright books that are not commercially available. Public-domain works fall outside of the settlement and owners of commercially available, in-copyright books created prior to January 5, 2009, may opt-out of the settlement or opt-in to other terms with Google. As a part of the settlement agreement, Google will fund the establishment of the Book Rights Registry. The registry, jointly run by authors and publishers, will collect and distribute royalties including an up-front payment by Google of \$45 million. Users will have several new opportunities to access scanned books, both free and fee-based, via public and university libraries and through institutional subscriptions for academic, corporate, and government libraries and organizations.

Although this is a private settlement, the result has very real implications for public policy and the way libraries of all types will operate. Many librarians have raised questions about the settlement's impact because of the complexity of the agreement, its potential long-term impact on libraries (thus user interests), and the enormity of the book collection involved. Members of the library community discussed the implications of the settlement in a meeting hosted on February 9, 2009, in Washington DC by ARL, the American Library Association (ALA) Washington Office, and the Association of College & Research Libraries (ACRL). The meeting led to identification of the key concerns of the library community with the proposed settlement and a

decision to file a legal brief before the court that articulates those concerns.

On May 4, 2009, ARL, ALA, and ACRL filed comments with the US District



Listen to Kenneth D. Crews, Director, Copyright Advisory Office, Columbia University Libraries, on the Google Book Settlement (4:07 MP3)

<http://www.arl.org/bm~doc/rli-264-google.mp3>

Photo Credit: Sam Scott

Court for the Southern District of New York for the judge to consider in his ruling. Representing over 139,000 libraries and 350,000 librarians, the associations filed the brief as members of the plaintiff class because they are both authors and publishers of books. The associations asserted that, although the settlement has the potential to provide public access to millions of books, many of the features of the settlement, including the absence of competition for the new services, could compromise fundamental library values including **equity of access to information, patron privacy, and intellectual freedom**. The court can mitigate these possible negative effects by regulating the conduct of Google and the Book Rights Registry that the settlement establishes.

The library associations are not asking the judge to reject the settlement. Instead, they are requesting the judge to carefully monitor the parties' behavior once the settlement takes effect.

Excerpts from the Library Associations' Brief

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.

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."¹
- 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.²
- 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 maximize the public benefit from the services enabled by the Settlement.

¹ Settlement Agreement 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.

² 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 database will have many uses, including assisting in finding the owners of orphan works. Accordingly, Google and the Registry should make these databases publicly available.

ARL and ALA have also released "A Guide for the Perplexed: Libraries and the Google Library Project Settlement," by Jonathan Band, JD. The guide is designed to help the library community better understand the terms and conditions of the proposed settlement agreement by outlining the settlement provisions that apply directly to libraries. The guide, along with the full text of the brief, and related materials are available from the ARL Web site at <http://www.arl.org/pp/ppcopyright/google/>.

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