

Is the Proposed Google Book Settlement “Fair”?

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Introduction

Class action lawsuits in the U.S. can only be settled if the presiding judge holds a hearing and determines that the proposed settlement is “fair, reasonable, and adequate” to the class on whose behalf it is being proffered.¹ The class at issue in the *Authors Guild v. Google* case now consists of all owners of copyrights in books and inserts (e.g., book chapters, short stories, and forewords) published in the UK, Canada, and Australia, and owners of rights in books and inserts registered with the U.S. Copyright Office.² (Excluded from the class are authors and publishers who opted out of the settlement by the court-set deadline of January 28, 2010.)

On February 18, 2010, Judge Denny Chin held a fairness hearing on the proposed settlement of the *Authors Guild v. Google* lawsuit.³ A ruling on this settlement is expected in the late spring of 2010. Whatever the ruling, it is likely to be appealed.

This article briefly discusses the *Authors Guild* lawsuit and key terms of the proposed Google Book settlement. After summarizing the main arguments in support of the proposed settlement, it considers the main objections to the settlement and my reasons for predicting the settlement will be disapproved.

The *Authors Guild* Lawsuit and the Proposed Settlement

The Authors Guild and three of its members sued Google in September 2005 on behalf of all owners of U.S. copyright interests in books in the collection of the University of Michigan Library.⁴ It charged Google with copyright infringement for scanning books from the Michigan library with the intent of indexing their contents and making snippets available in response to queries made by users of its search engine. Google claimed that this scanning was fair use because it facilitated greater access to books and Google offered links to libraries from which the books could be checked out and to bookstores

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¹ Federal Rules of Civil Procedure, Rule 23 (e) (setting forth requirements for the settlement of class action lawsuits).

² Amended Settlement Agreement, §§ 1.19 (defining books), 1.17 (defining author subclass), 1.122 (defining publisher subclass), *Authors Guild, Inc. v. Google, Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf [“ASA”].

³ A transcript of the February 18, 2010, fairness hearing on the proposed Google Book Settlement Agreement can be found at http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf [“Hearing Transcript”].

⁴ Class Action Complaint, *Authors Guild, Inc. v. Google, Inc.*, Case No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005).

from which the books could be purchased. Five major trade publishers brought a similar suit a month later.⁵

In October 2008, Google, the Authors Guild, and the Association of American Publishers (AAP) announced that they had reached an agreement to settle the now-combined lawsuit under which Google would pay \$45 million to compensate rights holders for works it had already scanned at a rate of \$60 per book and \$15 per insert.⁶ The most important part of the proposed settlement was, however, the license the settling class would give Google to commercialize all in-copyright, but out-of-print books. This included selling copies of the books to individual consumers, licensing access to an institutional subscription database (ISD) of millions of out-of-print books, and serving ads next to book contents.⁷ Under the agreement, Google promised to pay 63 percent of the proceeds to a newly established Book Rights Registry (BRR) which would be charged with locating rights holders and paying them for Google's uses of their books.⁸

The Main Arguments in Favor of the Settlement

Google's lead lawyer, Daralyn Durie, made a forceful argument at the February 18 fairness hearing that the settlement was fair to the settling class because it provided new opportunities for owners of copyrights in out-of-print books to reap the benefits of Google's commercialization of their books without having to do anything to make it happen.⁹ She regards the settlement as consistent with copyright law because rights holders will get paid for Google's uses of their books, so their economic interests cannot be harmed. Moreover, if rights holders do not want Google to sell their books or include them in an ISD, they just need to say so. She pointed out that the books Google will commercialize have all previously been published, which suggests their rights holders want their books to be available. The class action settlement is, in her view, an efficient means to make these books available because clearing rights to sell digital copies of these out-of-print books, one-by-one, would be prohibitively expensive. Google needs to have default rights to commercialize a large number of books in order to launch the new Google Book venture.

Whether the Google Book settlement is in the public interest is, strictly speaking, not relevant to whether it should be approved, as the formal question before Judge Chin is whether the proposed settlement is "fair" to the settling class. However, Google and other proponents of the settlement have vigorously argued that the settlement should be approved because it will advance the public interest.

⁵ Complaint, McGraw Hill Co. v. Google, Inc., Case No. 05 CV 8881 (S.D.N.Y. Oct. 19, 2005).

⁶ Press Release, Google, Inc., Authors, Publishers, and Google Reach Landmark Settlement (Oct. 28, 2008), available at http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html; Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (Oct. 28, 2008), available at <http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf>

⁷ Id. at §§ 4.1-4.4.

⁸ Id. at §§ 4.5 (revenue split), Art. 6 (establishment and responsibilities of BRR).

⁹ Hearing Transcript, *supra* note 3, at 143-58 (Durie's argument).

Professor Lateef Mtima of Howard University made an impassioned argument in favor of approval of the Google Book settlement.¹⁰ It would make millions of books from major research libraries available to poor, minority, and other disadvantaged communities, fulfilling the promise of equal educational opportunities in school desegregation cases such as *Brown v. Board of Education*. Public libraries will get one public access terminal each to make the ISD available to persons of all ages and from all walks of life. Colleges and universities will also be eligible for public access terminals based on the size of their student populations. The ISD promises to equalize access to knowledge at institutions of higher education, no matter how resource-rich or resource-challenged they might be.

A spokesman from the National Federation of the Blind praised the settlement because Google has promised to provide print-disabled communities with access to the 12 million books now in the Google Book corpus.¹¹ Only one million books are currently available to these communities, so Google Books would dramatically increase access to books by print-disabled persons. This increased access would allow visually impaired readers to become better informed and more effective citizens in our society.

Paul Courant, the Librarian of the University of Michigan and a long-time advocate for Google's book scanning project, spoke of the importance of preserving books that he asserts are literally falling apart on library bookshelves.¹² Michigan and other major research libraries lack the resources to preserve their research collections, which is why Google's commitment to providing libraries with scans of books in their collections is so valuable. Approval of the settlement will also result in a dramatic increase in public access to books, a result that Courant, as a librarian, regarded as highly commendable.

Objections and Oppositions to the Google Book Settlement

More than 500 organizations and persons submitted comments to Judge Chin about the proposed Google Book settlement.¹³ The overwhelming majority objected to or opposed the settlement. (Objections to class action settlements are different from oppositions because objections can only be filed by members of the class. Objectors must explain the basis of their objections to the judge. Yet, they must be willing to be bound by the settlement agreement if it is approved over their objections. Opponents do need not be members of the class. Opting out of the settlement is the best option for members of the class who consider a proposed settlement agreement to be unacceptable.)

¹⁰ Id. at 5-9.

¹¹ Id. at 15-17.

¹² Id. at 17-21.

¹³ See Brandon Butler, *The Google Book Settlement: Second Round Comments*, Feb. 10, 2010, at 2, available at <http://www.arl.org/bm~doc/gbs-pasa-summary.pdf> (estimating the number of comments filed with the court as in excess of 500). All filings concerning the proposed settlement of the *Authors Guild v. Google* lawsuit can be found on thepublicindex.org website established by Professor James Grimmelmann of New York Law School and his students. Grimmelmann has also kept an ongoing blog which contains considerable substantive commentary on the settlement as well as providing links to many other resources about the settlement. It can be found at <http://laboratium.net>.

There were five main categories of objectors and opponents of the proposed Google Book settlement who appeared at the fairness hearing on February 18, 2010.¹⁴ One set represented the interests of non-U.S. rights holders. A second consisted of U.S. authors and author groups who articulated their reasons for concluding that the proposed Google Book settlement was not fair to the class. A third set included public interest organizations that expressed doubts about whether the settlement was really in the public interest. A fourth set comprised Google competitors who believe that approval of the settlement would have anti-competitive consequences and would achieve results that can only legitimately be done through legislation. Finally, the U.S. Department of Justice (DOJ) recommended against approval of the settlement. It concluded that some provisions of the settlement may violate the U.S. antitrust laws, but more importantly, that the court lacks the power to approve a settlement that would create a forward-looking set of commercial transactions that goes so far beyond the issue in dispute in the lawsuit.¹⁵

The governments of France and Germany, along with representatives of authors and publishers from countries as diverse as Japan, the Netherlands, Sweden, Hungary, and New Zealand, were among the strongest critics of the Google Book settlement.¹⁶ France and Germany were outraged that the original settlement would have allowed Google to classify as out-of-print—and thus to commercialize—any books of their nationals’ books that were not commercially available in the U.S. (A book from the Germany or Japan might be a best seller in its home country, but if copies were not for sale in the U.S., Google originally planned to regard these books as out-of-print and available for commercialization in the U.S.) DOJ agreed with France and Germany that this was unfair to non-U.S. rights holders.¹⁷

In response to foreign rights holders’ criticisms, Google, the Authors Guild and AAP decided to narrow the settlement class through an amended settlement agreement which they filed with the court in mid-November 2009.¹⁸ The original class consisted of all persons who owned a U.S. copyright interest in one or more books or inserts (in other words, all owners of copyrights in books and inserts in the world); the amended

¹⁴ Only 21 of the hundreds of objectors and opponents to the Google Book settlement asked to speak at the fairness hearing. A sixth category of objections came from several states that oppose the settlement insofar as it contemplated giving to charities all funds owed to rights holders who did not claim their books with BRR within 10 years after approval of the settlement, which they argued was counter to state unclaimed funds laws. See Hearing Transcript, *supra* note 3, at 106-109 (argument by a representative of the Attorney General of the State of Pennsylvania).

¹⁵ Statement of Interest by the U.S. Dept. of Justice Regarding the Proposed Settlement, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. Feb. 4, 2010), available at http://thepublicindex.org/docs/amended_settlement/usa.pdf [“DOJ Statement II”].

¹⁶ See Butler, *supra* note 13, at 2 (noting that 300 of 400 objections filed in September 2009 were filed by foreign rights holders or those representing foreign rights holders). A German copyright official spoke at the fairness hearing, as did representatives of German, New Zealand, and German rights holders.

¹⁷ Statement of Interest by the U.S. Dept. of Justice Regarding the Proposed Settlement at 11, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 18, 2009), available at <http://thepublicindex.org/docs/letters/usa.pdf>.

¹⁸ ASA, *supra* note 2.

agreement applied only to owners of rights in books published in the UK, Canada, and Australia and those who had registered copyrights with the U.S. Copyright Office.¹⁹

Although foreign rights holders viewed this narrowing of the settlement class as an improvement, many non-Anglophone rights holders objected to the amended settlement class because thousands of rights holders from other countries were still within its scope insofar as they had registered copyrights in the U.S. The German minister who appeared at the fairness hearing pointed out that many German rights holders were unsure about whether they were in or out of the class because their records of U.S. copyright registration were incomplete.²⁰

Several non-Anglophone rights holders pointed out that the proposed settlement had not been translated into languages other than English so that non-Anglophone rights holders could neither read the settlement agreement, nor understand its implications.²¹ Non-U.S. rights holders also objected to inadequacies in the notice given to foreign rights holders, many of whom had not been informed about the proposed settlement. Germany and France also asserted that the proposed settlement violated U.S. treaty obligations because it imposed formalities on the exercise of authors' exclusive rights and gave Google a license to their nationals' books without getting their rights holders' permission.

Representatives of three public interest organizations also raised serious concerns about inadequacies of privacy protections in the Google Book settlement.²² The proposed settlement agreement requires Google to engage in extensive monitoring of uses that readers will make of Google books, even those that users have purchased from Google. Traditional libraries have zealously protected patron privacy. However, Google is unwilling to make any commitments about Google Books user privacy beyond saying that its general privacy policy will apply.

Eight persons who spoke against the fairness of the settlement at the fairness hearing represented U.S. author interests.²³ Two were literary agents who complained that the settlement was very difficult to understand and to explain to clients. The agents had recommended to most clients that they should opt out of the settlement because it would give them too little control over their works. A third author representative argued that the settlement's cap on compensation to owners of rights in inserts was unfair.²⁴ They cannot be paid more than \$500 per work for all uses that Google might make of their

¹⁹ Cf. Settlement Agreement, *supra* note 6, § 1.16 (defining book), ASA, *supra* note 2, at § 1.19 (defining book).

²⁰ Hearing Transcript, *supra* note 3, at 69-73.

²¹ See, e.g., Objection to the Amended Settlement Agreement by Members of the Japan P.E.N. Club, et al., at 3, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Jan. 28, 2010), available at http://thepublicindex.org/docs/amended_settlement/Saito.pdf.

²² Privacy concerns about the settlement were expressed by representatives of the Center for Democracy and Technology, the Electronic Frontier Foundation, and the Electronic Privacy Information Center. See Hearing Transcript, *supra* note 3, at 21-25, 59-65, and 85-88.

²³ This included two individual authors appearing on their own behalf, two literary agents, three lawyers representing multiple authors, and one lawyer representing two author groups. *Id.* at 22-102.

²⁴ Andrew DeVore argued this point on behalf of Arlo Guthrie, et al. *Id.* at 97-102.

inserts. This contrasts sharply with the substantial fees that some authors are able to charge (e.g., \$1000 to \$1500) for each licensed use of their works.

I filed two objections to the proposed Google Book settlement, the second on behalf of 150 academic authors, because the settlement runs counter to academic norms in several respects.²⁵ Of greatest concern to academic authors is the risk that prices of the ISD will, over time, rise to astronomical levels, and thereby be out of the reach to many institutions of higher education. The risk of price-gouging is significant because approval of the settlement would give Google a de facto monopoly over a corpus of millions of out-of-print books. Google must set prices in consultation with the BRR, which will have an institutional bias in favor of profit maximization. I argued that most of the books in the ISD will be books written by scholars for scholars, many of which will also prove to be “orphans” (that is, books whose rights holders cannot be found through a reasonably diligent search).²⁶ Academic authors would generally prefer to make their out-of-print books available on an open access basis, and orphan books should be available on an open access basis as well. BRR and Google will have little incentive to accommodate with the open access preferences of academic authors.

Amazon.com, Microsoft, and Yahoo! outright oppose the Google Book settlement. Google has sought to defuse this opposition by depicting these critics as envious rivals who lack the entrepreneurial initiative necessary to make a comparably bold move. Amazon.com countered by pointing out that it had digitized three million books, but only after getting permission from the rights holders. Copyright treatise author David Nimmer, who appeared at the fairness hearing for Amazon.com, charged that Google had turned copyright law on its head by scanning first and seeking permission later.²⁷

As search engine technology developers, Microsoft and Yahoo! have quite different concerns about the Google Book settlement.²⁸ Google has already digitized 12 million books, and has publicly announced its intent to scan all books in the world. Google has integrated these books into its search technologies. Every time someone makes a search using Google’s search engine nowadays, Google searches through 12 million books to find the answers. This gives Google an extraordinary competitive advantage in the search market because user satisfaction with search engines depends heavily on responses to “tail” queries (that is, to queries that involve obscure terms).²⁹ Books from major research libraries are dense in information relevant to such queries. Microsoft and

²⁵ Letter of Pamela Samuelson to Judge Denny Chin on behalf of academic authors, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 3, 2009), available at <http://thepublicindex.org/docs/letters/samuelson.pdf>; Supplemental Letter of Pamela Samuelson on behalf of academic authors, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Jan. 27, 2010), available at http://thepublicindex.org/docs/amended_settlement/Samuelson_supplemental_objection.pdf.

²⁶ My remarks at the fairness hearing can be found at Hearing Transcript, supra note 3, at 55-59.

²⁷ Id. at 44-50.

²⁸ Id. at 39-44 (remarks of Tom Rubin on behalf of Microsoft). Yahoo! objected to the settlement but did not appear at the fairness hearing.

²⁹ See, e.g., Supplemental Memorandum Amicus Curiae of the Open Book Alliance in Opposition to the Proposed Settlement at 16-19, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Jan. 28, 2010), available at http://thepublicindex.org/docs/amended_settlement/Open_Book_Alliance.pdf.

Yahoo! argue that approval of the Google Book settlement will enable Google to entrench its monopoly position in the search market and unfairly disadvantage its rivals.

DOJ agrees with Google's rivals that there is a significant risk that approval of the settlement will have anti-competitive consequences in both the search and the e-book markets.³⁰ Several provisions of the proposed settlement would also allow Google to coordinate prices in an anti-competitive manner and to mandate a revenue split rather than allowing it to be negotiated.

Anti-competitive pricing problems with the settlement agreement could presumably be fixed through further amendments to the Google Book settlement, but DOJ has articulated a far more profound problem with it. In DOJ's view, Judge Chin has no power under the law to approve a settlement that goes so far beyond the issues in litigation in the *Authors Guild* case.³¹

DOJ foresees no difficulty with approval of a settlement that only involved Google paying \$60 per book for its past scanning of in-copyright books because that conduct was at issue in the lawsuit. But the proposed Google Books settlement would give Google a license to commercialize all in-copyright but out-of-print books, even though Google never claimed—and could not plausibly claim—that it would be fair use to sell out-of-print books to consumers or to license an ISD of out-of-print books to colleges and universities. Nor had the Authors Guild or AAP ever charged Google with planning to carry out such commercial activities. The forward-looking commercial aspects of the settlement are, the DOJ has concluded, “a bridge too far.”³² The settlement uses the existence of a legitimate dispute between the parties about scanning-to-provide-snippets to remake the market for e-books.

At the fairness hearing, DOJ asserted that the author and publisher subclass counsel had the obligation to litigate the claims in dispute in the case or to settle them. No one appointed the Authors Guild or AAP to act as literary agents in relation to Google; yet, this is the role they seem to have taken on in negotiating the settlement.

DOJ has said that it is willing to work constructively with the parties to explore how a settlement could be configured that would not abuse the class action process. It held out the possibility that a settlement could be approved if Google agreed to settle the lawsuit with the same \$60 per past digitization, but with an amendment adopting an opt-in rather than an opt-out regime for the forward-looking commercial transactions now anticipated by the Google Book settlement.³³ (In an opt-in regime, authors and publishers could decide to opt-in to Google's commercialization of their out-of-print books, but Google

³⁰ William Cavanaugh appeared at the Feb. 18 fairness hearing on behalf of the DOJ. See Hearing Transcript, *supra* note 3, at 117-130. See also DOJ Statement II, *supra* note 15, at 16-22.

³¹ *Id.* at 4-14.

³² *Id.* at 3.

³³ Hearing Transcript, *supra* note 3, at 125. Hadrian Katz, arguing for the Internet Archive, also suggested that an opt-in regime would preserve almost all of the benefits of the settlement and would solve most of the problems. *Id.* at 92-96.

would not get a license automatically entitling them to commercialize out-of-print books unless the rights holders came forward and told them to stop doing this.)

In open court, both Google's and the Authors Guild's lawyers said that the settlement must remain an opt-out regime.³⁴ Yet, because Google faces potentially crippling damage liability—by one estimate, \$3.6 trillion in statutory damages³⁵—it may decide that an opt-in deal is better than no deal at all.

Conclusion

It is hard to know whether Judge Chin will agree with DOJ that an opt-in settlement of the Google Books could be approved. In colloquy with the DOJ lawyer, Judge Chin pointed out that the forward-looking commercial venture proposed in the Google Book settlement is also beyond the issue in litigation in the *Authors Guild* case. Yet, this one simple change to the settlement agreement would make it much fairer to copyright owners than the opt-out deal that Google prefers.

Judge Chin seems unlikely to approve the current settlement, especially given DOJ's opposition, but he may ask the parties to consider negotiating additional amendments so that the settlement could be approved. Or he may just decide there are too many problems with the settlement, in which case the parties would have to resume litigation on the fair use issue. This would likely take years to resolve definitively.

In the meantime, Google is continuing to scan as many books as it can from major research libraries in the U.S. This includes hundreds of thousands of books published in countries other than the U.S., Canada, the UK, and Australia. Just because Dutch books are, for example, formally outside this or any further amended settlement does not mean that Google is not going to scan them and make at least snippets of their contents available on the open Internet. Being outside the settlement only means that Google will not pay Dutch authors \$60 per book scan and Google will not get a license to commercialize their books.

Google wants Google Books to become a valuable resource not only for scholars, but also for ordinary people who seek information in their daily lives all around the world. If copyright is an obstacle to achieving this objective, Google seems to believe that copyright must give way. Google's boldness and the technological prowess of the Google Books project are unquestionably impressive, but the fairness of this project to authors, publishers, and the public will likely be a subject of intense debate for years to come.

³⁴ Id. at 138, 145.

³⁵ Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 27 JOHN MARSHALL REV. INTELL. PROP. L. 227, 229 (2009).