Standing Up for Copyright:
Marybeth Peters' Response to the Google Book Settlement

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When Google, the Authors Guild and the Association of American Publishers (AAP) announced in October 2008 that they had reached a settlement agreement for the copyright litigation against Google for its systematic scanning of books from major research libraries and serving up snippets of their contents in response to user queries, the initial reaction of most copyright professionals was quite positive.[1]

This was perhaps unsurprising, for at first blush, the settlement looks like a win-win-win. If the settlement is approved, the public would get substantially greater access to millions of in-copyright but out-of-print books; authors and publishers would enjoy new revenue streams from uses of books that, because they are out-of-print, are not currently generating any revenues for their rights holders; a new Book Rights Registry (BRR) would be created to handle payments to authors and publishers, as well as potentially to license third party uses of the books; public and higher education libraries would get a modest number of public access terminals to enable their patrons to have access to a database of millions of books; these libraries could also subscribe a database that would enable all of their patrons to have full access to the contents of all books in the subscription database; two universities would be licensed to make the full Google Book corpus available for nonprofit nonconsumptive research; and Google would have an opportunity to recoup its investment in the Google Book Search (GBS) project.[2]

Despite the high praise heaped upon the agreement by AAP and Authors Guild representatives, Marybeth Peters and others at the U.S. Copyright Office began to have reservations about the proposed settlement as they studied it further.[3] At a conference at Columbia Law School in March 2009, Peters expressed concern about the scope of the GBS settlement and its future impact on owners of copyrights in books.[4] Peters perceived the settlement to be aimed at giving Google a compulsory license to make out-of-print books available to the public.[5] She questioned whether compulsory licenses could be granted by courts through approval of a class action settlement, suggesting that Congressional authorization was necessary and expressing doubt that Congress would be willing to grant a compulsory license only to one firm.[6] She wondered also about the effect of the settlement on orphan works legislation and on existing proposals to reform

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[1] *See, e.g.*, Statement of Marybeth Peters, Register of Copyrights, before the House Committee on the Judiciary, 111th Cong., 1st Sess., Sept. 10, 2009 at 1 ("Peters Statement").
[2] Settlement Agreement,
[3] Peters Statement, *supra* note 1, at 1-2.
[4] *See* Peter Hirtle, *Google Books Settlement at Columbia, Part 1*, March 15, 2009, *available at* http://blog.librarylaw.com/librarylaw/2009/03/google-books-settlement-at-columbia-part-1.html (summarizing Peters' talk).
[5] *Id.*
[6] *Id.*

copyright exceptions for libraries and archives.[7] Peters was also unsure that the settlement adequately reflected the interests of all authors who would be affected by it, including those of foreign rights holders.[8] She thought the settlement posed serious public policy issues that were more appropriate for legislative action.[9]

While the Columbia conference gave Peters an opportunity to express some concerns about the settlement, there was little she could do on her own to affect approval or disapproval of the settlement or contribute to a broader public debate about it. Because the Copyright Office is a subunit of the Library of Congress, which in turn is a subunit of the U.S. Congress, Peters was unlikely to be in a position to submit a statement *sua sponte* to the court about the Office's concerns about the settlement. While she was quite willing to offer such a statement to members of Congress, she noted in her Columbia talk that not a single Congressman had asked her to comment on the proposed settlement, even though approval of the GBS agreement would, in effect, usurp Congressional prerogatives and have significant impacts on copyright and the public.[10]

Peters eventually had, however, an opportunity to be influential in the public debate about the proposed GBS settlement as well as in submissions to the judge in charge of ruling on the fairness of the GBS deal. One was through her testimony at a Congressional hearing in September 2009, a few weeks before the date on which the court had scheduled the fairness hearing on the settlement. A second was in connection with an investigation of the antitrust implications of the settlement initiated by the Antitrust Division of the U.S. Department of Justice (DOJ) undertook. In the course of intergovernmental consultations about the proposed settlement, Peters had a chance to explain why the DOJ should be concerned about copyright implications of the settlement as well as by antitrust and class action issues.

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*