Counsel's Advisory

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Vol. 17 No. 3 April 10, 2009

BOOK SEARCH SUIT SETTLEMENT MERITS BROADER PUBLIC ATTENTION

by
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Last October, book authors and publishers settled their 2005 lawsuits against Google alleging that the company's book scanning and indexing project had violated their copyrights. The proposed settlement, which must be approved by a federal district court, goes beyond addressing alleged past wrongs and providing monetary payment to the plaintiffs. It also erects a complex framework which will govern Google's continued book scanning and terms of its use. The settlement further creates a Book Rights Registry that will distribute payments from Google to copyright owners. Class members who do not wish to be bound by the settlement must opt out by **May 5, 2009** – also the deadline for objecting to the settlement or filing comments with the court. Relevant settlement documents, including the official notice, are available at http://books.google.com/booksrightsholders/.

The settlement agreement has inspired spirited discussion within the publishing, academic, and library communities, but it also merits wider public attention and scrutiny. The terms of this 130+ page document resulted from private negotiations among a small group of plaintiffs and their lawyers. This is customary for a class action settlement; but few private lawsuits have such a significant impact on the public interest as could the book search settlement. As one consumer advocate has noted, "the relationship between future generations and all the books ever written by previous generations" is at stake with the settlement.[1]

Debate and analysis over the agreement's terms has focused on a number of distinct issues. One is the broad, sweeping nature of the "Settlement Class." The settlement applies to anyone who owns a registered copyright on a "book" or "insert" published or distributed prior to January 5, 2009. The majority of books the settlement implicates are out of print but still protected by copyright, approximately 70% of which are "**orphan works**", or books for which the copyright holder cannot be determined. The public does benefit from having such out of print books available online. But if these copyright owners do not come forward before May 5, Google will have the exclusive right, free from fear of copyright litigation, to digitalize and sell online access to these books. Congress considered, but did not pass, legislation last year addressing all orphan works, including books. The bill featured a provision requiring that efforts be made to find the copyright holder before the work could lawfully be used. The book search settlement relieves Google of this requirement. Open content proponent Brewster Kahle termed this outcome as the settling parties' "own private orphan works legislation."[2]

Another important issue is whether the settlement contains adequate safeguards for consumer **privacy**. Rather than downloading a copy of a digitalized book, consumers will have to sign on to Google, which stores the purchases on its servers. Google will thus have unprecedented access to specific information about how and when books are read; in fact, a Security Standard in the settlement requires that Google keep extensive records of user activity.[3] The settlement contains nothing about how Google can use such information and whether it can be shared with third parties.[4]

A third area which merits more consideration is whether the settlement or the framework it creates are in line with **antitrust** laws. Some commentators have focused on the centralized Book Rights Registry and its power to negotiate prices. One academic notes that the settlement builds in some protections that dictate against the Registry acting like a "classic price-fixing cartel."[5] He concludes, however, that such

safeguards are not enough, and suggests the Department of Justice should step in and impose an antitrust consent decree on the Registry.[6] Other commentators have examined whether the settlement creates anti-competitive barriers to entry,[7] and how its "most-favored nation" clause (prohibiting the Registry from offering better terms to a competitor than it does to Google) might deter competition.[8]

Interested parties should take advantage of the opportunity to weigh in on the settlement before the court makes its final determination on whether it is "fair, adequate and reasonable." Given the potentially transformative nature of the settlement for publishing, authoring, and accessing books, one would hope that federal and state officials that are elected and appointed to uphold the public interest will make their views known as well.

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NOTES

1. Fred von Lohmann, *Google Book Search Settlement: Two Articles to Read*, Feb. 2, 2009, at http://www.eff.org/deeplinks/2009/02/google-book-search-settlement-two-articles-read.

2. *It's All About the Orphans*, Feb. 23, 2009, at http://www.opencontentalliance.org/2009/02/23/its-all-about-the-orphans/.

3. Settlement attachment D § 3.

4. *See* James Grimmelmann, *How to Improve the Google Book Search Settlement*, J. OF INTERNET LAW, Apr. 2009, at 16, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=james_grimmelmann.

5. *Id*. at 13.

6. *Id*.

7. Pamela Samuelson, *The Dead Souls of the Google Booksearch Settlement*, COMMUNICATIONS OF THE ACM, forthcoming July 2009 at 3.

8. Robert Darnton, *Google & the Future of Books*, N.Y. REVIEW OF BOOKS, Vol. 56 No. 2 (Feb. 12, 2009), available at http://www.nybooks.com/articles/22281.