



## **Background and Update On Google Book Search and the Proposed Settlement**

Brandon Butler  
Law and Policy Fellow

The original Google Books settlement was the proposed settlement of a class action lawsuit brought against Google, Inc. by groups and individuals representing authors and publishers who objected to Google's large-scale scanning of in-copyright books to facilitate its Book Search service. The settlement would have bound not only the plaintiffs who sued Google, but also most owners of copyrights in printed books ("class-members"), unless they chose to opt out. Class-members who opted out would have retained their right to sue Google over its scanning activities, but would not have been part of the collective licensing scheme created by the settlement.

The most important aspect of the original settlement is that it would have allowed Google to use its body of scanned works in an open-ended variety of new product offerings in addition to its search product. One of those new offerings would have been an institutional subscription that would allow libraries and other research institutions to provide users access to the millions of volumes (many of which are out-of-print) in Google's body of scanned works. Under the original settlement, participating class-members would have gotten a one-time payment in compensation for past scanning as well as a share of Google's future revenues from its scanning activities. A new, non-profit entity called the Book Rights Registry would have represented rights-holders under the Settlement going forward.<sup>1</sup>

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<sup>1</sup> For a more detailed explanation of the provisions of the original settlement, see Jonathan Band's excellent *Guide for the Perplexed* and *Guide for the Perplexed Part II*, available at <http://www.arl.org/pp/ppcopyright/google/index.shtml>.

The parties to the lawsuit agreed on the original settlement in October 2008, but because the suit is a class action and its resolution would bind an indefinite number of absent class-members, court approval is also required. As the court weighed whether the settlement was fair to all class-members, it received a huge number of filings (around 400) both from class-members and from other interested parties. Class-members had four options: they could do nothing (and be bound by the settlement, if it is approved), they could opt-out of the settlement entirely, they could participate but raise objections, or they could participate and indicate their support. The vast majority of class-member filings (nearly 300) were from foreign rights-holders who objected strenuously to the settlement but nevertheless did not opt out. Filers who do not hold copyrights in printed books covered by the settlement, but who nevertheless expressed an interest in the outcome of the case also filed opinions with the court. Most of these filers were research institutions and non-profit groups some of whom but not all, supported the settlement because of the benefits it would create for their users or members.

### **Bombshell: The Department of Justice Brief**

On September 18, 2009, the Department of Justice filed a sharply critical Statement of Interest arguing that the terms of the settlement do not meet important legal standards. In its Statement, the Department argues that the parties in the case do not adequately represent the members of the class with respect to the broad, open-ended rights that the original settlement would grant to Google. The Department also argues that the settlement is in tension with the tenets of copyright law and that it raises serious antitrust concerns, as well.

The Department is careful not to say definitively that the law requires limiting any settlement to authorizing only the original search product (which allowed the display of only three text “snippets” in response to a search query), but it casts serious doubt on whether any agreement that goes further could answer the legal concerns it raises. At the same time, the Department urges the court and the parties to continue discussions in an effort to secure the considerable social benefits that could result from a successful settlement.

### **What’s Next: A New Settlement, Perhaps a New Judge**

The DOJ’s brief was fatal to the original settlement. In light of the brief, the parties asked the court to cancel the October 7, 2009 fairness hearing where the parties and interested observers would have argued the merits of the original settlement before federal district court judge Denny Chin. Instead the court held a status conference that day at which the parties expressed optimism that a new agreement that would satisfy the DOJ’s concerns could be negotiated by November. The DOJ said it had not seen any proposed amendments to the settlement. The court ordered a new settlement be presented to the court by November 9, 2009. The judge and the parties also agreed that future objections to the new settlement would be limited to the amended aspects. A spokesman for the publishers told reporters he expected that the “core of the settlement” would be the same. Plaintiffs’ lawyer Michael Boni told the judge he hoped to seek final approval of a new settlement by December 2009 or early January 2010. Meanwhile, President Obama nominated Judge Chin for elevation to the Second Circuit Court of Appeals on October 6, 2009. Depending on how quickly his confirmation process moves, the settlement process may be further slowed by a change in judicial personnel.

## **Library Participation: Shaping the Debate, Informing Our Community**

The Association of Research Libraries, along with the American Library Association and the Association of College & Research Libraries, filed two sets of Comments with the district court. The Library Associations' initial Comments neither supported nor opposed the original settlement but raised some of the library community's key concerns about the settlement. Supplemental Comments outlined additional concerns prompted by further negotiations between Google and its partner institutions. The library groups also submitted a joint letter to the Attorney General of the United States regarding the Department of Justice's inquiry into antitrust concerns about the original settlement. Finally, the library groups submitted a joint letter to the Judiciary Committee of the House of Representatives in connection with its inquiry into the fairness of the settlement and the market for digital books.

In addition to these substantive interventions with the federal government, the Association of Research Libraries and its partners have published several explanatory guides for libraries concerning the settlement and the filings submitted to the court regarding the settlement.

These materials are available online at

<http://www.arl.org/pp/ppcopyright/google/index.shtml>,

<http://www.librarycopyrightalliance.org/submissions/domestic/google.shtml>, and

<http://www.arl.org/bm~doc/googlefilingcharts.pdf>.

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