



The Google Books Settlement: Second Round Comments

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Late last year, Google, the Author's Guild, the American Association of Publishers, and the individual plaintiffs in the lawsuit over Google's massive book digitization program negotiated several revisions to their original Proposed Settlement Agreement (original agreement). The revisions were designed to address concerns raised by the Department of Justice and other critics who advised the court to reject the original agreement.¹ The deadline to file comments on the new Proposed Amended Settlement Agreement (amended agreement) was January 28, 2010. The Department of Justice filed its comments on Thursday, February 4, 2010. This document describes the second round of comments.

The U.S. Department of Justice

The most important filing in the first round was the Department of Justice's thorough catalog of defects in the original agreement. The Department's second filing "reluctantly" concludes that the amended agreement does not cure those defects. The Department's brief argues that the amended agreement still violates the rules governing class action lawsuits, that it undermines competition in markets for both search and electronic publications, and that the amended agreement is inconsistent with copyright law. The Department nevertheless reiterates its hope that some of the benefits of a settlement could be obtained by further negotiation toward a narrower arrangement.

The Department concludes its brief with a series of modifications the court could propose if it decided to approve the settlement. They range from an "opt-in" arrangement that would differ little from the status quo (i.e., Google would be barred completely from making use of unclaimed and "orphan" works, shrinking the corpus significantly) to a two-year waiting period after which Google and the Registry could exploit unclaimed works more or less as the amended agreement currently contemplates. This list of tweaks, together with several expressions of regret and reluctance, suggests that despite its decisive legal arguments against approval, the Department is anxious to salvage some of the anticipated policy benefits of the settlement.

Numbers

There were significantly fewer filings in the second round of comments. This is likely due to the court's instruction that comments in the second round be limited to the new aspects of the amended agreement, and, as many filers noted, the revisions did little to change the fundamental structure of the settlement.

¹ For more on the revisions included in the amended agreement, see Jonathan Band, *A Guide for the Perplexed Part III: The Amended Settlement Agreement*, available at http://www.arl.org/bm~doc/guide_for_the_perplexed_part3.pdf.

There were just over 50 substantive filings on the amended agreement, compared to over 500 substantive filings regarding the original settlement. The ratio of objectors to supporters shifted slightly in favor of objectors this time around: roughly 400 of the 500 filings in round one were opposed, while roughly 49 out of 55 are opposed to the revised settlement. This is likely due to the fact that many domestic opponents reiterated their positions, while only one supporter chose to file again in the second round. The composition of the objectors changed substantially in this round: 300 of the 400 filings in the first round were foreign, while only 15 of 49 were foreign in the second round. The original and revised settlements both drew objections from four State governments.

New Objections

The amended agreement included several revisions aimed at addressing criticisms lodged against the original agreement. Objectors took issue with each of these changes. Here are some key changes and reactions from objectors:

Treatment of foreign works. In response to the aforementioned deluge of foreign objectors, the amended agreement was amended to exclude some foreign works by defining covered works to include only books registered in the U.S. or published in Canada, the U.K., or Australia. Foreign rightsholders responded with a series of new objections. First, excluded rightsholders object to their exclusion because they lose the benefits of the Settlement, including a cash payment for past scanning and inclusion in Google's future business models. Second, French and German publishers claim the revision may not actually exclude many foreign works, as it was common for foreign publishers to register their works in the U.S. in order to obtain copyright protection prior to its accession to the Berne Convention in 1990. Also, many foreign publishers had editions published in the U.K, Canada, or Australia that may qualify for inclusion in the Settlement. They complain that the cost of determining whether a particular work meets the new qualifications likely exceeds the \$60 per work one-time payment for past unauthorized use. Finally, foreign rightsholders continue to decry the notice process (e.g., translations of the key documents were poor or nonexistent) and their lack of representation on the Book Rights Registry (for rightsholders outside the U.K., Canada, and Australia).

The Unclaimed Works Fiduciary. The amended agreement attempts to remedy concerns about fairness to the owners of unclaimed or orphaned works by creating an Unclaimed Works Fiduciary (UWF) with various powers to act on behalf of these absent parties. The strongest objection, noted by Professor Pamela Samuelson, Richard M. Sherman Distinguished Professor of Law, University of California, Berkeley, and Public Knowledge, among others, is that the UWF would not be appointed, and so would have no power, until after the settlement is already in place, at which point it will be too late to alter any important terms of the arrangement between Google and rightsholders. Professor Samuelson also objects that the UWF is not empowered to change the terms on which unclaimed works are made available, e.g., to make them freely available under a Creative Commons license rather than subject to the automated pricing scheme in the amended agreement. Objectors also point out that the UWF is chosen by

members of the Book Rights Registry, who represent known rightsholders whose interests may be adverse to the owners of unclaimed works. The State objectors point out that, despite its name, the UWF is not subject to the duties that are typical of a fiduciary, and cannot be held accountable by the rightsholders she is supposed to represent.

Class Diversity. Filings from academic and science fiction writers, among others, argued in more detail that the class representatives did not adequately reflect the interests of all effected rightsholders. First, large commercial authors and publishers (e.g., Stephen King and Macmillan Publishers) have different goals and interests from smaller and academic authors and publishers. In particular, the profit-maximizing goals of the former group are inconsistent with the access-maximizing goals of many academic authors and publishers. Second, the interests of authors are often adverse to those of publishers, for example on the issue of how to divide revenue from the sale of e-books where a contract is silent. Finally, the Open Book Alliance pointed out that several of the class representatives had entered or would soon enter into Partner Agreements with Google that would exempt them from the terms of the Settlement. In other words, they were negotiating terms for other rightsholders that they would not have to follow due to these side agreements. The Department of Justice also raised concerns about these Partner Agreements.

State Objections. The States reiterated their objection that the settlement is inconsistent with state unclaimed property laws, which typically provide for the state to take control of unclaimed funds such as the revenue due to authors of unclaimed works. While the amended agreement took some steps to channel those funds to the states' unclaimed property regimes, objectors took issue with the fact that a portion of the funds is still reserved to pay administrative costs of the Book Rights Registry and that some of these funds may also distributed to charities other than those chosen by the states.

Objectors made several additional arguments, and many reiterated their prior criticisms.

Supporters

A handful of publishers' associations from Canada, the U.K., and Australia filed letters of support. The only repeat supporter is Prof. Gregory Crane of Tufts University, who heads an open access digital library called the Perseus Project.