

# The Google Books Settlement: Who Is Filing And What Are They Saying?<sup>1</sup>

Brandon Butler  
Law & Policy Fellow  
Association of Research Libraries

The Association of Research Libraries, the American Library Association, and the Association of College and Research Libraries have prepared this document to summarize in a few pages of charts some key information about the hundreds of filings that have been submitted to the federal district court presiding over the Google Books litigation. The Google Books Settlement is 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 bind not only the groups who sued Google, but also most owners of copyrights in printed books ("class-members"), unless they choose to opt out of the Settlement. Class-members who opt out retain their right to sue Google over its scanning activities, but will not be part of the collective licensing scheme created by the Settlement. Under the Settlement, participating class-members will get 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 will represent rightsholders under the Settlement going forward.<sup>2</sup>

The parties to the lawsuit agreed on this Settlement in October 2008, but because the suit is a class action and its resolution will bind an indefinite number of absent class-members, court approval is also required. As the court weighs whether the Settlement is fair to all class-members, it has received a huge number of filings 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. Filers who do not hold copyrights in the printed books covered by the Settlement, but who nevertheless express an interest in the outcome of the case are called "amici" (plural shorthand for "amicus curiae" or "friend of the court"). Some amici supported the Settlement, while others opposed. There have been over 400 filings by class-members and amici, and the charts that follow are meant to give the reader a general idea of who these filers are and what they are saying about the Settlement.

All of the filings represented below are addressed to the Settlement whose basic terms were reached in October 2008, but there is a chance this agreement will change substantially due to a recent filing from the United States Department of Justice. On September 18, 2009, the

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<sup>1</sup> With many thanks to Professor James Grimmelmann and his team at The Public Index ([www.thepublicindex.org](http://www.thepublicindex.org)) and to Justia for making these filings freely available online, often within hours of the court posting them to the Pacer system. The deadline for filing comments was September 8, 2009, and as of September 18, 2009, all filings appear to be available via those two sites. You can find documents referenced in the charts below by searching for the docket number (in the far left column) on Justia's page: <http://news.justia.com/cases/featured/new-york/nysdce/1:2005cv08136/273913/> or for the party name on The Public Index's Responses to the Settlement page: <http://thepublicindex.org/documents/responses>.

<sup>2</sup> For a more detailed explanation of the provisions of the 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>.

Department filed a 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 to the settlement do not adequately represent the members of the class with respect to the broad, open-ended rights that the Settlement would grant to Google. The Department also argues that the Settlement is in tension with the tenets of copyright law and that it creates serious problems under antitrust law, 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. The impact of the Department’s filing on the case is unclear at the time of this document’s release, but there is widespread speculation that it could prompt the parties to go back to the drawing board to create a significantly different (and perhaps much narrower) agreement. In that case, the entities listed in these charts could change their positions substantially. Those who filed in opposition of the October 2008 settlement may support a modified agreement, and vice versa.

Please excuse the unavoidable simplification and subjectivity involved in compiling and categorizing this material. The determination of who is a “Key” opponent or supporter was based primarily on whether the filing represented an institution or entity whose views likely readers of this piece would be curious to know. Categories such as “Anti-user” and “Anti-competitor” are often difficult to tease apart, and many filings expressed multiple, complex arguments that were distilled into a single position. Furthermore, some parties expressed important concerns about the Settlement, but chose to urge careful government oversight rather than opposing the Settlement entirely. In fact, this is the position taken by members of the Library Associations (of which ARL is one) in their Comments to the court. Filers with reservations and concerns are listed in their own chart, separate from the supporters and opponents. Because the concerns of parties with reservations were generally identical to those of the opponents, these views are collected together in the chart on page 3. Finally, while many rightsholders and interested observers have announced their views publicly, these charts represent only the views of those parties who filed with the court.

How Many Filings?		
<b>Class-member Objectors</b>	(domestic)	82
	(foreign)	295
<b>Amicus Objectors</b>	(domestic)	10
	(foreign)	3
<b>Classmembers with Reservations</b>		3
<b>Amicus Filers with Reservations</b>		5
<b>Classmember Supporters (all domestic)</b>		8
<b>Amicus Supporters (all but two are domestic)</b>		29
<b>Opt Outs</b>		>50 <sup>3</sup>

Of Key Filers, What Are Their Concerns? <sup>4</sup>	
Anti-competitive <sup>5</sup>	10
Anti-rightsholder <sup>6</sup>	23
Anti-user <sup>7</sup>	12

Of Key Supporters, Why Did They Support?	
Pro-competitive <sup>8</sup>	4
Pro-rightsholder <sup>9</sup>	1
Pro-user <sup>10</sup>	22

<sup>3</sup> Most of the authors and publishers who opted out (we believe more than 1,000) did so by filing with the settlement administrator rather than with the court.

<sup>4</sup> This chart counts the concerns of filers who expressed reservations as well as those of opponents of the Settlement. The Library Associations, e.g., asked the court to supervise the Settlement aggressively to guard against dangers to user privacy, intellectual freedom, and equal access. The majority of filers with reservations (seven out of eight) feared the Settlement could be “Anti-user” as defined below if the government does not carefully supervise the parties.

<sup>5</sup> Filings in this group generally argued that the Settlement would give Google an unfair advantage over competitors in the search, bookselling, or book scanning market.

<sup>6</sup> Filings in this group generally argued that the Settlement would interfere with what the filers believe to be the proper scope of rights granted by copyright law, e.g. by granting Google immunity from suit for what the filers believe to be infringing activity, or by empowering the Book Rights Registry to negotiate with Google on behalf of rightsholders who do not opt out of the Settlement.

<sup>7</sup> Filings in this group generally argued that the Settlement would endanger the users of Google’s proposed services by, e.g., providing inadequate protection for user privacy or academic freedom. There is sometimes an overlap between this group and anti-competitive arguments, as some filers worried that users would suffer due to monopolistic practices by Google or the Book Rights Registry.

<sup>8</sup> Filings in this group generally argued that the new services or works made available through the settlement would have positive effects on the market for books, digital books, and scholarly access to books.

<sup>9</sup> This party, a British licensing body representing several thousand authors, said the Settlement would create new opportunities for rightsholders to exploit their works.

<sup>10</sup> Filings in this group generally argued that the Settlement would expand access to books, especially for underserved communities such as rural areas, small colleges, and the disabled.

<b>Key Supporters of the Settlement<sup>11</sup></b>		
<b>#</b>	<b>Party Name</b>	<b>Reason for Support</b>
159	Abilene Christian University	Pro-user
125	American Association of People with Disabilities (AAPD)	Pro-user
275	Antitrust Law and Economics Professors	Pro-competitive
157	Association of Independent California Colleges and Universities (AICCU) (Also representing independent colleges in Arkansas, South Carolina, Iowa, and Florida)	Pro-user
457	Authors' Licensing Collecting Society (ALCS) (UK)	Pro-rightsholder
N/A <sup>12</sup>	Canadian Urban Library Council	Pro-user
354	City University of New York, LEADS (Linking Employment Academics and Disability Services)	Pro-user
261-2	Computer & Communications Industry Association (CCIA)	Pro-competitive
241-2	Cornell University	Pro-user
529	CUNY Assistive Technology Services	Pro-user
518	CUNY Committee On Student Disability Issues	Pro-user
353	Institute of Intellectual Property and Social Justice	Pro-user
342	Leadership Conference on Civil Rights	Pro-user
130	League of United Latin American Citizens (LULAC)	Pro-user

<sup>11</sup> All supporters listed here are amici, although the Authors' Licensing Collecting Society is an association owned and governed by writers in the U.K., who are themselves class-members.

<sup>12</sup> Filing appears on Prof. Grimmelmann's site, but does not appear to have been docketed by the court.

<b>Key Supporters of the Settlement<sup>11</sup></b>		
<b>#</b>	<b>Party Name</b>	<b>Reason for Support</b>
345	Members of the Stanford University Computer Science Department	Pro-user
350	National Association for Equal Opportunity in Higher Education (NAFEO)	Pro-user
129	National Association of Federally Impacted Schools (NAFIS)	Pro-user
N/A <sup>13</sup>	National Federation for the Blind	Pro-user
144	Photo Marketing Association International/Worldwide Community of Imaging Associations (PMA)	Pro-competitive
274	Sony	Pro-competitive
357	Stanford University Libraries	Pro-user
359	The National Grange	Pro-user
139	United States Distance Learning Association (USDLA)	Pro-user
138	United States Student Association (USSA)	Pro-user
514	University of Michigan	Pro-user
374	University of Virginia	Pro-user
149	University of Wisconsin-Madison	Pro-user

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Filers with Reservations			
#	Party Name	Amicus or Class-member	Reservations
519	American Association of University Professors (AAUP)	Amicus	Anti-rightsholder <sup>14</sup>
100, 466	Association of College and Research Libraries (ACRL), American Library Association (ALA) and Association of Research Libraries (ARL) (The Library Associations) (Supplemental Comments)	Class-member	Anti-user <sup>15</sup>
314	Center for Democracy and Technology	Amicus	Anti-user
361	Committee on Institutional Cooperation (CIC)	Amicus	Anti-user
239	Institute for Information Law and Policy at New York Law School	Amicus	Anti-user
381	International Federation of Library Associations and Institutions (IFLA)	Class-member	Anti-user <sup>16</sup>
158	Urban Libraries Council (ULC)	Amicus	Anti-user
134	University of California Faculty	Class-member	Anti-user

<sup>14</sup> Like Prof. Pamela Samuelson, below, and the Library Associations, the AAUP expresses concern that interests of academic rightsholders will not be represented on the Book Rights Registry's board.

<sup>15</sup> The Library Associations list several concerns related to the Settlement's possible impact on institutional users and their stakeholders. Some of these concerns could also be classified as worries the Settlement could be anti-competitive. Essentially the same set of issues is raised by the Committee on Institutional Cooperation, the Urban Libraries Council, and the University of California Faculty.

<sup>16</sup> In addition to the Library Associations' concerns, IFLA expresses concern that the new Google services will not be available outside the United States.

## Key Opponents of the Settlement

#	Party Name	Amicus or Class-member	Settlement is...
206	Amazon	Class-member	Anti-competitor
188	American Law Institute	Class-member	Anti-rightsholder
627	American Psychological Association	Class-member	Anti-rightsholder
218	American Society of Media Photographers, Inc., Graphic Artists Guild, et. al.	Class-member	Anti-rightsholder
111	Australian Society of Authors	Amicus	Anti-competitive, Anti-user
534	Charles Nesson et al.	Class-member	Anti-rightsholder
313	Consumer Watchdog	Amicus	Anti-user
238	DC Comics	Class-member	Anti-rightsholder
196	Dutch Publishers (30+)	Class-member	Anti-rightsholder
N/A <sup>17</sup>	Electronic Privacy Information Center (EPIC)	Amicus	Anti-User
470	EMI Music Publishing	Class-member	Anti-rightsholder
179	Federal Republic of Germany	Amicus	Anti-rightsholder
293	Free Software Foundation	Class-member	Anti-User
537	French Publishers' Association	Class-member	Anti-rightsholder
143	Scott E. Gant (joined by 99 foreign class-members filing separately)	Class-member	Anti-rightsholder
270	Hachette Livre, et al.	Class-member	Anti-rightsholder

<sup>17</sup> Filing appears on Prof. Grimmelmann's site, but does not appear to have been docketed by the court.

## Key Opponents of the Settlement

#	Party Name	Amicus or Class-member	Settlement is...
233	Harold Bloom, et. al	Class-member	Anti-rightsholder
167	Harrassowitz et al. (Publishers and Publishing Societies from Germany, Sweden, Austria, and Switzerland)	Class-member	Anti-rightsholder
292	Lyrasis, Inc. Nylink and Bibliographical Center for Research Rocky Mountain, Inc.	Amicus	Anti-competitor <sup>18</sup>
240	Microsoft	Class-member	Anti-competitive
698	New Zealand Society of Authors (Pen New Zealand, Inc.) (NZSA)	Class-member	Anti-rightsholder
645	NSF International (private standard-setting and certification body, not National Science Foundation)	Amicus	Other (GBS uses outdated standards on its site)
282	Open Book Alliance	Amicus	Anti-competitor
336	Pamela Samuelson, et al.	Class-member	Anti-rightsholder <sup>19</sup>
281	Privacy Authors and Publishers	Class-member	Anti-User
390	Professors Raymond Nimmer and Jeff Dodd (University of Houston)	Class-member	Anti-rightsholder
298	ProQuest LLC	Class-member	Anti-competitor
N/A	Public Knowledge (filing not docketed)	Amicus	Anti-competitor
117	Publishers' Association on Book Distribution (Japan)	Class-member	Anti-rightsholder
549	Questia, Inc.	Amicus	Anti-competitor

<sup>18</sup> These parties are concerned about a very specific provision regarding OCLC-affiliated consortia.

<sup>19</sup> Samuelson and others expressed concern that the interests of academic rightsholders – namely, the greatest possible access to the out-of-print works of others, and the widest possible availability of their own out-of-print-works – may not be represented by the Book Rights Registry if it places too much emphasis on maximizing profits for commercial rightsholders.



Key Opponents of the Settlement			
#	Party Name	Amicus or Class-member	Settlement is...
706	Rebecca C. Jones (childrens' book author) (similar briefs were filed by four other class-members)	Class-member	Anti-user <sup>20</sup>
287	The French Republic	Amicus	Anti-rightsholder
291	The Internet Archive	Amicus	Anti-competitor
278, 547, 334. 708	The State of Connecticut The States of Pennsylvania, Washington, and Massachusetts The State of Texas The State of Missouri	Class-member	Anti-rightsholder <sup>21</sup>
465	UK Booksellers' Association	Class-member	Anti-competitor
377	Uniform Law Commission	Class-member	Anti-rightsholder
720	The United States of America	Amicus	Anti-competitor/Anti-rightsholder
710	Washington Legal Foundation	Class-member	Anti-rightsholder
288	Yahoo!	Class-member	Anti-competitor

September 28, 2009

<sup>20</sup> These filings propose a definition of "Children's Book" and suggest making a free public access terminal available in public schools and public charter schools, as well as in public libraries.

<sup>21</sup> The states object that the Settlement is inconsistent with their unclaimed property laws, which would require profits derived from orphan works to be turned over to the government of the state where the putative owner resides. The Settlement calls for these funds to be distributed to the participating rightsholders, to the Book Rights Registry, or to charitable groups.