

Legal Update from Brian Flagler

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Will Renegotiated Google Books Settlement Be Approved?

UPDATE: On November 9, parties to the proposed Google Books Settlement are due to file an amended settlement agreement with the court. The parties have not yet disclosed what they plan to change in order to resolve concerns with the settlement raised by the Department of Justice and others. However, Richard Sarnoff, chairman of the Association of American Publishers, indicated during a panel discussion at the Frankfurt Book Fair that European works are likely to be excluded from the settlement to address objections filed by the governments of Germany and France.

The federal judge in New York has indicated that he plans to hold a Fairness Hearing on the revised settlement in early January. In that hearing, the court will consider the plethora of objections previously filed by a variety of parties to the original settlement agreement, as well as objections to the revised settlement which may be filed later this year after the revised agreement is filed with the court. Although the court will consider all appropriately-filed objections, whether the court does or does not approve the settlement will, in my view, depend in large part on the degree to which the revised settlement resolves two main concerns raised by the Department of Justice in its Statement of Interest filed September 18.

The DOJ's first objection is that the forward-looking components of the settlement exceed the bounds of what can be accomplished by a class action settlement. Class action settlements typically resolve past behavior. The Google Books Settlement, by contrast, grants Google and the Book Rights Registry the right to negotiate broad future uses of digital books. This issue is particularly significant for out of print books, because the default position in the agreement allows Google to display out of print books unless the author indicates otherwise. The DOJ's concern, also raised by some other parties, is that the rights-holders of many out of print books are the spouses or estates of deceased authors, who may not be aware of the settlement agreement. In these cases, the Book Rights Registry may license Google to exploit out of print books in ways that the rights-holder is not aware of.

Taken on its face, this objection cuts to the heart of the purpose of the settlement agreement: to make out of print books available for viewing by consumers and libraries without securing individual permission from the millions of rights-holders to out of print books. If display uses required the rights-holder to “opt in” this might resolve the concern raised by the DOJ (and the Copyright Office), but the practical result would be that millions of “orphan” works are not viewable. And, the settlement agreement already allows the rights-holder to object at any time and thereby stop all display of their work. I expect that the parties to the settlement may address part of the DOJ’s concern by eliminating a provision which penalizes rights-holders that do not come forward within five years and by limiting the future uses which may be licensed by the Book Rights Registry.

The DOJ’s second objection is that the settlement agreement may violate antitrust laws. The Antitrust Division of the DOJ has yet to issue its report on this point. The antitrust concerns fall into two main categories. First, the government is generally concerned that any agreement reached between the largest book publishers and representatives of authors may be collusive, with the effect of raising prices to consumers. This potential objection is complex, and I will not go into detail in this update. Suffice it to say that if the Antitrust Division concludes that the revised agreement violates the Sherman Act, this could potentially kill the settlement. Second, the government is concerned that the settlement releases Google from any copyright liability from its future use of the covered works, but does not grant any similar release to Google’s competitors. And, the agreement includes a “most favored nations” provision which does not allow the Book Rights Registry to license any other company to use the works on terms which are more favorable than those terms granted Google. I expect that the revised agreement will include a mechanism to insure that Google’s competitors will have access to the digital works covered by the settlement, but it is far from clear how this will be accomplished.

It should be noted that the DOJ went out of its way to compliment the parties on the significant potential value offered to society by making out of print works available electronically and for making the content available to the visually disabled. The DOJ stated repeatedly that it desires to work with the parties to find an acceptable settlement.

SIGNIFICANCE: The implications for the future of digital books depend on the terms of the revised settlement agreement proposed by the parties and whether it is ultimately accepted. If the settlement agreement insures that Google will have real competition in this space, the resulting economic models that may develop around this immense body of digital books are virtually limitless. On the other hand, if the settlement agreement is ultimately rejected and the parties resume litigation, a court finding as to whether Google’s scanning of books into its search engine is or is not “fair use” could have significant implications for copyright law. I tend to believe that all of Google’s activities are unlikely to be held to be fair use, but certain

aspects of the program may be deemed fair use, and the litigation would likely take years to reach conclusion.



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