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The Rejection of the Amended Google Book Settlement Agreement: A Librarian's Perspective

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I. BACKGROUND

Google started partnerships in 2004 with various academic and public research libraries to scan their book collections with the idea of creating an online archive and index of these books. Google intended to add this index to its massive search database. This became known as the Google Library Project. Any search results that included hits derived from the digital collection would display snippets of text from the scanned items, similar to what appears in Google Books and Google Scholar. The Project was ambitious. Twelve million volumes had been scanned by the time various publisher and author associations brought suit for copyright violation.

This legal action brought in federal court took the form of a class action under Federal Rule of Civil Procedure 23. The major claim of the class was that Google had undertaken the scanning project without securing permission from rightsholders to scan entire items or to display portions of the text in search results. Google defended on the grounds that its actions constituted fair use under United States copyright law.

The underlying copyright claims were never litigated as the parties entered into settlement talks that produced an agreement presented to the Court in November 2008. The original settlement terms generated objections, which resulted in the renegotiation of the settlement to meet the objections. The Amended Settlement Agreement ("ASA")[2] was presented to the Court and the public in November of 2009. The Court received briefs, letters, and other documents over the course of the following months, both in favor of and against the proposed settlement.

The ASA resolved claims of copyright violation against Google and set up a business arrangement that would allow Google, among other terms, to:

- continue scanning books for its digital collection;
- set up a store where copies of scanned books could be sold with money being divided between Google and the rightsholder;
- created a digital registry for orphaned books, identified as books in copyright whose rights-holder could not be identified;
- set up a royalty structure for books sold through online sales; and

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[2] A copy the Amended Settlement Agreement is available at http://www.googlebooksettlement.com/r/view_settlement_agreement (last visited on June 17, 2011). This is part of the site that was established to act as a clearinghouse on the administration and settlement of claims.

- created licensing terms for other vendors to sell scanned content.

One of the major points of contention in the agreement was that Google would have the right to continue scanning and display materials unless an individual rightsholder opted out of the project.

The United States Department of Justice filed a document in the case presenting its concerns over the impact the agreement would have on other vendors. At the same time, the document expressed a conciliatory tone, noting the intellectual value of the archive that Google was creating and offering to work with the parties to meet the Department's objections.

Foreign publishers and authors objected about how the ASA would affect their copyrights under their domestic laws and the laws of the United States. Nations, themselves, filed objecting briefs in the case. The most frequent objection was that the law of each objecting country tended to offer stronger protections to rightsholders and that the terms of the settlement would not be allowed under those laws.

On March 22, 2011, Judge Denny Chin[3] rejected the Amended Google Book Settlement Agreement as "not fair, adequate, and reasonable" as required by Federal Rule of Civil Procedure 23(e)(2). The basis for the rejection came from the intersection of copyright, antitrust, and international law. Judge Chin touched on all of these as presented by the various stakeholders on both sides of the issue and concluded that many of the objections could be cured by changing the opt-out provision to opt-in. The parties continue to negotiate as of this writing.

II. THE DIGITAL COLLECTION

Much of the discussion surrounding the ASA considers the economic power that Google would have if it was approved and the impact on Google's book selling competitors. However, the point that seems secondary in this analysis, the actual content of the scanned books, is, from a librarian's perspective, very important. Having online access to the contents of the book collection from a library such as the University of Michigan would be remarkable in and of itself. Adding collections from other great academic library systems such as the Universities of Texas, California, and more would create a unique resource with unparalleled research opportunities.

Oxford University Press ("OUP), a premier academic publisher, recognized this. OUP USA President Tim Barton published a statement in the *Chronicle of Higher Education*[4] supporting the ASA. His example was what the OUP learned from a focus group conducted at their offices in New York. Some 70 percent of students working on an essay assignment in a Classics class at Columbia University cited an obscure text published in 1900 that had not been on any reading lists and had been overlooked in classics scholarship. The reason for the citation, he states, is that the book was freely available online through Google. Comparatively, modern works are not. The implication is that for those "born digital" the book does not exist if not available online. The ASA, he reasoned, was a vehicle to address that problem and thus worth supporting.[5]

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[3] The Author's Guild, et al. v. Google, ____F.Supp.2d____ (S.D.N.Y. 2011). *Available at* http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115 (last visited June 13, 2011).

[4] Published on June 29, 2010 and *available at* http://chronicle.com/article/Saving-Texts-From-Oblivion-/46966/ (subscription required for premium content, last visited on June 8, 2011). Reprinted in full at the Oxford University Press OUP Blog, *available at* http://blog.oup.com/google_settlement/ (last visited on June 8, 2011).

[5] Barton's concern is not a new one, though his example is quantified. Martin Runkle, then Director of the University of Chicago Library, said in 1995: "As long as we have researchers working with the historical record,

The material that Google scanned through the Library Project provides a unique opportunity for institutional and other public libraries to enhance their users' access to hard-to-locate scholarship. The current method for discovering relevant books uses standard bibliographic information such as title, author, and subject. Search results from a library's online catalog or a database such as WorldCat are useful, though they generally describe a book. A feature that allows even a snippet view of a title would do more by showing its true value to a research project.

Libraries often subscribe to online collections. These come with their own licensing restrictions, ranging from limitations defining an authorized user to describing how much material may be viewed, printed, or downloaded. The least restrictive models tend to offer a broad set of options to the libraries and their users for locating and manipulating content. The ASA, however, would have given even the contributing libraries little advantage in using the digital version of their stacks beyond acting as a back-up to their print collection and as a searchable index to it. Libraries not a party to the ASA would have no rights in the collection unless it became commercially available. That option, which was a possibility prior to the ASA, does not appear to exist at this point.

These capabilities are fine for what they are. They expand access to the collection consistent with Barton's example. They fall artificially short, however, compared to those granted in commercial online subscriptions. Once a search reveals a useful item, it would take redundant effort to locate the physical volume, scan the appropriate pages and process it for convenient manipulation in a digital format. Generally accepted principles of fair use offer more liberal options for libraries in using the collection content than does the ASA.

III. TERMS FOR PARTICIPATING LIBRARIES

Libraries that choose to contribute books to the Library Project have a number of options under the settlement. They may sign agreements giving them greater or lesser rights to use the digital version of their contribution. There are four types of status: Fully Participating ("FP"); Cooperating Library ("CL"); Public Domain Library ("PDL"); and Other Libraries.

For the effort of cooperating with Google, FP libraries can develop tools of their own that can mine the digital collection, provided that snippet view is the only display option. Faculty, staff researchers, and librarians can read, print, or download up to five pages of a text for scholarly or class use, provided that the book is not commercially available. The digital copies or extracts may not be placed on electronic reserve. This would prevent any part of the digital collection from appearing in what would amount to an electronically accessible digital course pack assembled by the library at faculty request.

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we'll maintain those printed volumes—and manuscripts and maps and other formats. We want to do everything we can to make sure that people don't just make do with what they can find on machines." His comment is *available at* http://magazine.uchicago.edu/9502/Feb95Journal.html (last visited June 12, 2011).

His successor, Judith Nadler, stated in 1995 "Google's initiative to digitize the holdings of major research libraries is a boon and will ultimately change the way people learn about information and interact with it. However, digitization is only the first step. Organizing, preserving, and providing access to this information are activities historically performed by libraries. Building on powerful technology, we will join with our peers to make these resources available locally and to the world." Her comment is *available at* http://magazine.uchicago.edu/0502/chicagojournal/reading.shtml (last visited June 12, 2011).

There is separate litigation pending on whether a library's use of electronic reserve is a violation of copyright laws.[6] Ironically, a contributing library would have greater rights to place a photocopy of an article on reserve than to use material returned to it by Google. The ASA provides other restrictions for FP libraries along with a requirement to provide detailed statistics on use of the items in the collection.

The other library categories defined under the ASA offer even less use of the digital collection. Cooperating libraries do not get access to the collection and must destroy copies they may have received from Google. Public Domain libraries only contribute out-of-copyright books and must destroy any in-copyright titles they may have received from Google. Libraries that have contributed books but choose not to sign one of the other agreements can keep what they have from Google but assume the risk of liability for how they use those books.[7]

IV. THE FUTURE

Any successful renegotiation of the settlement agreement between the parties will likely not result in any expanded rights for libraries in the digital collection beyond the limited rights described above. Again ironic, as without the participation of the contributing libraries there would be no court case or potential settlement. The better result for libraries would be for the case to proceed to litigation where the underlying issue of digitization and snippet display may be ruled to be fair use. Libraries and other organizations could undertake their own digitization projects without liability from authors and publishers. They would be able to use the digital collection to perform some of their traditional functions in information gathering, distribution, and preservation by what copyright law allows rather than by separate agreement.

None of this precludes Congress from setting rules on its own. One central controversy of this battle is the status of orphaned books. Judge Chin's opinion notes that there were failed attempts to resolve these books' status in 2006 and 2008. In this regard, Congress could enact legislation creating something similar to the settlement's contemplated book registry. A compulsory license for the use of orphaned books would free these books from most distribution restrictions, allow better use by scholars and researchers, and provide a stream of income to legitimate claimants to rights. The same scheme would allow Google and others to sell the books without liability.

From a librarian's standpoint, the worst result would be maintaining the status quo and losing the current Google collection. One of the positives of Google's efforts, legal or not, was the effort the company made in mass preservation and archiving of books that could otherwise get lost or discarded. Google went beyond other public domain projects such as the Internet Archive, the Gutenberg Project, and others. The Google collection should at least be preserved no matter what its legal status until a declared legal alternative for its use emerges.

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[6] *See* the case of Cambridge University Press et al. v. Patton et al. (1:2008cv01425 N.D. GA filed April 15, 2008), full text docket available at Justia. *See* specifically Document 235 in which the Court denied summary judgment motions for a statement of the issues in the case.

[7] A more detailed look at the conditions of use imposed on participating libraries is contained in the report published by OCLC called Impact of the *Google Book Settlement on Libraries* (Revised Edition), by Ricky Erway, *available at* http://www.oclc.org/research/publications/library/2009/2009-01.pdf (last visited June 12, 2011.