



## Hearing Summary on Proposed Google Book Settlement Agreement: “Competition and Commerce in Digital Books”

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On September 10, 2009, the House Committee on the Judiciary held a hearing entitled “Competition and Commerce in Digital Books,” with testimony from eight witnesses about the proposed settlement between Google and class action plaintiffs representing authors and publishers (the Settlement). Given the Committee’s jurisdiction, the hearing examined two aspects of the Settlement: consistency with intellectual property law and anti-trust concerns. Concerns about privacy, intellectual freedom, and pricing for institutional users were not discussed. The interests of competing booksellers and individual end-users took center stage, while institutional users were not discussed and libraries were mentioned only in passing as the sources of Google’s texts.

The two major developments in the hearing were the Copyright Office’s blistering critique of the Settlement and Google’s announcement that it would allow other booksellers to sell access to out-of-print works it scans under the terms of the Settlement.

The hearing was somewhat sparsely attended by Committee members. In attendance were Chairman John Conyers, Jr. (D-MI), ranking member Lamar Smith (R-TX), Representatives Zoe Lofgren (D-CA), Mel Watt (D-NC), Howard Coble (R-NC), Bob Goodlatte (R-VA), Brad Sherman (D-CA), Sheila Jackson Lee (D-TX), Hank Johnson (D-GA), and Charles Gonzalez (D-TX).

The panel of witnesses was evenly divided on these issues, with four unequivocally in favor of the settlement, including representatives from Google and the Authors Guild. Three witnesses were unequivocally opposed, including Register of Copyrights Marybeth Peters and a representative from Amazon.com. The eighth witness, law professor Randall Picker of the University of Chicago, was ambivalent and suggested several changes that he felt would cure potential problems with the Settlement. A complete list of witnesses appears on the last page of this summary, with hyperlinks to the written testimony of each witness.

Opening statements from Chairman Conyers and Rep. Lofgren indicated that both are strongly in favor of the Google Book Search product coming online, with Chairman Conyers calling it “the most innovative thing since the Gutenberg press” and Rep. Lofgren saying that the future of literacy depended on getting digital books right. Chairman Conyers indicated that he thought the Settlement was fair and the burden was on Congress to open the way for others to follow in Google’s footsteps by legislation that he believes Google supports. Rep. Lofgren said it was Congress’s failure to legislate on orphan works that forced Google to “ask forgiveness rather than asking permission.”

There was some early drama when Rep. Lofgren ended her opening statement by taking the Copyright Office to task, saying she was “quite distressed” that the Office had failed to submit its written testimony to the Committee more than 24 hours before

the hearing. She called it “scandalous” and “outrageous” that the Office was late in filing.

David Drummond, Google’s Chief Legal Officer, began by emphasizing that Google still believes scanning the full text of books to create a search database is permissible fair use, as is displaying ‘snippets’ of the books in search results. He also argued that the Settlement was not exclusive, and that it gave Google no rights that another party could not also obtain.

Drummond hinted in his testimony at an announcement he made later in the hearing, saying the Settlement was already “the past,” and that “the future” is an “open platform” for selling access to e-books hosted by Google. Drummond elaborated during questioning from Chairman Conyers, saying Google plans to create an “open platform for e-books,” which it will extend to all out-of-print books in the corpus, including orphan works. Any reseller would be able to use the platform to sell e-books covered by the Settlement. Google would share its portion of the profits under the Settlement (37%) with the reseller. Google published more details on its public policy blog this afternoon: <http://googlepublicpolicy.blogspot.com/2009/09/congress-examines-future-of-digital.html>.

Other proponents of the Settlement emphasized the huge library of information it would make available to underserved readers outside of elite institutions, as well as Google’s efforts to make this information accessible to the blind. Paul Aiken of the Authors Guild suggested that the number of truly “orphan” works is relatively small, and that the Settlement would enable the authors of out-of-print works to see new profits. Aiken said that recent hearings in Brussels revealed that many in Europe are envious of the solution that the Settlement proposes to the orphan works problem. David Balto of the Center for American Progress argued that the Settlement was actually pro-competitive because it will create a new market for books and empower a new entrant.

Among opponents of the Settlement, the Copyright Office was one of the most strident, calling it “at odds with the law.” Register of Copyrights Marybeth Peters told the Committee that the Settlement goes far beyond the dispute between the parties because it gives Google a compulsory license to conduct a variety of new conduct not at issue in the original suit. (Drummond later pointed out that the license was not compulsory insofar as rights-holders can opt out at any time.) The Office also took issue with the fact that a reasonable search for the rights-holder was not required in connection with Google’s use of orphan works, an approach that she said was inconsistent with Congress’s most recent proposals. The Office also suggested that sweeping in foreign works could violate the United States’ obligations under various international IP agreements.

On anti-trust issues, Paul Misener of Amazon.com argued that the Settlement gave Google an unfair advantage because the Book Rights Registry could negotiate with Google on behalf of all authors who *do not opt out*, while the Registry is only authorized to negotiate with other parties on behalf of authors who *do opt in*. Misener argued that orphan works will by definition only fall into the former category, giving Google an exclusive compulsory license for those works.

In questions, Google’s representative told Chairman Conyers that the company would support Congress extending the terms of the Settlement to other service providers.

Representatives Watt and Lofgren both suggested it was inappropriate for Congress to play a role in the Settlement, and that Congress would pass its own legislation later. Rep. Johnson argued that the Settlement encroached on Congress's legislative role, and that it was the court that was acting prematurely. Rep. Sherman again raised the possibility of legislation based on the Settlement, asking Misener of Amazon.com if he would object to such a law. Misener said he would not, but worried that Google would have a first-mover advantage.

## WITNESS LIST

To download testimony of witness list, please visit:  
[http://judiciary.house.gov/hearings/hear\\_090910.html](http://judiciary.house.gov/hearings/hear_090910.html)

In favor were:

[David C. Drummond](#)

Senior Vice President of Corporate Development and Chief Legal Officer  
Google Inc.

[Marc Maurer, J.D.](#)

President  
National Federation of the Blind

[Paul Aiken](#)

Executive Director  
Authors Guild

[David Balto](#)

Senior Fellow  
Center for American Progress

Unequivocally opposed were:

[Paul Misener](#)

Vice President of Global Policy  
Amazon.com

[John M. Simpson](#)

Consumer Advocate  
Consumer Watchdog

[Marybeth Peters](#)

Register of Copyrights  
U.S. Copyright Office

One witness was ambivalent, suggesting action the court, the DOJ, and Congress could take to improve the Settlement:

[Randal C. Picker](#)

Paul H. and Theo Leffmann Professor of Commercial Law  
University of Chicago Law School