



The Proposed Google Book Search Settlement: Fact vs. Fiction

FICTION: The proposed settlement agreement merely resolves private litigation between private parties, which is a good thing.

FICTION: Google is paying copyright owners an enormous sum of \$125 million for the use of their books.

FICTION: The proposed settlement is “non-exclusive” and would create a Books Rights Registry (BRR) to license books to Google’s competitors.

FACT: The deal far exceeds the bounds of a typical legal settlement. It would tread directly on Congress’ jurisdiction, privatizing important copyright and public policy decisions historically made by Congress. It abuses class action procedure to create an exclusive joint venture between Google, the Association of American Publishers (AAP) and the Authors’ Guild, strengthening Google’s dominance in search and creating a cartel for the sale of digitized books. It would bind nearly every copyright owner of every book published before 2009 throughout the world, and thus create, as the U.S. Register of Copyrights said, “a compulsory license for the benefit of one company.”¹

FACT: In fact, the deal would give a handful of lawyers involved \$45 million, the same amount that will be spread in small amounts to the millions of copyright owners whose books were copied by Google. Authors and publishers would get only 1/3 of Google’s outlay, paid at \$60 per book only if Google has already scanned the book into its database. Google would pay nothing under the settlement for any scanning done after January 2009.

FACT: The deal would create a *de facto* exclusive license for Google because the deal grants no rights to the BRR to license books to competitors -- copyright owners will have to license Google’s competitors *voluntarily*, while Google gets an *involuntary, virtual compulsory* license through class action process. As a result, only Google receives a license to “orphan books”, whose owners won’t show up to license competitors and which comprise an estimated 70% of books. In short, the settlement all but guarantees that Google would have permanent competitive advantages around comprehensiveness and cost. This is one reason why the Department of Justice is investigating the proposed deal and numerous non-profit organizations, academics and other stakeholders have condemned it.

¹ Marybeth Peters, Register of Copyrights, Keynote Address, “Legislating Through Settlement”, *The Google Books Settlement: What Will It Mean for the Long Term?*, Columbia Law School (March 2009)

FICTION: Google Books is about finding old books and making them available – it’s not about web search.

FACT: Google’s copying activities were initially focused on feeding its search engine. That continues to be its primary motivation. The proposed settlement would provide Google enormous benefits by using books to improve the artificial intelligence (AI) behind *all* of its services, including its dominant web search and advertising, via valuable “non-display” uses. Under the proposed settlement, authors and publishers would get paid nothing for any of these uses. As one Google engineer explained, “We’re not scanning all those books to be read by people. We’re scanning them to be read by [our] AI.”²

FICTION: Congress can fix any problems with the proposed settlement by passing orphan works legislation.

FACT: The deal would usurp the role of Congress and grant special rules for Google – and only Google – to use orphan works that are very different and much more advantageous to Google than the rules contained in the orphan works bills considered last term in Congress. Orphan works reform can only be enacted through legislation, not class action fiat, and must be made available to all potential users – educational, non-profit and commercial institutions alike.

FICTION: Authors and publishers can tell Google not to use their books in Google Books, so their copyright rights are preserved.

FACT: An author’s right to remove her book from Google’s database expires in 2011. Given the millions of absent and orphan rights holders, and the fact that the commercial service may not even launch by then, many rights holders will be unaware of this irrevocable loss of control over their copyrights. Finally, if Google does not comply with an author’s instructions, she is limited to bringing arbitration over Google’s “best efforts” and will have forfeited the ability to file a copyright infringement lawsuit.

FICTION: Copyright owners who don’t like the settlement can simply opt-out of the class action and preserve their rights against Google.

FACT: The deal would establish Google as the new superpower in the online book marketplace, leaving those authors who opt-out at a substantial commercial disadvantage.

FICTION: The proposed settlement is limited to the United States and doesn’t affect foreign authors, publishers and other stakeholders.

FACT: The deal would dramatically impact copyright owners around the world, as it would give Google a license to use nearly every foreign book ever published, even books that have never been published in the United States. While Google could only sell and display those books to U.S. customers, many foreign owners are unaware of how their rights are being involuntarily licensed in the important U.S. market. Moreover, the deal would license Google to use the foreign book data to improve its dominant web search and advertising services that can and will be offered worldwide.

² Nicholas Carr, *The Big Switch: Rewiring the World from Edison to Google* 223 (2008)