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## **A Guide For the Perplexed Part IV: The Rejection of the Google Books Settlement**

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On March 22, 2011, Judge Denny Chin rejected the proposed settlement in copyright infringement litigation over the Google Library Project.<sup>1</sup> Judge Chin found that the settlement was not “fair, reasonable, and adequate” as required by the Federal Rules of Civil Procedure. Judge Chin issued the decision over a year after the fairness hearing he conducted. His opinion agrees in large measure with the objections to the settlement asserted by the U.S. Department of Justice at the hearing and in its written submissions. This paper discusses the opinion and where it leaves Google Books Search.

### **I. Summary**

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<sup>1</sup> See Jonathan Band, A Guide for the Perplexed: Libraries and the Google Library Project Settlement, November 13, 2008, <http://www.arl.org/bm~doc/google-settlement-13nov08.pdf>, for a discussion of the original settlement agreement; Jonathan Band, A Guide for the Perplexed Part II: The Expanded Google-Michigan Agreement, June 12, 2009, <http://www.arl.org/bm~doc/google-michigan-12jun09.pdf>, for a discussion of the subsequent modification to the agreements between Google and its partner library associations; Brandon Butler, The Google Book Settlement: Who is Filing and What Are They Saying?, September 28, 2009, <http://www.arl.org/bm~doc/googlefilingcharts.pdf>, for a summary of the objections made by various entities; and Jonathan Band, A Guide for the Perplexed Part III: The Amended Settlement Agreement, Nov. 23, 2009, [http://www.arl.org/bm~doc/guide\\_for\\_the\\_perplexed\\_part3.pdf](http://www.arl.org/bm~doc/guide_for_the_perplexed_part3.pdf), for a discussion of the amended settlement agreement reached by the parties in an effort to address concerns raised by the US Department of Justice and class members objecting to the settlement. This paper will assume that the reader is generally familiar with the settlement’s provisions.

The court concluded that the settlement was unfair because a substantial number of class members voiced significant concerns with the settlement. The concerns related to the adequacy of the notice of the settlement to the class; the adequacy of the class representatives; the use of the class action mechanism to enable Google to provide full text display services not at issue in the litigation; the consistency of the settlement with copyright principles; the monopoly the settlement would give Google over unclaimed books; the privacy of readers; and the consistency of the settlement with international law. The court agreed with the Department of Justice about the validity of many of these objections, particularly those relating to the settlement enabling Google to provide full text displays and Google's resulting market power. However, the validity of the objections seemed less important to the court than the fact that many class members raised them. Finally, the court indicated that it might be willing to approve a narrower settlement that only allowed full text displays of works whose rightsholders had opted-in to the settlement.

It is unclear what will happen next, but the options for the parties were evident even before the decision was announced:<sup>2</sup> 1) they could abandon negotiations and litigate the original issue;<sup>3</sup> 2) they could submit a revised (presumably opt-in) settlement; 3) they could appeal Judge Chin's rejection; or 4)

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<sup>2</sup> See Jonathan Band and Tricia Donovan, GBS March Madness: Paths Forward for the Google Books Settlement, updated March 22, 2011, <http://www.arl.org/bm~doc/gbs-march-madness-diagram-final.pdf>.

<sup>3</sup> I.e., whether unauthorized scanning and snippet display of in-copyright books is a fair use under 17 U.S.C. 107.

the plaintiffs could abandon the suit. All parties have been committed to orphan works legislation, and may return to Congress for a solution. It is too early to say which of these outcomes is most likely.

In any event, however, it appears that both the challenges and the opportunities presented to libraries by the settlement when it was announced in the fall of 2008 are growing narrower and more distant. The greatest opportunity for libraries, access to a relatively comprehensive institutional subscription, had already been reduced significantly compared to the original proposed settlement, and is barred by this decision unless reversed if appealed. If the institutional subscription diminishes in importance as it shrinks, so too would the challenges associated with that product (negotiating fair terms with a single provider, ensuring privacy for readers, making the subscription accessible to smaller and less wealthy institutions, and so on). A legislative solution would be contentious and is almost certain to be considerably narrower than the settlement, but would theoretically allow others to compete with Google to provide a more limited digital corpus. In short, the decision makes it less likely that libraries will be subject to Google's monopoly over a valuable research tool, but it also reduces the likelihood that such a tool, at least in the comprehensive form it was initially imagined, will ever come into existence. At the same time, Google continues to scan books and make them searchable, displaying "snippets" of books in response to search queries – the original purpose of its project with libraries.

## **II. The Opinion's Introductory Sections**

The 46-page opinion is much easier to read than the amended settlement agreement (ASA) itself. At the outset, the court declares:

While the digitization of books and the creation of a universal library would benefit many, the ASA [amended settlement agreement] would simply go too far. It would permit this class action – which was brought against [Google] to challenge its scanning of books and display of ‘snippets’ for on-line searching – to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without the permission of copyright owners. Indeed, the ASA would give Google a significant advantage over competitors, rewarding it for engaging in the wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.

Slip op. at 1-2.

In its recitation of the facts, the court acknowledges that the ASA would have many benefits:

Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books – particularly out-of-print books, many of which are falling apart buried in library stacks – will be preserved and given new life.

Slip op. at 3.<sup>4</sup>

The court then provides a lucid summary of the ASA's complex provisions and the objections.<sup>5</sup> Next, the court describes the applicable legal standard for assessing whether a class action settlement is fair, reasonable, and adequate. The controlling precedent, *City of Detroit v. Grinnell Corp.*, 495 F. 2d 448, 463 (2d Cir. 1974), sets forth nine factors a court should consider in assessing the fairness of a class action settlement.<sup>6</sup> The court found that only two weighed against approval: the defendant's ability to withstand judgment, and the reaction of the class. The court observed that there was "no real risk that a judgment following trial would render Google insolvent," slip op. at 18-19, and hence a settlement was not necessary to ensure that the plaintiffs would receive compensation.<sup>7</sup> With respect to the class's reaction, "the objections were great in number, some of the concerns were significant," and "an extremely high number

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<sup>4</sup> It is unclear on what basis the court states that many out of print books "are falling apart buried in library stacks." The law review article Judge Chin cites merely points out that absent the settlement, research library collections will only be accessible to those located nearby geographically. This passage is also curious in that it appears in the middle of a discussion of the Library Project's scan and snippet display, but seems to describe the benefits of the settlement, not the Library Project.

<sup>5</sup> The court noted that the "vast majority" of the 500 comments filed with the court objected to the ASA. Additionally, 6800 class members opted out of the settlement.

<sup>6</sup> The *Grinnell* factors are: 1) the complexity, expense, and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining a class action through trial; 7) the ability of defendants to withstand greater judgment; 8) the range of reasonableness of the settlement fund in light of the best possible recovery; and 9) the range of reasonableness of the settlement in light of the attendant risks of litigation. The factors reflect the underlying purpose of the class action approval process in Rule 23(e) to protect members of the class from class action lawyers and class representative, who could be motivated to settle cases on terms advantageous to them but detrimental to absent class members.

<sup>7</sup> The court evidently did not consider the possibility of statutory damages: 12 million books multiplied by up to \$150,000 in statutory damages per book yields a potential award of \$1.8 trillion - a lot even for Google.

of class members – some 6800 – opted out.” Slip op. at 19.<sup>8</sup> The court spent the remaining 26 pages of the opinion reviewing the objections.

Before proceeding to the court’s discussion of the objections, it must be stressed that it appears from this passage that the court’s ultimate legal basis for rejecting the settlement was *not* that the ASA goes beyond the permissible scope of a class action settlement, in that it enables a “forward-looking business arrangement,” *nor* that the ASA would give Google an unfair advantage over competitors. Rather, the ultimate basis for the rejection was the class’s negative reaction to the settlement. In other words, the ASA was not fair, reasonable, and adequate because a significant number of class members opposed it strongly. To be sure, their reasons for opposition included the Rule 23 and competition points, but the basis for rejecting the ASA was the adverse class reaction.

Why did Judge Chin structure his decision this way? He certainly could have directly ruled that the settlement exceeded the permissible bounds of Rule 23, which governs the scope of class action settlements. Two reasons come to mind. First, by framing his decision as assessing the fairness to the class, rather than determining the court’s power to approve a settlement with forward-looking features beyond the scope of the original complaint, Judge Chin may have been trying to secure a more deferential standard of review by the court of

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<sup>8</sup> The court recognized that the parties “argue[d] that the number of objections received is small when ‘viewed in light of the size of the Class, which numbers in the hundreds of thousands, if not millions.’” Slip op. at 10 n. 6. But the court didn’t explain why objections and opt-outs from less than one percent of the class should receive more weight than the 99% that either supported or did not oppose the settlement.

appeals. A fairness determination would be reviewed by a highly deferential “abuse of discretion” standard, i.e., the appellate court can only reverse Judge Chin if they find he abused his discretion in finding the settlement unfair. In contrast, a ruling on the scope of the court’s power would be reviewed by a “de novo” standard, where the court of appeals would make its own determination of the legal question as if they were hearing the issue for the first time, according no deference to Judge Chin’s ruling.

Second, by focusing on the class reaction, he avoided having to wrestle with the full range of complexity of each argument. He could simply present the objection raised without addressing the parties’ response or deciding which side was right. Judge Chin observed that the Third Circuit had found that “the number and vociferousness of the objectors’ is a factor to consider in weighing the reasonableness of [a] proposed settlement.” Slip op. at 19. In this case, the vociferousness of the objections was far easier to determine than their correctness.

### **III. The Opinion's Review of Objections**

#### **A. Adequacy of Class Notice.**

Some objectors argued that the parties had not provided class members with adequate notice of the settlement as required by Rule 23(e)(1). The court described the measures undertaken by the parties to notify class members, and concluded that the class received adequate notice. Technically, adequacy of the notification is not part of the fairness determination under Rule 23(e)(2). Rather, it is a separate requirement of Rules 23(c)(2) and (e)(1).

#### **B. Adequacy of Class Representative**

The court found that there was “a substantial question as to the existence of antagonistic interests between named plaintiffs and certain members of the class.” Slip op. at 20. Later in the decision, the court explained that the class plaintiffs have not adequately represented the interests of certain class members, including academic authors, foreign rightsholders, and the rightsholders of unclaimed works. As with adequacy of class notice, adequacy of class representative technically is not part of the fairness determination under Rule 23(e)(2). It is a separate requirement under Rule 23(a), and provided the court with grounds for refusing to certify the class under Rule 23(c). Presumably the court chose not to refuse to certify the class so as to permit the parties to propose a narrower settlement, discussed below in great detail. If the court rejected the class certification outright, no class action settlement would be possible.

#### **C. Scope of Relief Under Rule 23**



The court explained that the ASA could be divided into two parts: the release of liability for past conduct (Google’s scan and snippet display), and a release of liability for future conduct different from and more extensive than the past conduct. The court concluded “that this second part of the ASA contemplates an arrangement that exceeds what the Court may permit under Rule 23.” Slip op. at 21.<sup>9</sup> The court quoted the Justice Department’s statement that the ASA “is a forward-looking business arrangement that goes far beyond the dispute before the Court in this litigation.” *Id.*<sup>10</sup>

The court’s discussion in this section reads more like an analysis of the court’s power to approve a settlement this sweeping rather than an evaluation of its fairness to class members.<sup>11</sup> The court stated that “the establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court.” Slip op. at 22. Citing the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), and *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984), the court opined that “the questions of who should be entrusted with guardianship over orphan works, under what terms, and with what safeguards are matters more appropriately decided by Congress than through agreement

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<sup>9</sup> This conclusion lacks the equivocation the court displayed in the adequacy of class representative section when it stated that there was a “substantial question” about possible antagonism between the interests of class members, and it was “troubled,” slip op. at 21, by the differences in views between class members.

<sup>10</sup> At the same time, the court noted that “the United States is of the view that the first part of the settlement – settling claims for past infringement based on digitization for use of snippets – is a matter appropriately settled in this case....” Slip op. at 21 n.8. The court offered no opinion of this view.

<sup>11</sup> Nonetheless, the court framed the issue in terms of fairness and reasonableness: “In this case, the fairness and reasonableness of the ASA has been challenged on the basis that it would release claims not properly before the Court.” Slip op. at 16.

among private, self interested parties.” Slip op. at 23. The court also mentioned Congress’s “longstanding efforts” to enact orphan works legislation,<sup>12</sup> as well as the international law concerns voiced by foreign countries, as reasons for concluding that “the matter is best left for Congress.” Slip op. at 24.

The court next reviewed the complaints filed by the authors and publishers, as well as Google’s actions prior to the settlement, to determine whether the ASA’s “forward-looking business arrangements” were implicated. The court found that “there was no allegation that Google was making full books available online, and the case was not about full access to copyrighted works. The case was about the use of an indexing and searching tool, and not the sale of complete copyrighted works.” Slip op. at 25. Nonetheless, “the ASA would grant Google the right to sell full access to copyrighted works that it otherwise would have no right to exploit. The ASA would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works.” Slip op. 26-27.

At this point, the opinion took an odd turn. Earlier, the court said that “the case was about the use of an indexing and searching tool,” and whether the fair use doctrine permitted Google “to make available small portions of ... works in

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<sup>12</sup> The orphan works legislation addressed a different, albeit related, problem from the ASA. The orphan works legislation would have reduced the legal uncertainty confronting those who wanted to make use of a work after attempting unsuccessfully to identify or locate the rightsholder. In contrast, the ASA would have eliminated the enormous costs of attempting to identify or locate the rightsholders of millions of out-of-print books.

response to search requests.”<sup>13</sup> Slip op. at 25. But in the context of the rights granted to Google under the ASA, the court asserted that Google would obtain these rights

even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions. While its competitors went through the ‘painstaking’ and ‘costly’ process of obtaining permissions before scanning copyrighted books, ‘Google by comparison took a shortcut by copying anything and everything regardless of copyright status.’ As one objector put it: ‘Google pursued its copyrighted project in calculated disregard of authors’ rights.’

Slip op. at 27 (citations omitted).

This sudden shift in tone is startling. Moreover, the suggestion that Google was engaged in “piracy,” slip op. at 27 n. 14, and “wholesale, blatant copying” undercuts the court’s position that scan and snippet display was a far more limited activity than the “forward-looking business arrangements” permitted by the ASA. One explanation of this passage is that the court was attempting to demonstrate the vociferousness of the objectors’ opposition to the broad license granted to Google under the ASA.

#### **D. Copyright Concerns**

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<sup>13</sup> It is important to note, however, that the court did not rule on the original subject of the dispute. *See* Brandon Butler, “What the Google Books Decision Said About Fair Use,” March 31, 2011, <http://policynotes.arl.org/post/4247776049/what-the-google-books-decision-said-about-fair-use>.

The court stated that “certain objectors contend that the ASA’s opt-out provisions would grant Google the ability to expropriate the rights of copyright owners who have not agreed to transfer those rights.” Slip op. at 31. Section 201(e) of the Copyright Act provides that no effect shall be given to an “action by any governmental body ...purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright....” The court found that “at a minimum a fair question exists as to whether this Court or the Registry or the Fiduciary would be expropriating copyright interests belonging to authors who have not voluntarily transferred them.” Slip op. at 32. The court continued that “the notion that a court-approved settlement agreement can release the copyright interests of an individual is a troubling one.” *Id.* The court stated that “a copyright owner’s right to exclude others from using his property is fundamental and beyond dispute.” *Id.* Thus, the court found it “incongruous with the purpose of copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copied their works without first seeking their permission.” Slip op. at 35. But under the ASA, “if copyright owners sit back and do nothing, they lose their rights. Absent class members who fail to opt out will be deemed to have released their rights even to future infringing conduct.” Slip op. at 33.

The parties responded that in “virtually every class action settlement, a percentage (often a high percentage) of class members does not file claims or

otherwise participate but nevertheless, their claims are released.” Slip op. at 29.

The court answered that

While it is true that in virtually every class action many class members are never heard from, the difference is that in other class actions class members are merely releasing ‘claims’ for damages for purported past aggrievements. In contrast, here class members would be giving up certain property rights in their creative works and they would be deemed – by their silence – to have granted Google a license to future use of their copyrighted works.

Slip op. at 30. The court seemed to question the permissibility of an opt-out class action settlement in a copyright infringement case, particularly if the settlement allowed the defendant to continue to use the works in the future. This view may limit the settling parties’ options going forward, as discussed below.<sup>14</sup>

Notwithstanding these ruminations on how “the ASA proposes to expropriate rights involuntarily,” slip op. at 31, the court decided that it “need not decide the precise question of whether the ASA would in fact violate §201(e)....” Slip op. at 32. Instead, the court quoted numerous objectors’ distress over the ASA’s opt-out structure and found that “many authors of unclaimed

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<sup>14</sup> The court’s expansive interpretation of Section 201(e) runs contrary to precedent. There have been class action settlements in copyright cases; indeed, the Supreme Court considered an aspect of a copyright class action settlement last year. *Reed Elsevier v. Muchnik*, 130 S. Ct. 1237 (2010) (holding 17 U.S.C. § 411 registration requirement does not bar jurisdiction over class action that includes non-registered works). Moreover, the court equated a non-exclusive license with a transfer of ownership. Under this reasoning, Section 201(e) would bar a court from awarding a reasonable royalty rather than entering an injunction in copyright infringement cases. But the Second Circuit last year ruled that courts need not issue an injunction if money damages are adequate to compensate the plaintiff. *Salinger v. Colting*, 607 F.3d 68 (2010).

works undoubtedly share similar concerns.” *Id.* at 34.<sup>15</sup> In other words, rather than reach a legal conclusion that the ASA was incompatible with the copyright law, the court in the end tied its analysis to “the reaction of the class to the settlement.” *Grinnell*, 495 F.2d at 463.

#### **E. Antitrust Concerns.**

The focus on the volume of objections continued in the antitrust section. The court started the section by noting that the “United States, Amazon, and Microsoft, among others, raise a number of antitrust concerns presented by the ASA.” Slip op. at 36. The court stated that “the ASA would give Google a de facto monopoly over unclaimed works.” *Id.* The court then quoted the Justice Department asserting that “this de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital book subscription.” *Id.* The court added that the Internet Archive, Public Knowledge, and the Institute for Information Law and Policy at New York Law School raised similar concerns about monopoly power over the market for orphan works.

There are three significant omissions from the antitrust section. First, the court recited none of the settling parties’ many counter-arguments concerning

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<sup>15</sup> The court quoted a 79-year old nature writer who feared that the loss of control over her works could result in their being used to “vilify the wildlife I spent my life trying to help the public come to understand and protect.” Slip op. at 33. It is unclear how enabling digital purchase of a book is any more likely to lead to the vilification of animals than purchasing a hard copy of the book from a bookstore. And of course, the argument that an author should be able to prevent the downstream use of her work to make a particular political point is inconsistent with both the First Amendment and the fair use doctrine.

monopoly power. This was a major topic in their presentations at the fairness hearing and in their written submissions to court, but the court ignored their arguments entirely. Second, although the court mentioned the views of the Justice Department on the impact of the de facto exclusivity on libraries, the court did not mention what the libraries themselves said on this precise issue in two detailed submissions to the court.<sup>16</sup> Third, the court failed to explain how the monopoly for the market for unclaimed works would have an adverse impact on members of the class.

#### **F. Privacy Concerns**

The court noted that several objectors “contend that the ASA fails to provide adequate protections for users of Google Book Search.” Slip op. at 39. The court stated that although “the privacy concerns are real... they are not a basis in themselves to reject the proposed the settlement.” *Id.* In an apparent non-sequitur, the court justified this conclusion by describing the provisions of the ASA that protect the privacy of *authors* – not users. The court did, however, concede that Google could incorporate additional protections for user privacy while still accommodating its marketing objectives.

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<sup>16</sup> See Library Association Comments On the Proposed Settlement, May 4, 2009, <http://www.arl.org/bm~doc/googlebrieffinal.pdf>; Supplementary Library Association Comments On the Proposed Settlement, Sept. 2, 2009, <http://www.arl.org/bm~doc/library-associations-supp-filing-sept-2-09.pdf>. The libraries expressed concern about the possibility of monopoly pricing of the institutional subscription, but did not oppose the settlement. Recognizing that the creation of an alternative comprehensive database of books in the near term was unlikely, the library associations proposed that academic authors be represented on the board of directors of the Book Rights Registry and that the court closely supervise the settlement to prevent unfair pricing.

## **G. International Law Concerns**

The court explained how the amended settlement attempted to address the concerns of foreign rightsholders with the original settlement agreement by including only foreign works registered with the Copyright Office or published in the United Kingdom, Canada, or Australia. Further, the plaintiffs added six non-U.S. class representatives to the litigation. Nonetheless, many foreign rightsholders remained concerned because they had registered their books with the Copyright Office. The court cited filings by rightsholders from Canada, Germany, Switzerland, Austria, New Zealand, Belgium, India, Ireland, Israel, Italy, Japan, Spain, Sweden, and the United Kingdom objecting to the ASA. Additionally, the governments of Germany and France filed objections to the ASA.

Many of the foreign objectors contended that the ASA would violate the Berne Convention and the TRIPS Agreement by allowing the exploitation of their works without their permission. As with the copyright concerns, the court stated that it “need not decide whether the ASA would violate international law. ...[I]t is significant that foreign authors, publishers, and, indeed, nations would raise the issue.” Slip op. at 43. The court added that “the fact that other nations object to the ASA, contending that it would violate international principles and treaties, is yet another reason why the matter is best left to Congress.” Slip op. at 45.

## **IV. What’s Next?**



On the last page of the opinion, the court stated that “many of the concerns raised in the objections would be ameliorated if the ASA were converted from an ‘opt-out’ settlement to an ‘opt-in’ settlement.” Slip op. at 46. An opt-in settlement would in essence be an expansion of Google’s existing partnership arrangements with publishers. It would not provide a mechanism for inclusion of the unclaimed books, meaning that 50 percent or more published books probably would remain unavailable digitally until they entered into the public domain or Congress enacted a legislative solution.<sup>17</sup> Additionally, the court provided no guidance on whether the opt-in should apply to all services or just to the “forward-looking business arrangements.” That is, the court did not indicate whether it would entertain an opt-out settlement for scan and snippet display while requiring opt-in for full text displays. Arguably, many of the concerns with adequacy of class representation, copyright, international law, and even antitrust<sup>18</sup> apply with equal force to scan and snippet display as to full text display. On the other hand, the objections might be less vociferous with respect to a scan and snippet display settlement.<sup>19</sup>

The court also provided few clues about how it might rule on the fair use argument with respect to scan and snippet display in the event the parties did

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<sup>17</sup> John P. Wilkin, *Bibliographic Indeterminacy and the Scale of Problems and Opportunities of “Rights” in Digital Collection Building*, [http://www.diglib.org/publications/reports/ruminations\\_1/](http://www.diglib.org/publications/reports/ruminations_1/).

<sup>18</sup> The court stated that “the ASA would arguably give Google control over the search market,” slip op. at 37, presumably because providing search results for books would make its search engine more attractive to users.

<sup>19</sup> The United States, for example, expressed support for a scan and snippet display settlement, provided that it extended to Google’s competitors in Internet search services.

not reach agreement on further modifications. As noted, the court used strong language to describe Google's scanning to date, yet in all but one instance it was quoting an objector.<sup>20</sup> The court did, however, make clear that "Google would have no colorable defense to a claim of infringement based on the unauthorized copying and selling or other exploitation of entire copyrighted books." Slip op. at 26.

The court left no doubt about its conviction that creating a mechanism for full text display of unclaimed works was a matter best left to Congress. However, the court did not indicate any appreciation for the difficulty Congress would encounter in forging a consensus among the competing interests. Unfortunately, the court's deliberate pace in issuing its ruling a year after the fairness hearing may appear expeditious relative to the rate of successful Congressional progress on this issue.

It is unclear what will happen next. Judge Chin has ordered a status conference on April 25. At the status conference, the parties will inform the court whether they will attempt to negotiate an opt-in settlement, or instead resume litigation over whether scan and snippet display is a fair use. Alternatively, the parties could appeal the decision to the court of appeals. Another, more remote possibility is that the publishers and the authors would drop the suit against

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<sup>20</sup> *E.g.*, the court quoted the German government describing Google as "a serial scanning infringer...." Slip op. at 45 n. 22.

Google. While pursuing any of these options, the parties could start lobbying Congress in earnest for a legislative solution.

Regardless of which direction the case takes at this point, it appears that Google will continue (for the time being, at least) to scan books, provide its partner libraries with digital copies, and display snippets in response to search queries. This is an important research tool whose utility should not be underestimated.

It also appears that the challenges and opportunities presented to libraries by the settlement when it was announced in the fall of 2008 are growing narrower and more distant. The original settlement would have enabled the creation of a database of books published before 2009, for which libraries could have purchased an institutional subscription. This resource would have been particularly valuable for underserved communities such as the print disabled and communities with small libraries. The amended settlement would have excluded many books published outside the United States, thus reducing the database approximately by half. The opt-in settlement suggested by Judge Chin likely would reduce the database at least by half again.

In other words, if the parties agree to an opt-in settlement, the institutional subscription database would probably contain at most a quarter of the number of books envisioned under the original settlement. Even if legislation is enacted to enable inclusion of unclaimed books, it is hard to imagine that the legislation would reach as many books as the original settlement – or even the amended

settlement; the objectors would make sure of that.<sup>21</sup> The license fees Google would have to pay under the legislation probably would be higher than under the settlement -- why would the objectors to the settlement agree to the same fees? This, in turn, could drive up the cost of the institutional subscription. And it likely would take Congress years to fashion legislation.

On the other hand, the progressive slimming of the settlement means that a single commercial entity will not have control over what the library associations described as an “essential research facility.” As the institutional subscription becomes less essential, so too would the challenges associated with that product diminish: negotiating fair terms with a single provider, ensuring privacy for readers, and making the subscription accessible to smaller and less wealthy institutions. The ultimate question here is whether the American public is better off with a relatively comprehensive books database under the control of a commercial entity, or a much smaller database under the control of the same commercial entity, with the theoretical possibility of other providers of a similarly small database.

March 31, 2011

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<sup>21</sup> For example, in testimony before the House Judiciary Committee, then-Register Marybeth Peters (now a board member of the Copyright Clearance Center) advocated legislation based on the orphan works bill in the 110<sup>th</sup> Congress. That approach required a user to conduct a reasonably diligent search for a work’s owner before providing relief from statutory damages. It is unlikely that Google – or any other entity engaged in the mass digitization of books – would expend the substantial resources necessary to search for the owners of a large number of books.