

SOME PERSPECTIVES ON THE PROPOSED SETTLEMENT OF THE GOOGLE BOOK SEARCH LAWSUIT

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I look forward to hearing the thoughts of the distinguished participants at the February 9 meeting in Washington, D.C. Thank you all for participating!

Although it is certainly accurate to say that the American Library Association (ALA) is interested in truth and even beauty (and that it is freely expressed!), our bottom line must be action. Therefore, I am most interested in a crisp, definitive message and a specific plan for proceeding – whether that may be delivering comments to the court, mobilizing ALA’s 67,000 members in a coordinated campaign, or pursuing some other course of action, which could include remaining silent.

I offer the following perspectives as from someone inside of ALA who is thinking in terms of what would be useful for ALA and consequent interventions by the library community, but not as a formal representative of ALA. In the course of thinking about the proposed settlement, a few opinions did arise, which I report here for discussion purposes only. I would like to acknowledge Jonathan Band’s indispensable summary “A Guide for the Perplexed: Libraries and the Google Library Project Settlement”² that provided a quick overview of the issues and the extensive list of resources on the Google Books Search site.³

The ALA Framework – Criteria for Evaluating the Proposed Settlement

So from the ALA perspective, I begin with our foundational statements, values, and strategic objectives, to make it clear where we are coming from. The mission of ALA is “...to enhance learning and ensure access to information for all.” Thus, the fundamental question for ALA is whether the proposed settlement advances or hinders progress on this mission as

¹ Included for identification purposes only. This note does not necessarily reflect the position of the American Library Association or any of its constituent entities.

² See <http://www.arl.org/bm~doc/google-settlement-13nov08.pdf>.

³ See <http://wo.ala.org/gbs/articles-blog-posts-links/>.

compared to the viable alternatives.⁴ The next level of detail involves the promotion of various strategic objectives, as articulated by ALA:⁵

1. All forms of literacy
2. First Amendment rights, intellectual freedom, and privacy
3. Equity of access and fair use
4. Preservation of our [American] cultural heritage
5. Grassroots efforts to influence local, state, federal, and international policies and standards that affect library and information services
6. Understanding of international issues affecting library and information services and generate support for international partnerships that strengthen library and information services
7. Alliances with organizations that share common goals to advance policy issues
8. Free, permanent public access to government information

The final foundational text is an excerpt from the description of the Program on Public Access to Information of ALA's Office for Information Technology Policy. This text, while consistent with the statements above, provides a more integrated yet succinct summary of the relevant points for our discussions:

Libraries are major sources of information for society and they serve as guardians of the public's access to information more generally. The advent of the digital world has revolutionized how the public obtains its information and how libraries provide it. The central purpose of the Program on Public Access to Information is to help ensure that Americans can access the information they need – regardless of age, education, ethnicity, language, income, physical limitations or geographic barriers – as the digital world continues to evolve. Core values of the library community such as equal access to information, intellectual freedom, and the objective stewardship and provision of information must be preserved and strengthened in the evolving digital world.⁶

Selected Issues and Thoughts

As we all know, the proposed settlement is lengthy and complex, and has critical implications for the library community. So as someone approaching this issue from one of action-orientation, my focus is on setting priorities and identifying interventions. Certainly, I

⁴ From <http://www.ala.org/ala/aboutala/missionhistory/mission/index.cfm>.

⁵ From http://www.ala.org/ala/aboutala/missionhistory/plan/2010/index.cfm#Goal_Area_III.

⁶ From <http://www.ala.org/ala/aboutala/offices/oitp/programs/publicaccesstoinfo/index.cfm>.

cannot claim total victory in this preliminary note, but I did make an effort. The topics that follow are in approximate ranked order; that is, the first topic is the one in which I place the highest priority. Prioritization is important because the library community (and ALA specifically) may well not possess the resources to pursue all relevant directions vigorously.

1: The library community must have (adequate) representation on the board of directors of the Book Rights Registry

I know that a number of people acknowledge that representatives of the library community (and representatives of the “general public” as well) should serve on Book Rights Registry (BRR) board of directors, but I suggest that this is our top priority. This Google information service is important, long lasting, and will evolve. The library community must be at the decision-making table going forward for the years to come. Whatever modifications to the proposed settlement that we may earn in 2009 may be adversely affected in the future by this board of directors; moreover, new issues will undoubtedly arise. For example, the BRR board of directors can decide to expand the PAS program. It seems imprudent (or outrageous) to me that such a decision would be made without direct and active involvement of library representatives in the decision making.

Also, given the central role of libraries in the proposed settlement, it seems eminently reasonable that library representatives should be included. In this sense, I see this request as a fairly easy win (though the question of how many representatives might not be so easy to agree upon) and establishes our community as reasonable. Library representation will contribute to more effective and efficient decision making and it is morally the right thing to do.

So we must ask (demand) for library representation on the BRR board. However, there is a very large devil in these details. Here are some questions that we must answer:

- How many representatives should be request?
- What kind of representatives do we want? For example, should they be librarian practitioners, library directors, library school (or other) professors, policy analysts and advocates / lobbyists in the library community, or others? How should the representatives be allocated across research, college, school, public, government, and special library sectors? What mix is appropriate?
- By what process will these representatives be selected and for what terms? How will they inform and involve the library community?
- Will their expenses (e.g., travel) be subsidized in some way?

If the mission of the BRR is construed to be narrowly focused not to warrant library community inclusion on its board, then some other overarching oversight body should be created that includes proper representation of the library community.

2: “We do not believe that fair use is affected”

Some of us were hoping that the Google lawsuit would be determined in favor of Google – that its digitization activities and display of snippets are allowable under fair use. Of course, the proposed settlement will not generate this favorable determination and, moreover, it could be interpreted by some as an assault on fair use because the settlement involves significant constraints on access, in some instances more rigorous than those under fair use. In addition, the settlement enables a market for out-of-print works, for instance, and others could use the settlement as a model for a future marketplace. In this line of reasoning, fair use claims would then become less compelling as potential market could be harmed.

Others, notably James Grimmelman in his excellent analysis of the proposed settlement,⁷ argues against this general line of thinking. And, indeed, the proposed settlement itself asserts that fair use is not affected. Since it is arguable whether fair use is affected or not, it is in our interest to promote the idea that fair use is not affected. Our public position should be that the proposed settlement involves an idiosyncratic agreement among private parties and is silent on the question of fair use in the digital age in general. The proposed intervention is disseminating this message as widely as possible.

Are there any changes in the text of the proposed settlement that we should recommend to reinforce this point? How should the library community promote this message otherwise?

3: Privacy aspects of the proposed settlement violate library community values

The terms of the proposed settlement create opportunities for unacceptable tracking of individual browsing and reading. For example, for purchases of online e-book access or access via institutional subscriptions, Google will have the technical ability to track every page that one views, even recording how long is spent on a page. Admittedly, some tracking – preferably at an aggregate level – is perhaps reasonable and necessary, but the potential level of tracking – and the corresponding potential for abuse – in the proposed settlement is excessive.

What to do? Well, why recreate the wheel? I simply quote Grimmelman: “*The settlement should contain explicit privacy guarantees that user information and reading habits should be monitored only that minimal extent necessary to audit for security and billing, that no such data be used for any other purpose, that all such data be promptly destroyed, and that Google not reveal any information about any user or users’ reading habits to any other entity, including the Registry. Further privacy principles will not be hard to articulate; there’s been plenty of good scholarship and activism around reader privacy and online privacy.*”⁸

⁷ See Principles and Recommendations for the Google Book Search Settlement, The Laboratorium, James Grimmelman, http://laboratorium.net/archive/2008/11/08/principles_and_recommendations_for_the_google_book.

⁸ Recommendation 8, Grimmelman.

4: Concerns about financial sustainability

Google may be around for a long time and have the best of intentions, but as the library community increasingly depends on this new information service, what concerns do we have for its continuing operation? Even if Google persists for decades, internal financial support for this service may dwindle, especially if it becomes a money-loser or the corporation comes on economic hard times.

There is also considerable financial uncertainty on the library side of this service. The price of institutional subscriptions is unknown. Although Google will provide limited resources for online access and printing, there is no doubt that libraries will incur additional costs in supporting this service (e.g., see item 5 below). Even for the “free” service, there is no free lunch (but isn’t this always true, says the cynical inside-the-beltway analyst). Whether needing to provide financial support for institutional subscriptions or the “free” service, libraries have differential abilities to meet these costs, across research, college, public, school, government, and special libraries.

Finally, Google gets 37% and rightsholders get 63%. Libraries get 0% (but they do get the “free” service and the opportunity to pay for a subscription). Overall, do we construe this allocation to be fair? If we want to argue that libraries should receive some (more) financial or in-kind support, what is the argument? Of course, libraries already support a myriad array of information services as required by their mission and needs of users, so how is this different?

I’m not so sure about what we should do, if anything.

5: Proposed settlement is complex for insiders – How will the “general public” cope with it?

Insiders, such as those attending the February 9 meeting, understand the rationale (irrespective of whether you fully accept it or not) for the complexity of the access rules; for example, for in-copyright, not commercially available works, the system will display up to 20% of the work, but for most non-fiction works, generally no more than 5 adjacent pages can be displayed at a time and then a subsequent query may display 5 more pages, but at least 2 pages distant from previous queries, but it is different for fiction, especially with blocking the final 5% of the work, but no less than 15 pages will be blocked, and there are different rules for anthologies, drama, short stories, reference guides, etc. But how will the general public respond to these rules? Will users at public libraries, for instance, experience high levels of frustration, which will be directed at the local library’s staff, since they are those nearby?

What can be done to simplify the experience for the general public? Can the terms in the proposed settlement be simplified? Will the user interface be designed to simplify the user experience, especially when the user wants to do something that is not permitted? Should educational or awareness materials be created to help create appropriate user expectations?

6: Proposed settlement has unanalyzed but potentially negative effects for “library collections”

Central to the concept of a library is that its collection is created through intellectual organization. Items are included or omitted for particular reasons in support of target audiences.

The Google mass-digitization effort does not yield a collection in this sense. It is based on a model of “digitize as much as possible” and then “omit selected works” (e.g., because of copyright holder requests). Of course, it does represent a valuable aggregation of content that is accessible online. It is a valuable tool, but *it is not a library* and we should underscore this point. However, it is another milestone on the road to the future of libraries and should be carefully studied.⁹

7: Diversity of information sources is adversely affected

One consequence of the settlement is that Google becomes further entrenched in providing key information services to the general public and libraries, able to pursue digitizing and scanning on a huge scale without having to worry about legal problems. There are reasons for this, of course, such as taking initiative, possessing the scale necessary to pursue such an undertaking, and others, that severely constrain potential competitors. Some claim that Google poses an antitrust problem.¹⁰ The important point for the library community isn’t really the cause, but the consequences of increasing the concentration in the provision of information services for libraries. The reason why this issue is ranked as the last priority is it isn’t clear that there is much we can do about this, at least in the short and intermediate term.

Potential Responses by the Library Community

Option A: Fully endorse the proposed settlement

ALA has obtained the views on the proposed settlement from librarians around the country. The views vary widely. Some find the proposed settlement to be highly problematic and object to it in strong terms. Others are neutral or favorable, the latter concluding that the advantages outweigh the disadvantages. However, there are few (if any) who advocate for unqualified endorsement. Thus, Option A seems infeasible.

Option B: Reject the proposed settlement

There is certainly a constituency in the library community who would like to see the proposed settlement just go away. However, in my admittedly limited inquiry into the situation,

⁹ Such as in OITP’s Program on America’s Libraries for the 21st Century, <http://www.ala.org/ala/aboutala/offices/oitp/programs/americaslibs/americaslibs.cfm>.

¹⁰ See Grimmelmann.

outright rejection doesn't seem likely to prevail as the momentum seems toward court approval of some flavor. ALA does have considerable grassroots resources that it could mobilize – witness the recent issue (just last month) on children's books, lead, and the Consumer Product Safety Commission.¹¹ But it isn't clear that the court will be greatly influenced by such a grassroots effort. ALA could deploy its resources in a media campaign via grassroots means, but would that prevail?

There is also the small matter of substance. My general feeling is that the proposed settlement is better than the status quo, though that feeling is just that, a feeling – and I could be persuaded otherwise.

Option C: Reject the proposed settlement and advocate for an alternative that is friendlier to library interests

If we had much more time and resources, this would be the option of choice. But we do not. Idealistic but not realistic.

Option D: Recommend changes in the proposed settlement

The comments in the previous section probably alerted you that I find this option to be the only practical one. But how to proceed? We (whoever that constitutes) could submit comments to the court. But is there any other productive path? For example, would it be useful to engage Google directly?

The End (as Carrie Russell would write)

¹¹ “Immediate Action Needed: Call the Acting Commissioner of CPSC and Express the Concern of Libraries About CPSIA,” <http://www.wo.ala.org/districtdispatch/?p=1601>.