



December 15, 2009

William F. Cavanaugh
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: Google Library Project Settlement

Dear Mr. Cavanaugh:

The American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries (the Library Associations) write to express our views concerning how the United States should respond to the Amended Settlement Agreement filed by the parties on November 13, 2009. In brief, we believe that active supervision of the settlement by the court and the United States will protect the public interest far more than any additional restructuring of the settlement.

In our July 29, 2009, letter to you, we made the following points:

- The settlement has the potential to provide unprecedented public access to a digital repository containing millions of books. Thus, the settlement could advance the core mission of the Library Associations and our members: providing patrons with access to information in all forms, including books.
- But for the settlement, the services it enables would not come into existence in the near term. A class action settlement provides perhaps the most efficient mechanism for cutting the Gordian knot of the huge transaction costs of clearing the copyrights in millions of works whose ownership often is obscure.
- The digital repository enabled by the settlement will be under the control of Google and the Book Rights Registry. The cost of creating such a repository and Google's significant lead time advantage suggest that no other entity will create a competing digital repository for the foreseeable future. In the absence of competition for the services it will enable, the settlement could compromise fundamental library values such as equity of access to information, patron privacy, and intellectual freedom.
- In particular, the absence of competition for the institutional subscription service, combined with the high likely demand among academic libraries for this service, makes libraries particularly vulnerable to profit maximizing pricing.

The United States in its September 18, 2009 Statement of Interest agreed that Google would have exclusive control over the database, noting that under the settlement there was “a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital book subscription.” U.S. Statement of Interest at 24. To address this problem, the United States urged the parties to amend the settlement “to provide some mechanism by which Google’s competitors[] could gain comparable access to orphan works....” Id. at 25.

As you are no doubt aware, the Amended Settlement Agreement does not provide such a mechanism. It may well be that the parties ultimately agreed with the Statement’s intimation that “an industry-wide arrangement for the licensing of copyrighted works for digital distribution” would not comply with “the limitations of Rule 23.” Id.

However, even if the parties had found a way to create an industry-wide arrangement that did comply with Rule 23, it would not have solved the fundamental problem of Google’s exclusive control of the database. Google has a five-year lead-time advantage over potential competitors, during which it has refined the scanning process and scanned as many as 12 million books into its search database. Considering this significant head start, it is unlikely that any commercial competitor will enter into this unproven market in the foreseeable future. And there is no indication that the federal government or private foundations would fund the creation of a comprehensive database of books to compete with Google’s.

Moreover, assuming that a competitor to Google did emerge, the competition problem would remain because the Registry would still control the rights to the “orphan works.” The Registry would have no competition, and it could attempt to push the price of the institutional subscription to a profit maximizing point.

Given these marketplace realities, the Library Associations believe that the most effective way to prevent the Registry and Google from abusing the control they will have over the essential research facility enabled by the settlement would be for the court to regulate the parties’ conduct under the settlement. Specifically, when requested, the court should review the pricing of the institutional subscription to ensure that it meets the economic objectives set forth in the settlement, *i.e.*, “(1) the realization of revenue at market rates for each Book and license on behalf of Rightsholders and (2) the realization of broad access to the Books by the public, including institutions of higher education.” Settlement Agreement at 4.1(a)(i).

Rule 23 and the settlement agreement already provide the court with the authority to conduct this oversight. However, the United States should advise the court that it has this authority, and urge the court to use this authority to the extent necessary to prevent abuse by the parties and to maximize the public benefit of the settlement. Additionally, the United States should carefully monitor implementation of the settlement, including the pricing of the institutional subscription. If the United States concludes that Google, the Registry, or rightsholders are acting in a manner inimical to the public interest, the United States should petition the court to address the situation. We believe that

supervision of this sort will be far more effective in preventing abuses of market power than attempting to create industry-wide licensing arrangements that will never be used.

Finally, we wish to express our great disappointment that the United States in its Statement of Interest did not urge the parties to require representation of academic authors on the Registry board. As we explained in our filings with the court and in our meeting with the Division staff, academic authors wrote the vast majority of the books Google will include in its database. These academic authors probably would want the Registry to price the institutional subscription in a manner that maximizes public access rather than profits. Accordingly, we requested the staff to advocate for representation of academic authors on the Registry board.

While the Statement of Interest articulates at great length concern about the adequacy of representation of foreign rightsholders, it contains no mention whatsoever of academic authors. The parties responded to the United States' solicitude for foreign rightsholders by mandating six seats on the Registry board for rightsholders from Australia, Canada, and the United Kingdom. But in the absence of any support from the United States for the interests of academic authors, the Amended Settlement Agreement reserves no seats for these scholars whose works constitute most of the books Google will scan and display.

Going forward, the United States should urge the class representatives to ensure adequate representation of academic authors on the board. If necessary, the United States should ask the court to review the procedures for the selection of board members, and to evaluate whether the Registry properly considers the interest of academic authors in its decision-making.

As we stated in our July 29 letter, libraries will be among the primary consumers of the institutional subscription service enabled by the settlement. Accordingly, the Division should pay special attention to the perspectives of libraries on the approval and implementation of the settlement. We would be happy to meet with you to discuss our views in greater detail.

Respectfully submitted,

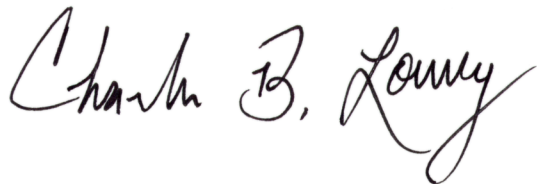
Mary Ellen Davis
Executive Director, Association of
College and Research Libraries

A handwritten signature in black ink that reads "Mary Ellen Davis". The signature is fluid and cursive, with the first and last names being more prominent.

Keith Fiels
Executive Director, American Library
Association

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Charles Lowry
Executive Director, Association of
Research Libraries

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