BerkeleyLaw
UNIVERSITY OF CALIFORNIA

Pamela Samuelson
Richard M. Sherman Distinguished Professor of Law
University of California, Berkeley School of Law
434 Boalt Hall North
psamuelson@law.berkeley.edu
Berkeley, CA 94720-7200
Phone (510) 642-6775
Fax (510) 643-5814

Berkeley April 27, 2009

The Honorable Denny Chin
United States District Court Judge
U.S. Courthouse, 500 Pearl Street
New York, NY 10007-1312

Re: *Authors Guild v. Google Inc., No. 05-civ-8136 (DC)*

Dear Judge Chin:

The signatories of this letter are academic authors of scholarly books and other works of scholarship who are affiliated with institutions of higher education. Academic authors constitute a substantial proportion of people affected by the proposed Settlement Agreement in the above-captioned case, both as class members who were neither parties to the settlement negotiations nor effectively represented in those negotiations and as prospective users of the updated Book Search system once the settlement is approved.

We are worried that the proposed Agreement in its present form does not adequately protect the interests of scholarly authors. Neither the Authors Guild nor the American Association of Publishers (AAP) shares the professional commitments or values of academic authors. Only a small minority of Authors Guild members would consider themselves to be scholars, and few write scholarly books of the sort likely to be found in major research libraries such as those whose books Google has scanned.[1] So far as we can tell, the Authors Guild's members primarily write books or other works

[1] Approximately 3000 members of the Authors Guild have websites to which the Guild's website links. A review of those websites shows that slightly over 10 per cent of these Guild members have written books of the sort likely to be found in major research libraries, such as those whose collections Google has scanned.

aimed at non-scholarly audiences (including romance novels, erotica, travelogues, magazine articles, magic books). We are sure many of them are accomplished writers, but the Guild's membership is, in our view, unrepresentative of the interests of most authors of most books in the Book Search corpus. Evidence that the AAP does not share the values of scholarly authors can be found in its recent efforts to thwart open access policies as to government-funded academic research. The Guild and the AAP are entities that are more likely to value maximization of profit over maximization of access to knowledge.

While approval of the Settlement Agreement will unquestionably bring about a significant expansion of access to knowledge in the near term, which we applaud, the Agreement will effectively create two complementary monopolies that will control access to the largest digital library in the world. There is a real risk that these monopolies will, over time, raise subscription and purchase prices and impose other restrictions on access to or use of books in the Book Search corpus, and this could seriously limit access to knowledge. It is clear to us that the settlement, if approved, will shape the future of reading, research, writing, and publication practices for decades to come. Because of this, it is critically important to get the new information environment it will bring about "right," and to ensure that the scholarly communities whose books are major parts of the corpus will be well served by it.

We are also deeply concerned that there has been as yet insufficient engagement about the proposed Settlement Agreement among academic authorial communities. We have spoken with many colleagues in the past few weeks who are author subclass members, some of whom have been unaware of the Agreement (notwithstanding Google's prodigious efforts to give notice to class members), unaware of various provisions likely to affect their academic work, unaware of their own rights as individual authors, and/or confused about how they should respond to the notices about the Agreement. An impediment to academic deliberation about and assessment of the Agreement is its considerable length and complexity. The Agreement is more than 300 pages long (with appendices) and is written in dense and highly interlinked prose. Based on our conversations with academic colleagues, we are convinced that there remains widespread ignorance about the Agreement and its implications for the future of scholarship and research. Therefore, we respectfully request that the Court extend the opt-out and comment period by six months and re-set the date of the Fairness Hearing accordingly.

We realize that the parties have recently proposed a 60 day extension of the opt-out period, but we believe that this is insufficient to allow academic authors an adequate opportunity to consider how they should respond to the proposed settlement and to some of its specific terms. If the opt-out period was extended to early November, as we request, it would be possible during the summer to plan a series of town-hall meetings and other venues for debate and discussion about the proposed settlement in academic communities to be held in the fall, which would then provide for much better informed decision-making and consensus-building about the implications of the Agreement.

As scholars, it is both our privilege and our obligation to promote the progress and sharing of knowledge for the good of the general public. Our professional work—including writing the kinds of books typically found in major university libraries—is mainly motivated by a desire to advance science, social science, literature and the arts rather than by hope or expectation of direct financial rewards.

An essential part of our work, as well as our professional advancement, depends on exchanging research with our colleagues so that our conclusions can be rigorously evaluated and, hopefully, inspire new research. Thus, we usually want our works to be as accessible as possible, whether or not we are compensated directly for every reproduction. Unlike the Authors Guild and the individual plaintiffs in this case, we think that Google's scanning of books from major research libraries for purposes of indexing them and making snippets available in response to user queries is fair use.

Here are just a few examples of provisions in the Agreement that seem to run contrary to scholarly norms and open access policies that we think are widely shared in scholarly communities:

1) Open Access Policies: We believe that most scholarly authors of out-of-print books would prefer to make their books widely available with either no or minimal restrictions. We are concerned that an Authors Guild or AAP-dominated Book Rights Registry (BRR) will have an institutional bias against helping academic authors who might want to put their books in the public domain or make them available under Creative Commons licenses. The notices Google has mailed to class members do not, for example, mention either public domain dedication or Creative Commons licenses as alternatives to registration for payouts from Google through the BRR.

2) Monitoring Academic Uses: The Agreement contains various provisions that seem to permit Google and the BRR to monitor scholarly uses of books in the Book Search corpus. For example, a library that allows faculty to read, print download or otherwise use up to 5 pages of a digital copy of a book that is not commercially available must keep track of all such uses and report them to the BRR. *See* Section 7.2 (b)(vii). Researchers who wish to do research on the Book Search corpus must submit a research agenda in advance, which may be reviewed by the BRR. *See* Section 7.2 (d)(xi). In effect, the BRR will be able to gather detailed information about the type and extent of academic research. This kind of monitoring is inconsistent with norms and sound practices within academic communities.

3) Digital Rights Management: The proposed Settlement Agreement is vague about the extent to which Google and the BRR will or will not use digital rights management (DRM) technologies in ways that would impede academic exchanges. Although the Agreement will allow individuals to "purchase" books, they can only access those books "in the cloud." This would seem to mean that

there will be DRM restrictions on some uses of books scholars like us have purchased. Moreover, Section 4.7 provides that Google and the BRR may agree to sell Adobe Portable Document Format ("PDF") downloads, among other business models.[2] If such downloads are wrapped in copy protection, it will limit their use and circulation, and may inhibit scholarly citation as well. If so, the benefits of this bargain will be significantly impaired for academic authors.

4) Transparency of BRR: There is too little specificity in the Agreement about how transparent the BRR will be about what books are in or out of copyright, in or out of print, who the rights holders for particular books are, how to contact them, and what books are true "orphans." This information could be important to academic researchers. A scholar, for instance, may want to digitize her collection of books on a given subject, which she believes are orphan works. It is unclear whether she would be able to get up-to-date information from the BRR to determine if a rights holder has come forward for any of those books or to get from Google or the BRR information that they might possess about the "orphan" status of particular books.

5) Representation of Academic Author Interests in the BRR: The Settlement Agreement contemplates that the governing board of the BRR will be made up of representatives of authors and publishers in equal numbers. Although we concur in the idea that authors should have equal representation as publishers on the BRR board, we are concerned that the author representatives will be drawn from the Authors Guild's membership rather than being drawn from or otherwise representative of the interests of academic authors whose books constitute a substantial majority of books in the Book Search corpus.[3]

6) Limits on Book Annotations: The Agreement contemplates that subscribers will be able to annotate their books, but restricts the extent to which annotations can be shared. Section 3.1(c)(ii)(5) promotes scholarly communication to some degree, but it is so limited in scope that it will likely impede scholarly communications in many communities. The Agreement would allow individuals to share their annotations with 25 other persons, all of whom must be also purchasers of the digital book, and they must be identified in advance. The Agreement appears to contemplate minimal annotations—personal notes, for example, or, in a group context, the sharing of comments between

[2] *See generally* Adobe – Acrobat solutions: Control your work, PDF passwords and permissions, redaction tolls remove sensitive information, http://www.adobe.com/products/acrobat/solutions/detail/protect_info.html (discussing options for setting permissions on Adobe PDF documents).

[3] Data from the U.S. Dept. of Labor, Bureau of Labor Statistics indicates that there are more than 800,000 post-secondary educators in the United States. OCLC reports that there are more than twenty-two million authors of books published in the U.S. since 1923. These data make clear that the Authors Guild represents a tiny minority of authors affected by the Book Search initiative and raise questions about how representative the Guild is of the interests of most authors of most books in the Book Search corpus.

book club members or a class. In academia, however, annotation is a time-honored form of scholarship, which the annotator may wish to share with a large community for criticism and further comment—but not monetary profit. Members of that community may wish to forward the annotations to other scholars, add their own comments, and so on. Limiting annotation sharing to only twenty-five specifically identified fellow purchasers will inhibit such exchange and seriously impair the benefits of the bargain for academic authors.

7) Interaction with Publishing Contracts: Many contracts between academic authors and publishers provide for copyright to remain with the publisher during the period in which the books are in print, but copyright reverts to the authors when works are out of print. In addition, copyright law allows authors to terminate transfers of copyright interests during a five year window thirty-five years after the transfer. It is unclear from the Agreement how Google or the BRR will handle these reversions and terminations of transfer. We believe many scholarly authors who reclaim copyrights in out of print books will want to put them into the public domain or make them available under Creative Commons licenses, but are unsure that the BRR will be helpful or cooperative with these measures.

These are just a few of the concerns raised by our review of the agreement. We also share the concerns expressed by other commentators about the potential dangers of lack of competition, transparency and privacy that may result in harm to the public from the Agreement.[4]

Given the complexity and importance of this Agreement, the initial six-month comment (which included the Thanksgiving and Christmas holidays) period has proven inadequate to allow meaningful understanding of the Agreement, at least for academic authors. The Court should not evaluate the fairness of this Agreement without reasoned commentary from academic authors who are far more representative of the author subclass identified in the Agreement than the Authors Guild or the individual plaintiffs in this case. Academic authors are professionally committed to promoting learning and the public interest. This kind of commentary on the Agreement must be based on careful consideration, and that consideration will take time.

---

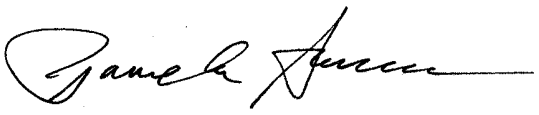
[4] *See, e.g.,* Robert Townsend, "Google Books: What's Not to Like?" American Historical Association (Apr. 30, 2007), *available at* http://blog.historians.org/articles/204/google-books-whats-not-to-like; Letter from Hadrian Katz to Hon. Denny Chin (April 17, 2009) (Internet Archive Request to Intervene); James Grimmelman, "How to Fix the Google Book Search Settlement," 12 *J. of Internet L.* 10:1 (April 2009); Randal C. Picker, "The Google Book Search Settlement: A New Orphan Works Monopoly?" *John M. Olin Law & Economics Working Paper* No. 462 (April 2009); Fred von Lohmann, "Google Book Search Settlement: A Reader's Guide," Electronic Frontier Foundation (Oct. 31, 2008), *available at* http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide; Robert Darnton, "Google and the Future of Books," 56 *The New York Review of Books* (Feb 12, 2009).

Therefore, we propose that the court delay closing the objections period for six months. Such an extension may find parallel in actions take by federal agencies such as the Food and Drug Administration, which extended and then re-opened the period for review and commentary on new and complex rulemaking regarding the sale of tobacco. See Steven P. Croley, *Public Interested Regulation*, 28 Fla. St. U. L. Rev. 7, 66 (2000) (citing Analysis Regarding the Food and Drug Administration's Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products; Extension of Comment Period, 60 Fed. Reg. 53620 (Oct. 16, 1996)). This settlement is likely to have at least as significant and very likely an even broader public impact.

We pledge to use any additional time granted to continue to educate and confer with our academic colleagues regarding the details of this complicated agreement. At the end of that period, we (and other groups of authors) will be better positioned to assist the Court with detailed comments on the Settlement, and/or to object if necessary.

Thank you for your consideration.

Sincerely,



Pamela Samuelson
on behalf of herself and the following persons:

Matt Blaze, University of Pennsylvania
Steven M. Bellovin, Columbia University
Lorrie Cranor, Carnegie Mellon University
David Farber, Carnegie Mellon University
Jessica D. Litman, University of Michigan
Patrick McDaniel, Penn State University
Anthony Reese, University of Texas
Jerome H. Reichman, Duke University
Annalee Saxenian, University of California, Berkeley
Eugene Spafford, Purdue University
David Touretzky, Carnegie Mellon University
Eric von Hippel, Massachusetts Institute of Technology
David Wagner, University of California, Berkeley
Dan Wallach, Rice University
Diane Zimmerman, New York University

Cc: Michael J. Boni, Esq.
Daralyn J. Durie, Esq.
Bruce P. Keller, Esq.