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Summary of Objections to Google Books Settlement

On September 18, 2009, the Department of Justice filed a brief that listed objections and modifications it would like to see made to the proposed Google Books Settlement. DOJ's brief followed more than four hundred others that outlined a host of flaws in the Settlement.

In the coming weeks, new briefs will be filed in response to the Amended Settlement submitted by Google and its partners. As that process gets underway, it is important to assess the Amended Settlement in light of DOJ's brief and the overarching objections of third parties. Without sufficient attention paid to addressing these objections, the Amended Settlement should not be given approval by the Judge presiding over the proceedings.

DEPARTMENT OF JUSTICE OBJECTIONS

In its brief, the Department of Justice outlined its key points of objection and suggested changes to the Settlement, nearly all of which were ignored by the parties in the revised settlement. Each of those points the parties have failed to address are listed below and analyzed against the revised Settlement to provide a basis upon which to conclude whether the revisions sufficiently addressed DOJ's concerns.

- I. ***Any forward looking business models must not use opt-out, but use opt-in for absent rightsholders;*** The forward looking business models of the revised Settlement remain opt-out for absent rights holders. This is counter to standard business terms and fails to address DOJ's objection on this point.

- II. ***Foreign rightsholders should be adequately represented;*** Foreign rightsholders in the U.K., Canada, and Australia, as well as other foreign rightsholders whose books were published in those countries, will still be bound by the terms of the revised Settlement. In addition, Google has indicated that it will continue to scan and make snippet display of foreign books that have been excluded from the revised Settlement, significantly improving their search engine and providing financial benefit to Google's ad revenues without compensating the owners of the rights to those scanned works. Google and its partners failed to address DOJ's concerns on foreign rightsholders.

- III. ***Author/publisher representatives that are parties to the Settlement Agreement must be bound by the settlement and not have separate deals;*** Just as with the original Settlement, the revisions did not eliminate the ability of the parties to opt-out of the terms they negotiate on behalf of an entire class so that they can negotiate separate and, presumably better, terms for themselves on the side. On this issue, Google and its partners failed to adhere to DOJ's suggestion.
- IV. ***Funds escrowed from unclaimed works cannot be diverted to other rightsholders;*** The amended Settlement creates an "Unclaimed Works Fiduciary" that somewhat alleviates this concern, although the independence of the UWF is questionable. Its governing board will be appointed by the class representatives with approval of the court. In addition, nothing in the revised Settlement allows the UWF to license competitors of Google, so the UWF remains simply an administrator of this settlement and not a means to effective competition.
- V. ***Book rights registry should have additional obligations to find absent rightsholders to avoid conflicts among class members;*** Although the revised Settlement adds language to the provisions on the Book Rights Registry that mentions efforts to locate absent rightsholders, the remaining opt-out language in the Settlement gives Google license without the consent of the rightsholder. Accordingly, nothing has changed to ensure proper consent is given by absent rightsholders. Google has failed on this point to address DOJ's concerns.
- VI. ***Settlement notice needs to be more robust if broad class is being used;*** The notice program under the revised Settlement does not appear to be materially different from the first notice effort, which was the subject of substantial criticism by rightsholders. It appears that Google and their partners have failed to heed DOJ's insistence that their prior notice was insufficient and therefore have failed in providing sufficient notice to the class on the revised Settlement.
- VII. ***Settlement cannot allow horizontal pricing agreements by rightsholders;*** The revised Settlement attempts, but fails, to alleviate this concern by the parties agreed to cede pricing decisions to Google to make "unilaterally" through a pricing algorithm that attempts to simulate competitive prices. The problem remains; however, as the Settlement itself is still a horizontal agreement to set prices. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) ("[P]rices are fixed . . . if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices." Further, it ignores the incentives that Google would have as a monopolist in setting prices, and creates no means of ensuring that pricing is actually "competitive." It would

be unusual indeed for the government to accept some self-imposed and self-regulated promises on pricing to substitute for actual competition.

- VIII. ***Settlement cannot create de facto exclusive copyright license for Google;*** The amended Settlement still grants Google a de facto exclusive license to an enormous corpus of books – namely, essentially every English language book published before 2009 for which the owner cannot or will not voluntarily license others (now called “unclaimed works”, a term which includes “orphan works”). There were no changes that would allow competitors access to “unclaimed works” in the corpus of scanned books. Google has failed to address a key concern of DOJ is failing to dispose of the de facto exclusive license.
- IX. ***Settlement cannot rely on additional class action litigation to ensure competition;*** The Settlement, as amended, would still require competitors to infringe, litigate, and hope to negotiate a comparable deal. Google has failed to address this key concern of DOJ, preventing any chance for competition.

PREVAILING THIRD PARTY OBJECTIONS

Over 400 third party briefs were filed on the Google Books Settlement, with 90% of them objecting to the deal. In addition to the comprehensive brief filed by the Department of Justice, many of the third parties had additional concerns with the Settlement.

- I. ***Different rightsholder groups may need to be excluded/represented (e.g. academic authors, literary agent authors, photographers);*** The amended Settlement was negotiated by the same narrow parties, did not include representatives of others’ interests, and did not create any additional subclasses despite the divergent interests that were highlighted in numerous objections to the Settlement.
- II. ***Privacy concerns must be addressed;*** Google and its partners made one minor tweak which did nothing to address the major privacy concerns expressed by the nation’s leading advocates on privacy issues.
- III. ***Google’s commercialization of “Non-Display Uses” must be specifically disclosed and understood by class members;*** No changes at all were made to Google’s license to broad “Non-Display Uses” in the amended Settlement, nor does it elaborate on what uses Google plans to make under that license. It also made no changes to the severe restrictions that Google has imposed on third parties who might wish to conduct research on the corpus.