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Memorandum

May 2010

To: Open Book Alliance
From: Cynthia S. Arato
Subject: The Google Books Settlement

As you requested, we summarize below the objections and argument that we lodged against the proposed settlement of the “Google Books” lawsuit on behalf of leading foreign publishing and authors’ associations, foreign publishers, and foreign authors. In particular, we explain how the settlement, if approved by the United States District Court, would contravene the United States’ obligations under international treaties.

If approved, the settlement would (1) grant Google automatic rights to exploit digitally millions of books without requiring Google to obtain *any* authorization from *any* foreign copyright owner or author; and (2) require these foreign rights holders to jump through burdensome hoops simply to exercise a watered-down contractual right – that the settlement creates – to halt such use. As we explain below, that unprecedented usurpation of copyright owners’ rights would violate two fundamental provisions of the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention” or “Berne”) – the protection of copyright owners’ exclusive rights and the prohibition against imposing formalities that would

impair the exercise of those rights. In addition, the settlement would violate the principle of non-discrimination enshrined in the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").¹ It would do so by imposing many of its most burdensome provisions on foreign rights holders who are not nationals of the United Kingdom, Canada or Australia – three countries whose nationals are unfairly given special treatment under the settlement.

Because the settlement would dramatically impair the copyrights of foreign rights holders, it provoked strong opposition from foreign rights holders throughout the world, many of whom filed objections to the deal. As we also explain below, if the court disregards those objections and approves the current settlement proposal, affected WTO members would have grounds to initiate international proceedings against the U.S. on the basis that the settlement violates the United States' international treaty obligations.

I. The Google Book Search Lawsuit and The Settlement

The Google Books settlement attempts to resolve a lawsuit that The Authors Guild and The Association of American Publishers, among others, brought against Google in 2005. The plaintiffs brought their lawsuit as a class action, and purported to bring claims on behalf of authors and copyright owners throughout the world who had written or own books published between 1923 and January 5, 2009, as well as certain "inserts" in those books. The lawsuit challenged Google's Book Search service, in which Google scans and digitizes millions of books from university libraries throughout the country, and displays "snippets" of those works in

¹ See Berne Convention, Sept. 9, 1886; as last amended Sept. 28, 1979, S. Treaty Doc. No 99-27, 1161 U.N.T.S. 18388; Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809.

response to on-line search queries – all without permission from the books’ copyright owners. The plaintiffs claimed that Google’s copying and displaying of the books constituted copyright infringement on a massive scale; Google claimed that its conduct was protected by the “fair use” provisions of U.S. copyright law.

Rather than litigate the “fair use” question, Google and the plaintiffs reached a sweeping settlement of the case, purportedly on behalf of the entire putative class.² The settlement seeks to grant Google automatic rights to exploit and profit from millions of books and inserts, even in direct competition with affected authors and publishers themselves. Among other things, the settlement would allow Google to continue to scan, digitize, and display “snippets” of these works; display up to 20 percent of most books; sell full electronic versions of millions of “out-of-print” books; sell subscriptions to libraries and universities allowing their patrons to access the digitized books; exploit the books in as-yet undeveloped ways (including for print on demand, file download and consumer subscription); and to make so called “non-display” uses of the books and their associated trademarks, including in Google’s lucrative “AdWords” program. The settlement provides for rights holders to receive a percentage of the revenue that Google generates from some (but not all) of these permitted uses, and individual authors are unlikely to receive any significant income from Google’s exploitation.

The settlement gave putative class members two equally unsatisfactory choices. First, they could affirmatively ‘opt-out’ of the settlement. Although this option would prevent Google from obtaining the right to use their works, it would require them to bring their own individual

² Under class action rules, the parties were required to submit their settlement to the court for approval. The parties submitted an initial settlement agreement in October 2008, but they withdrew that agreement after it drew fervent opposition. The parties submitted an amended settlement agreement in November 2009, and the court is currently deciding whether to approve or reject that amended agreement. This memorandum addresses the amended settlement agreement.

lawsuits against Google for any unauthorized use. And, as explained below, the “opt-out” process is itself burdensome. Second, putative class members could remain in the class, and invoke contractual rights – that the settlement itself creates – to “direct” Google not to make certain use of their works. But as we also explain below, those contractual rights are also burdensome to exercise, and in any event, they are no substitute for the exclusive copyright rights that the settlement would eliminate.

The proposed settlement ignited extensive controversy. In the end, hundreds of groups and individuals from the U.S. and around the world filed objections to the original and amended settlement agreements, including authors, publishers, public interest groups, libraries, companies, and publishing associations.³

A significant number of objections were lodged by and on behalf of foreign rights holders regarding uniquely foreign issues. The governments of both France and Germany filed amicus

³ The objections identified an array of fundamental problems with the settlement that impacted both domestic and foreign rights holders. Among other things, objectors demonstrated how the settlement turns U.S. Copyright law on its head by granting Google rights to exploit works by default, without any affirmative permission from rights holders. The settlement also would grant Google a *de facto* monopoly on the digital distribution of millions of “orphan works” (books whose authors or owners cannot be identified or located), because, as a practical matter, no other company would be able to obtain equivalent licenses from absent owners. Thus, the settlement would give Google an anticompetitive advantage in the nascent market for digital books that no competitor could hope to replicate, which U.S. antitrust law prohibits. The settlement would likewise raise antitrust concerns because it would allow Google illegally to obtain or maintain a monopoly in other markets (*e.g.*, search and search advertising), including by using its exclusive access to the scanned books to achieve an unfair and irreparable advantage in search, automated digital translation, and other services. In addition, the settlement effectively would allow authors and publishers, with Google’s help, to collude in setting prices for digital access to their books, a result that would also be illegal under U.S. antitrust laws. Opponents also contended that the settlement usurps Congress’s role in U.S. copyright law and fails to protect the privacy of readers; that the groups negotiating the agreement did not adequately represent the entire and diverse putative class; and that putative class members did not understand and were not provided adequate notice of the settlement. The U.S. Department of Justice filed its own submissions with the court that echoed the concerns of many of the objectors. The Department identified significant antitrust, class action and copyright problems with the settlement, which it characterized as “an attempt to use the class-action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the court in this litigation.” Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement (“DOJ Stmt.”) at 2, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Feb. 2, 2004)

briefs with the Court, arguing, among other things, that approval of the settlement would violate bedrock provisions of international copyright treaties.⁴ Our own objections contained an in-depth analysis of how the settlement, if approved, would violate two of the most important international copyright treaties, Berne and TRIPs.⁵

II. The International Treaties

The Berne Convention, which was first established in 1886, is “the oldest and most respected international copyright treaty.” House Report on the Berne Convention Implementation Act of 1988, H.R. Rep. No. 100-609, 100th Cong., 2d Sess. 27, at § III.A (1988) (“House Report”). The United States joined the Berne Convention in 1988, and over 160 countries are currently parties to this treaty. When implementing Berne, Congress found that U.S. adherence to it would “manifest a firm and sustained commitment to achieving strong and uniform protection for intellectual property worldwide” and “strongly encourage other countries to adopt and enforce high levels of [copyright] protection,” thereby creating “a strong and viable international legal regime that will develop to the benefit of the United States, not only to the advantage of proprietary interests but also to the public good.” House Report, at § III.B. Congress has enacted legislation over the years to ensure that the U.S. adheres to Berne, and, while Berne is not self-executing, U.S courts have looked to it when construing the rights of copyright owners to ensure that their rulings are not “contrary to [its] spirit,” and to avoid “offend[ing] other member nations” and “undermin[ing] Congress’s objective of achieving

⁴ See Federal Republic of Germany Objections at 2-8, 10, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Jan. 28, 2010); French Republic Objections at 1-2, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Jan. 28, 2010); French Republic Memo. of Law in Opposition to the Settlement Proposal at 10, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Sept. 8, 2009).

⁵ See Objections of Harrassowitz *et al.*, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Aug. 31, 2009); Objections of Carl Hanser Verlag *et al.*, *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Jan. 28, 2010) (“Objections”).

‘effective and harmonious’ copyright laws among all nations.” *See, e.g., Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994).

Congress reaffirmed the U.S. commitment to Berne in 1994 when this country joined TRIPs. Among other things, TRIPs requires that signatory nations afford the legal protections guaranteed by Berne. TRIPs, art. 9(1) (“Members must comply with Articles 1 through 21 of the Berne Convention.”).

III. The Settlement Contravenes Berne and TRIPs

As explained below, the settlement disregards fundamental provisions of both Berne and TRIPs.

A. The Settlement Eviscerates Exclusive Rights

Berne mandates that owners of “works protected by this Convention *shall have the exclusive right of authorizing the reproduction* of these works, in any manner or form.” Berne, art. 9(1) (emphasis added).⁶ However, if approved, the settlement would grant Google automatic rights to exploit digitally millions of books found throughout the world without requiring Google to obtain *any* authorization from *any* foreign copyright owner. On its face, this eviscerates copyright owners’ exclusive rights under Berne to authorize the reproduction of their works. Indeed, the nation’s top copyright official, Mary Beth Peters, the Register of Copyrights, testified before Congress that the settlement should not be approved because it amounted to an end-run around copyright law that would wrest control of books from authors and other rights holders. As Ms. Peters explained: “[i]n essence, the proposed settlement would give Google a license to infringe first and ask questions later, under the imprimatur of the court.” Sept. 10, 2009,

⁶ U.S. copyright law, in accord with Berne, similarly guarantees that U.S. copyright owners have the “exclusive rights to . . . reproduce the copyrighted work in copies or phonorecords” 17 U.S.C. § 106.

Statement of Marybeth Peters, Register of Copyrights, before the House Committee on the Judiciary at 7. For this reason, Ms. Peters warned that the settlement could subject the U.S. to “diplomatic stress” because of its impact on foreign rights holders. *Id.* at 3.

Throughout the court proceedings regarding the settlement, the parties attempted to conceal this profound impairment of exclusive rights by arguing that the settlement gives class members the “right” to direct Google not to use their works, and thus honors members’ exclusive rights. Yet that purported “right” is clearly an inadequate substitute for the exclusive copyright rights that the settlement takes away.

Regardless of what the settlement allows copyright holders to do if and after they remain in the settlement (*i.e.*, if they do not take steps to “opt out”), the settlement grants Google rights to exploit a vast number of copyrighted works at the outset, by default and without any affirmative grant of rights. That alone turns the black-letter law of exclusive rights on its head. And although a portion of rights holders may in fact exercise their so-called “right” to direct Google not to use their works under the settlement, it is apparent that vast numbers of rights holders will not pursue this course, whether out of ignorance, confusion, lack of diligence or resources, or, with respect to orphan works, because those right holders cannot be found.

In addition, this alleged “right” is far from unfettered. As explained below, rights holders must jump through a series of burdensome administrative hoops to direct Google not to use their works.

This alleged “right” is also critically incomplete. Google will honor rights holders’ requests not to use their works only if the rights holders file a claim form and identify each applicable book (or insert) that is the subject of such request, on or before March 9, 2012. After that date, Google will honor these requests only if it has not digitized the applicable work as of

the date of the request and only for select uses. And even where the “right” is preserved, obtaining it comes at a steep price; class members who do not opt out of the settlement forever waive their rights to sue Google for copyright infringement in the future, or even, in certain circumstances, to recover damages for a breach of contract, even if Google fails to honor member’s directives and exploits their works over their objection.

Accordingly, to the extent the settlement provides non-opting-out class members with a “right” to direct Google not to use their works that “right” is a highly circumscribed one that bears no relationship to the exclusive rights that the Copyright Act, Berne and TRIPs guarantee. Plainly, if the settlement simply obligated Google to do what copyright law already requires – to refrain from exploiting copyrighted works absent affirmative consent – there would have been no reason for much of the settlement in the first place. Indeed, Google has admitted that requiring it to obtain affirmative consent from rights holders “would eviscerate the purposes of the [settlement].” Brief of Google Inc. in Support of Amended Settlement Agreement (“Google Brief”), *Authors Guild, Inc. v. Google, Inc.*, 05-CV-8136 (S.D.N.Y. Feb. 11, 2010).

B. The Settlement Imposes Impermissible Formalities That Impair Copyright Protection

Berne mandates that the “enjoyment and exercise of these [exclusive] rights shall not be subject to any formality” in “countries of the Union other than the country of origin.” Berne, art. 5(1),(2); *see also* TRIPs, art. 41(2) (“Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits . . .”). As the World Intellectual Property Organization (“WIPO”), a leading authority on Berne, has explained, “(f)irst and foremost” among the many principles of the Berne Convention is Article 5(2)’s requirement that “protection may not be made conditional on the observance of any formality whatsoever . . . *If protection depends on*

observing any such formality, it is a breach of the Convention.” WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1971) 33 (1978) (emphasis added).

“In the context of the Berne Convention, formalities are generally understood to be legal conditions that, if not fulfilled, affect the existence, *scope of rights*, or continuing validity of a copyright.” Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & Tech. 71, 81-82 (1988) (emphasis added); *see also* Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 Cornell Int’l L.J. 171, 192 (1989) (Berne “prohibits signatories from creating ‘formalities’ which might pose obstacles for the ‘enjoyment or exercise’ of rights of authors seeking copyright protection.”).

The settlement flouts Berne by erecting formalities that impair foreign rights holders’ exclusive rights in at least three ways. Most obviously, the class action settlement procedures required foreign rights holders to formally “opt out” if they wished to preserve their existing copyright protections and remain legally unaffected by the settlement. This action required foreign rights holders to read and comprehend complex, poorly translated “Notices” of the settlement (which, in turn, repeatedly directed them to a 300-plus-page, dense English-only settlement agreement) and to fill out and submit detailed “opt-out” forms.

The settlement imposes additional burdens on those members who don’t “opt-out” and who wish to invoke the agreement’s watered-down contractual right to direct Google not to use their works. These burdens include submitting a lengthy 8-page “Claim Form” individually “claiming” each book or insert and providing significant amounts of information about each work – some of which can only be found by navigating through a seriously flawed and cumbersome “books database” that Google exclusively manages.

These filing requirements are remarkably similar to a “registration” requirement that previously existed for certain foreign rights holders under U.S. law and which Congress repealed in light of Berne’s prohibition against formalities. Prior to the United States’ accession to Berne, both foreign and domestic copyright holders were required to “register” their works with the U.S. Copyright Office before they could sue for copyright infringement in a U.S. court. Like the submissions required under the settlement, that registration required copyright holders to submit a form to the U.S. Copyright Office containing information about their works. *See* 17 U.S.C. § 411(a). Congress recognized that this registration requirement was a formality prohibited by Berne, and, to bring U.S. law into compliance, it eliminated the requirement for foreign copyright holders who have not published their works in the U.S. *See* Hatch, *supra* at 194-5. Like the now-repealed registration requirement, the settlement prevents foreign rights holders from asserting infringement claims against Google unless they have first made formal submissions to Google either opting-out of the settlement or directing Google not to use their work. And unlike the now-repealed registration requirement, which rights holders were able to satisfy at any time prior to bringing suit, rights holders here will forever lose their rights against Google if they fail to make their submissions within the deadlines that the settlement imposes.

Finally, the settlement’s definition of “book” inflicts particular hardship on many foreign rights holders. Although the original settlement covered virtually every book ever published in the world, the amended settlement now purports to cover only those books that have been registered with the U.S. Copyright Office or which had a “place of publication” in three chosen countries – the United Kingdom, Canada or Australia. This place of publication is to be “evidenced by information printed in or on a hard copy of the work” and “may include, for

example, a statement that the book was ‘Published in [Canada] or [the U.K.] or [Australia],’ or the location or address of the publisher in one of those three countries.”

This new definition required most foreign rights holders to engage in a painstaking book-by-book analysis to determine whether any, and/or how many, of their works – going back to 1922 – might have been registered or included publication information that purportedly brought them within the scope of the settlement. And rights holders were given an unreasonably short time period to accomplish this enormous task.⁷ For many foreign rights holders, it was practically quite difficult, and in some cases impossible, to comply with this requirement. For example, it is common for authors and publishers to transfer and re-transfer publication rights, such that current rights holders may not even have access to decades-old registrations that their predecessors-in-interest had submitted. Foreign rights holders also had little incentive to maintain these U.S. copyright registration records in the first place. That is because the significance of registration has fluctuated dramatically over time and has been of almost *no importance* for foreign rights holders for several decades. Objections at 11 & n.9. In addition, the Copyright Office’s record-keeping policies make it surprisingly difficult and expensive to determine the registration status of works registered before 1978. Such registration records are not available online; they must be searched at the Office in Washington, D.C. or at select U.S. universities.⁸

⁷ The settlement gave rights holders only six weeks over the Christmas and New Year’s holidays to perform this burdensome task. *See* Order Granting Preliminary Approval of Amended Settlement Agreement ¶ 17 (noting Supplemental Notice Commencement date of Dec. 14, 2009 and Supplemental Opt-out and Objection date of January 28, 2010).

⁸ Google made a belated attempt to solve this problem by making scanned, text-searchable copies of the Copyright Office’s “Catalog of Copyright Entries,” which lists the Office’s registration records from before 1978, available online. This effort was simply too little, too late. Google did not make a complete version of these records available until about January 13, 2010 – only two weeks before the January 28 deadline to opt-out of, or object to, the settlement. Furthermore, Google made no apparent effort to notify

The “place of publication” prong of the definition of books placed similar and unreasonable burdens on foreign rights holders from outside the U.K., Canada or Australia; it required these rights holders to scour all of their records from 1922 forward to determine whether their works have “printed information” evidencing a place of publication in one of these three countries.⁹

The burdens imposed upon foreigners by the registration and place of publication requirements would violate Berne even if they had some coherent justification. Here, they have none. For example, the registration hook makes little sense from a copyright perspective. Why should an Italian work published only in Italy be included in the settlement just because the rights holder’s predecessor-in-interest happened to register the book with the U.S. Copyright Office decades ago – even if that registration has essentially no legal significance from a copyright perspective, and even though the work has had no other connection to the U.S. since? The “place of publication” standard is equally unjustifiable. Why, for example, should a book written in Nigeria that has no connection to the U.S. be included in the settlement simply because it had a “place of publication” in the U.K.? The parties initially gave the nonsensical explanation that they included works published in the U.K., Canada and Australia because those countries share a common legal heritage and similar book industry practices with the U.S. *See AAP FAQ: The Revised Google Books Settlement, available at* <http://books.google.com/googlebooks/agreement/press.html>. In its final submission to the court, however, Google revealed that these countries were included because, unlike other foreign

class members at large of these records, and Google has conceded that the records may not provide accurate results. Objections at 12-13.

⁹ Our objections demonstrated that this “place of publication” standard was ambiguous and uncertain and made it impossible to define the putative class precisely, as required under the governing class action rules. Opposition at 5-10; see also DOJ Stmt. at 12 n. 7 (citing our Objections; finding that the “place of publication exacerbated confusion over the scope of the class; and recommending changes to the definition of books as a result).

countries, “rightsholder organizations in those countries generally were supportive of the Settlement” Google Brief at 77.

For each of these reasons, the burdens imposed upon foreign rights holders by the settlement contravene Berne and TRIPs.

C. The Publication Requirement Discriminates Between Nationals of the Chosen Countries and Nationals of Other Foreign Countries In Conflict With TRIPs

Under Article 4 of TRIPs, “any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.” The settlement violates this prohibition of “most-favored nation” treatment because nationals of the U.K., Canada and Australia are largely spared the burdens of the settlement’s cumbersome registration inquiry and ambiguous publication requirement and because they otherwise receive favorable treatment under the settlement.

It is overwhelmingly likely that, to the extent nationals of the U.K., Canada and Australia have published their works at all, they have done so in their country of origin. As a result, it is relatively simple for nationals of these countries to determine whether, and the extent to which, they are covered by the settlement. For this reason, unlike other foreign rights holders, nationals of these countries do not have to determine whether their works have been registered with the U.S. Copyright Office in order to ascertain whether they are included in the settlement.

Although it is hardly an “advantage” to be included in this settlement class by virtue of one’s citizenship, it is clearly better to *know* whether you are included than not to know at all. Denying this certainty to foreign rights holders who are not nationals of the U.K., Canada or Australia – and thus forcing them to jump through hoops to ascertain their class status – is discriminatory under TRIPs. Furthermore, regardless of one’s views of the merits of the

settlement, including certain foreign countries within, and excluding others from, its reach is itself discriminatory.

The Settlement favors these three “chosen countries” in other ways as well. The settlement gives these countries, and no others, a seat on the “Books Rights Registry,” an entity created to administer the royalty payments for Google’s ongoing exploitation of the books at issue. In addition, the settlement restricts Google’s rights to exploit works that are “commercially available” in these three countries and the U.S., but these restrictions do not apply to works that are “commercially available” elsewhere.

IV. If The Settlement is Approved, WTO Members May Bring Proceedings Against The U.S. For Violating Its International Treaty Obligations

As explained below, WTO Members – which includes the vast majority of the world’s major markets – would have the ability to bring proceedings against the U.S. before the World Trade Organization (the “WTO”) for alleged violations of TRIPs (and, by incorporation, Berne). Should the settlement be approved, there is good reason to believe that a number of our trading partners will want to initiate proceedings against the U.S. Indeed, the governments of France and Germany already have taken the somewhat uncommon step of filing objections to the settlement and their submissions make clear that they are deeply committed to protecting their citizens’ fundamental copyright rights, as embodied in Berne and TRIPs. And in December 2009, a French court found that Google’s Book Search service – the same service that is the subject of the U.S. lawsuit – violated French copyright law. The court ordered Google to pay over 300,000 euros in damages and interest and to stop digitally reproducing copyrighted material. *See* Matthew Saltmarsh, *Google Loses in French Copyright Case*, N.Y. Times, Dec. 18, 2009, at B3.

Foreign nations also likely will see Google's operations, if authorized under the settlement, as damaging to their own efforts regarding orphan works and national digitization efforts. In contrast to the settlement, which seeks to usurp copyright holders' rights, many European countries have devoted significant time and resources to dealing with these issues in a manner that is protective of authors' and publishers' rights. These efforts have been undertaken under the European Commission's i2010 Digital Libraries Initiative and include the Europeana, a European Digital Library that already contains 4.6 million books, maps, photographs, film clips and newspapers, digitized with permission from the rights holders, the Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW), and "Libreka!," an on-line platform for the digital exploitation of books. In France, President Sarkozy recently pledged nearly 750 million euros toward the computer scanning of French literary works, archives and historical documents, which has been seen as proof of France's desire to exercise control over its cultural heritage in the digital age. *Id.*

Foreign nations that wish to challenge the U.S. over the settlement may do so before the WTO. Under WTO rules, Members may bring formal claims before that organization, alleging that the U.S. has violated its TRIPs obligations. *See* TRIPs, art. 64(1); 1994 General Agreement on Trade and Tariffs ("GATT"), art. 23; WTO Appellate Body Report on *EC – Asbestos*, ¶ 185, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001).

Such a dispute would be resolved before a panel of international judges selected by the Dispute Settlement Body ("DSB") of the WTO. *See* Uruguay Round Agreement Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Uruguay Agreement"), art. 2, 8. Should such a panel find that the U.S. has violated TRIPs through its judicial endorsement of the sweeping settlement, the panel would issue a report explaining the violation and

recommending ways for the U.S. to bring its actions into compliance. *Id.*, art. 19(1). If the U.S. failed to withdraw the offensive measure within a reasonable time, the parties to the proceeding may then agree to the payment of appropriate compensation for the violation. *Id.*, art. 22(1). If the U.S. fails to follow the recommendations of the DSB and refuses to pay compensation, the DSB can authorize the aggrieved member to impose trade sanctions against the U.S. to offset the harm caused by the violation. *Id.*, art. 3(7). Those sanctions would be imposed against the U.S. as a whole and could harm companies having nothing to do with Google or the settlement. *See* Decision by the Arbitrator, *United State – Subsidies on Upland Cotton*, WT/DS267/ARB/1 (Aug. 31, 2009) (recognizing that violators can be subject to trade sanctions outside of the sector in which the dispute arises).

Typically, the measures challenged in WTO proceedings are tariffs and other regulations or laws imposed by national legislatures.¹⁰ There is no reason to believe that the judicial approval of a class action settlement could not be similarly challenged. Among other things, TRIPs does not exclude any type of claim from WTO review. TRIPs, art. 64.

The Uruguay Agreement, moreover, provides that a WTO member may bring proceedings against another member whenever it considers that “any benefits accruing to it directly or indirectly under covered agreements [including TRIPs] are being impaired by measures taken by another member.” *See* Uruguay Agreement, art. 3(3). The WTO Appellate Body has relied on this language to hold that, unless a particular WTO agreement provides

¹⁰ Member states have successfully challenged the United States before the WTO for violating TRIPs and Berne. In 2000, at the behest of the Irish performing rights organization, member states of the European Union asserted claims against the U.S. over a 1998 amendment to the U.S. Copyright Act. That amendment (17 U.S.C § 110(5)) exempted a broad range of retail stores and restaurants from liability for the public performance of musical works via radio and television. The WTO panel found that this provision violated the exclusivity provisions guaranteed to copyright holder under TRIPs and Berne Convention. *See* WTO Panel Report on *United States – Section 110(5) of the U.S. Copyright Act*, ¶ 7.2, WTO Doc. WT/DS160/R (June 15, 2000).

otherwise, “*any act or omission* attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.” Report of the Appellate Body, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, ¶ 81 (adopted December 15, 2003) (emphasis added). And, notably, the International Law Commission’s *Articles on the Responsibility of States for Internationally Wrongful Acts* provides that: “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions.” *Id.*, art. 4.1 (2001); *cf.* Report of the Appellate Body, *United States - Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/, ¶ 176 (adopted 4 February 2009) (emphasizing that measures susceptible to challenge under the DSU include any “acts or omissions of the organs of the state, including those of the executive branch.”).

Finally, the “transparency” provisions of TRIPs specifically recognize that a “judicial decision . . . in the area of intellectual property rights” may affect a member’s rights under that agreement, and therefore entitle a member to receive information about any such decision upon request. TRIPs, art. 63(3). And while most judicial decisions affect only specific rights holders or named parties to the proceedings, this settlement, if approved, would ensnare a worldwide class of individuals and entities and effectuate sweeping changes to the copyright landscape in contravention of international treaties. Indeed, many rights holders objected to the settlement as usurping Congress’ role in establishing the copyright laws and policies of this country. Accordingly, any judicial approval of the settlement should constitute a “measure” subject to challenge before the WTO.

V. Conclusion

Numerous provisions of the proposed Google Books settlement would, if approved, violate the treaty obligations of the U.S. For this reason, and because of its myriad other defects, the settlement should not be approved by the court. If the settlement is approved, it may give rise to legal action against the U.S. before an international tribunal and will certainly expose the U.S. to diplomatic stress.