



July 29, 2009

William F. Cavanaugh  
Deputy Assistant Attorney General  
Antitrust Division  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 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 follow-up on our May 27, 2009 meeting with Antitrust Division staff concerning the proposed settlement of the Google Library Project litigation.

In the meeting, the Library Associations highlighted some of the points we made in the comments we filed with the court on May 4, 2009. We reiterated that we do not oppose the court's approval of the settlement. We believe that the settlement has the potential to provide unprecedented public access to a digital library 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.

We expressed our belief that 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.

At the same time, we recognized that the digital library enabled by the settlement will be under the control of Google and the Book Rights Registry. The cost of creating such a library and Google's significant lead time advantage suggest that no other entity will create a competing digital library 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 order to mitigate the possible negative effects the settlement may have on libraries and the public at large, the Library Associations requested the court vigorously exercise its jurisdiction over the interpretation and implementation of the settlement. In the settlement agreement itself, the parties acknowledged the court's authority to regulate their conduct under the settlement.

The Antitrust Division staff asked us what action we wanted the Division to take with respect to the settlement. We replied that the Division should join us in urging the court to supervise the settlement closely, particularly with respect to the pricing of the institutional subscription and the composition of the board of the Book Rights Registry.

Upon further reflection, we believe that the Division itself should take a proactive role in the implementation of the settlement. During our meeting, we mentioned that the settlement

agreement was in essence a "*de facto* consent decree." We now believe that the Division should treat the settlement, if approved, as a consent decree to an antitrust action it brought. It should monitor the parties' compliance with the settlement's provisions as it would monitor the conduct of parties under an antitrust consent decree, and it should request the court to take action when it concludes that the parties have not met their obligations under the settlement.

In particular, the Division should ask the court to review the pricing of an institutional subscription if the Division concludes that the price does not meet 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). To assist the Division in evaluating the price of the institutional subscription, the Division should have access to all relevant price information from Google and the Registry.

The Division should also request the court to review any refusal by the Registry to license copyrights on books on the same terms available to Google. Finally, if necessary, the Division should ask the court to review the procedures by which the Registry selects members to its board of directors, and to evaluate whether the Registry properly considers the interest of all rightsholders in its decision-making.

If the Division makes a submission to the court prior to the fairness hearing, we suggest that the Division inform the court of its intention to treat the settlement as an antitrust consent decree and to monitor the settlement's implementation. Additionally, the Division should ask the court, in its order approving the settlement, to confirm the Division's standing to request the court to enforce the settlement's provisions.

The likely demand among academic libraries for an institutional subscription is high; faculty and students performing serious research will insist on the ability to search and read the full text of out-of-print books. This means that libraries probably will be among the primary fee-paying users of the services enabled by the settlement. Accordingly, the Division should pay special attention to the perspectives of libraries on the approval and implementation of the settlement.

Please let us know if you have any questions.

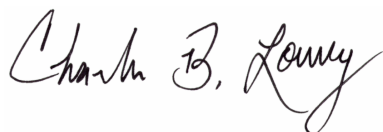
Respectfully submitted,



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