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An Academic Author's Perspective on the Google Book Settlement

by **Pamela Samuelson** (Professor, Berkeley Law School & School of Information, University of California, Berkeley, CA 94720-4600)



During the long-awaited “fairness hearing” about the proposed settlement of the *Authors Guild v. Google* lawsuit on February 18, 2010, I was one of the 21 non-party objectors or opponents of the proposed settlement to whom the judge granted five minutes to present their views. After introducing myself and noting that I had filed two letters objecting to specific terms of the **GBS Settlement**, the latest one on behalf of 150 academic authors, I made the following points.

Most of the books that will be regulated by the settlement agreement are out-of-print books from the collections of major research libraries such as the **University of California**, and most of these books were written by scholars for scholarly audiences.

Many scholars own copyright interest in their books and inserts at least for electronic distribution. Many of them have clauses in their contracts that allow author reversion rights upon the book going out of print. Most of these books will be core parts of the institutional subscription database that will be licensed to universities such as my own.

In the past year I have spoken to many colleagues at **U.C. Berkeley** and elsewhere about the proposed **Settlement**. When I asked them whether they would be willing to allow their out-of-print books to be made available on an open-access basis, each has said yes. Academic authors tend to believe that orphan books should be available on an open access basis too.

Orphan books are not a trivial problem. The *Financial Times* has estimated the number of books likely to be orphans as between 2.8 to 5 million. These books will form a core part of the institutional subscription database to which my university and others are expecting to subscribe.

The Plaintiff's memorandum responding to objections characterizes open access advocacy as “a prime example of...parochial self interests” (p. 3). The memo goes on to say that the interests of open access advocates “plainly are inimical to the class” (p. 23). As if the word inimical wasn't strong enough by itself, the plaintiffs italicized the word to emphasize just how “inimical” they think open access advocacy really is.

These statements to me illustrate that the **Authors Guild** has not fairly represented the interests of academic authors who are members of the author subclass. It also bears mentioning that academic authors would not have brought this lawsuit against **Google**, because we tend to think that scanning books to make snippets available is fair use. If this case goes back into litigation, instead of being settled, I will be writing briefs in support of **Google**, not in support of the **Authors Guild**.

But it's not just I and the 150 people who signed the supplemental academic author objection letter who endorse open access for these books. Last August, a letter was sent to the judge on behalf of the **UC Academic Council** — representing 16,000 faculty members at the **University of California** — which expressed concern that the open access preferences of academic authors would not be respected.

More important, though, is the open access recommendation of the **U.S. Copyright Office** in its report on orphan works. The **Copyright Office** considered and rejected an escrow model for orphan works akin to that in the amended **Settlement** agreement. Once the orphan status of a work has been determined, the **Copyright Office** recommends that the work should be available for free use. **Congress** modeled its orphan works legislation on the **Copyright Office's** recommendation. With all due respect, I believe that what should be done about orphan works is a public policy issue that should be decided by **Congress**, not private parties or the courts.

It is far more consistent with the utilitarian principles of copyright law to allow orphan books to be made freely available once we know that they are, in fact, orphaned. This is important to academic authors, because the Plaintiffs only care about maximizing revenues for the millions of orphan books that will be in the institutional subscription database. Academic authors want to maximize access. This is why it is crucial to include meaningful constraints on price hikes as part of the settlement agreement.

There is a fundamental difference in perspective between the Plaintiffs and academic authors about why books are valuable. For the

Plaintiffs, books are commodities to be exploited for maximum revenues. However, for academics, books are more like a slow form of social dialogue. Books from the past open the conversation that scholars pick up and carry forward. The books academics write further that conversation and set the stage for the conversation to be carried on by our successors.

The set of objections I made on behalf of academic authors should not be swatted down one by one, as they were in the Plaintiff's Objection memo; instead, they should be viewed as important component parts of the cultural ecology of knowledge in academic communities. This ecosystem will be impaired if the ecosystem envisioned in the settlement agreement is adopted, instead of the one that has long prevailed and should prevail in the future for academic communities.

While I could live with the **GBS Settlement** if it was amended as I have suggested, I worry very much about the precedent that would be set by approval of this particular **Settlement**.

Google's founders say that the company's goal is to organize all of the world's information. As we all know, books are not the only information resource that contains the world's information. I have been wondering for some time which sector of the copyright industry will be next to have its works scanned by **Google** for inclusion in its search database.

If this settlement agreement is approved, **Google** and possibly others may feel free to go out and scan other copyrighted works. And if their rights holders object, the pragmatic response might well be: hey, we could litigate about this, but I have a good fair use defense, and it would be expensive and ugly to litigate, so why don't we just reach a deal on my terms right now? Approval of the settlement would give **Google** unfair leverage in such negotiations.

But beyond that, I believe that approval of this settlement would encourage other class action lawsuits, which would then seek to justify their efforts to remake copyright law by saying, in effect, “**Congress** is too dysfunctional to address this problem, so we must be allowed to do it through a class action settlement.”

Pamela Samuelson is recognized as a pioneer in digital copyright law, intellectual property, cyberlaw and information policy. She has written and spoken extensively about the challenges that new information technologies are posing for public policy and traditional legal regimes. Since 1996, she has held a joint appointment with the **Berkeley Law School** and the **School of Information**. She is the director of the **Berkeley Center for Law & Technology**, serves on the board of directors of the **Electronic Frontier Foundation** and the **Electronic Privacy Information Center**, and on advisory boards for the **Public Knowledge** and the **Berkeley Center for New Media**. She is also an advisor for the **Samuelson Law, Technology and Public Policy Clinic**. Since 2002, she has also been an honorary professor at the **University of Amsterdam**.

For **Pamela Samuelson's** home page, where all her writings on the **Google Book Settlement** are posted, see: ischool.berkeley.edu/~pam. The full transcript of the fairness hearing is available at: <http://thepublicindex.org/>. Also well worth consulting is the lively synopsis of the hearing by **James Grimmelmann** at: http://laboratorium.net/archive/2010/02/20/gbs_fairness_hearing_report.