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Paul Whitney

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# The Google Book Settlement: Canadian Perspectives

by Paul Whitney (City Librarian, 350 West Georgia Street, Vancouver, British Columbia, Canada V6B 6B1)

A Canadian analysis of the **Google Book Settlement (GBS)** must be placed in the context of a cultural policy, which has always taken a protectionist stance largely motivated by the perceived danger of cultural incursions from south of the 49th parallel. While several years of a minority Conservative government have signalled a move to a more free market approach to the regulations governing cultural industries, sensitivities are still present and quickly manifested if threats to cultural sovereignty appear. **Amazon's** announced intention to open a Canadian based warehouse to service **Amazon.ca** was front page news in our national newspaper in February 2010, with industry representatives denouncing the threat this would pose to Canadian booksellers. The virtual existence of **Amazon.ca** supplying its products (Canadian and foreign) through a subsidiary of **Canada Post** was approved by the government several years ago, on the basis that there were no employees in Canada and, therefore, it fell outside the regulations designed to protect Canadian distribution and retail. This counter-intuitive perception that the creation of Canadian infrastructure and employment by a foreign owned company already fully serving Canadian consumers was a threat to Canadian interests is indicative of the confusing outcomes which can arise from "brick and mortar" regulatory regimes applied to virtual enterprises. The ongoing debate over **Amazon.ca** indicates that Canadian cultural protectionism is alive and well.

Given this environment, it is especially surprising that Canadians were largely absent from the initial debate on the **Google Book Settlement (GBS)**. Unlike governments in France and Germany, the Canadian government took no position on the **GBS** before the U.S. Court or in the media. English Canadian publishers largely signed on to the Book Rights Registry and took no formal position prior to the September 2009 Court deadline for submissions. Their motivating factor appeared to be that if there was money to be made, they needed to be part of the initiative. In keeping with their European counterparts and in contrast to their Anglophone counterparts, **ANEL, (Association Nationale des Editeurs de Livres)**, urged their members not to sign on to the Registry but appear not to have made a submission to the Court. As far as I can ascertain, there were only three Canadian submissions by the September deadline:

- A strongly worded objection from the **Canadian Standards Association**, as a publisher owning international copyrights including U.S. publications. **CSA** described the **GBS** as "anticompetitive, arguably violates antitrust laws, and improperly uses the class action mechanism...to force a perpetual business deal upon class members for the future use of copyrighted works in ways that go

well beyond the facts that gave rise to this lawsuit in the first place."<sup>1</sup> The brief concluded with the **CSA's** concern for the future implications of the **GBS**: "**Google** will likely continue its practice of 'copy first, settle later' and, after its monopoly power is firmly entrenched through this action, will likely attempt to leverage an even better deal for itself at copyright holders' expense next time."<sup>2</sup>

- The **Canadian Urban Libraries Council (CULC)** offered "general support in principle" for the **GBS**, arguing that without it "the probability of a subscription-based service with this vast body of work being available outside the United States is very unlikely."<sup>3</sup> **CULC** stated that the **GBS** was a first step in making more information available to library users.
- The **Writers' Union of Canada (WUC)** Statement of Objections indicated support for the **GBS** establishment of the Book Rights Registry, while expressing a number of concerns over "expropriating the copyrights of foreign rights holders"<sup>4</sup> if their works were published only outside the U.S. without authorization for U.S. distribution. Other concerns raised by the **WUC** included:

— The settlement should not permit future digitization by **Google** without voluntary sign up with the Book Rights Registry.

— **Google** should not be permitted to license and profit from orphan works in the absence of U.S. Congress legislation on the matter.

— Libraries and non-profit higher educational institutions should be required to pay a licensing fee to provide public access to the database, and digital copies should not be used by them to replace titles that are commercially available. The **WUC** Chair was quoted as saying on the free access to the database through public libraries, "That really sticks in our craw because we think it could have copyright implications in Canada."<sup>5</sup>

— Authors of foreign works should be represented on the Books Rights Registry.

— Rights holders should have the choice of opting into new uses not covered by the **GBS**.

— **Google** should not be given preferential treatment in the negotiation of other licensing agreements by the Book Rights Registry.

Canadian stakeholder engagement with the **GBS** increased significantly following the filing of the **Amended Google Book Settlement (AGBS)** in November 2009. The **AGBS** limited the scope of access to digitized works (but not their actual digitization) to works published in the U.S., UK, Australia, and Canada, countries described as having common legal heritage and

similar book industry practices. **Paul Atken**, Executive Director of the **Authors Guild**, one of the main plaintiffs in the case against **Google**, stated that this narrowing of coverage in the **AGBS** meant "Ninety-five percent of foreign language works are out," meaning that "the lion's share of the potential unclaimed works are now out of the **Settlement**."<sup>6</sup> What does make Canada unique in this grouping is its active French language publishing sector. While reliable Canadian publishing statistics are elusive, it is reasonable to assume that 25% to 33% of Canadian publishing is French language. It is interesting to speculate if the anomaly of full database access to these "foreign" language titles might generate additional revenue relative to European-published French language titles. The extent of this "advantage" is, of course, contingent upon the percentage of Quebec publishers that heeded **ANEL's** urging to remove titles from the Book Rights Registry.

The two major national English language Canadian publisher associations, **The Association of Canadian Publishers** (membership comprises 133 Canadian owned and controlled publishers) and the **Canadian Publishers' Council** (18 publishers including foreign-owned trade and education publishers and legal publishers), both issued general letters of support for the **AGBS** shortly after its release. The **Canadian Publishers Council** specifically noted its satisfaction with the change to the definition of "commercially available," which reads in the **AGBS** (new text underlined):

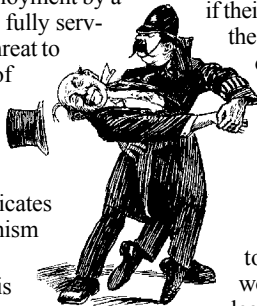
'Commercially Available' means, with respect to a Book, that the Rightsholder of such Book, or such Rightsholder's designated agent, is at the time in question, offering the Book (other than as derived from a Library Scan) for sale new from sellers anywhere in the world, through one or more then-customary channels of trade to purchasers within the United States, Canada, the United Kingdom, or Australia.

Publisher pleasure with this amendment is understandable, as the distinction between "in print" and "out of print" is significant in the **AGBS**, with **Google** restricted for in print titles from displaying more than text snippets and publishers controlling the right to sell full text. In this age of Internet bookselling, the definition change means effectively that any book available anywhere in the world is deemed to be in print worldwide and **Google** has restricted rights on what it can do with the book.

As Canadian publishers quickly fell into line in support of the **AGBS**, the mobilization of writers and educators in opposition to the deal started to coalesce.

An online petition from writers opposed to the **AGBS** circulated, and by early January 2010 had 250 signatories. The **WUC** submission to the U.S. Court in 2009 was described by a spokesperson for dissident writers as failing to

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take an official position and trying “to work it from the inside.”<sup>77</sup> The writers under the name “Canadian Writers Against Google Settlement” filed an objection to the **AGBS** to the U.S. Court on January 28th asking that Canadian copyright holders be removed from the agreement. Several new arguments (from Canadians at least) against the settlement were introduced:

- As well as violating the Berne Convention (an argument made forcibly by European interveners), the agreement would be in violation of U.S. obligations under NAFTA
- Canadian authors' moral rights would be violated under the agreement
- Competition and privacy concerns should be addressed
- Canadian provisions for addressing orphan works should be respected
- Canada's bi-lingual and bi-juridicial heritage and tradition set it apart from the other countries included in the **AGBS**

As was the case with the **WUC**, the **Union des Ecrivaines et des Ecrivains Québécois**, the primary Quebec writers organization, did not advise members on a specific position on the **AGBS**.

The **Canadian Association of University Teachers (CAUT)**, representing over 65,000 teachers, librarians, and other academic staff, also intervened with the U.S. Court on the **AGBS** in late January. **CAUT** echoed a number of the objections raised by other Canadian groups, including that the **AGBS** is in conflict with international copyright and trade agreements, ignores Canadian legislation on moral rights and orphan works, is in conflict with the separate Quebec legal and commercial regulatory regimes, and includes minimal privacy protections. **CAUT** also introduced the objection that the interests of its members are at odds with those of the **AGBS** plaintiffs in that “academic authors generally place a higher premium on access than is reflected in the (**AGBS**).”<sup>78</sup>

**Paul Whitney** joined the **Vancouver Public Library** as City Librarian in June 2003. He has served in national, provincial, and local leadership positions, including President of the **Canadian Library Association** and the **British Columbia Library Association**. He currently Chairs the following groups: **Library and Archives Canada Council on Access to Information for Print-Disabled Canadians** and the **Canadian Urban Library Council Copyright Committee**. **Whitney** serves on the **International Federation of Library Associations (IFLA)** Governing Board and is the Board liaison to the **IFLA Copyright and Other Legal Matters Committee**. 🐾

As we await the next stage of the ongoing **GBS** saga, from a Canadian perspective it is difficult to imagine that it could be implemented as written without it leading to transformative change in Canada's regulatory, publishing, and library environments. Whether the transformation is catastrophic or liberating or a little of both remains to be seen and will certainly be in the eyes of the beholder. As a librarian I tend to “fetishize” access (in the memorable phrase of European critic **Roland Reuss**)<sup>9</sup> and am inclined to agree with **CULC** in its assertion that implementation of the **GBS** is a necessary first step in providing universal access to our print heritage, while providing reasonable protections for writers and content providers. I worry that “universal access” for a number of years will be limited to the United States, and that there has not been enough consideration of the research imbalance this will create, especially if institutional subscriptions are constrained in any number of ways for institutions outside the U.S.. Setting aside the implications for academic research, the image of a Canadian having to travel to a U.S. public library to access a digital text of a Canadian title is both troubling and offensive. The impression left in a June 2009 meeting between **Google** representatives and Canadian educators and librarians that **GBS** implementation was at least ten years away in Canada does not offer much hope in this regard.

The only thing that is certain is that this process will not get any easier as it proceeds. I do believe, however, that the imperatives of the emerging digital reality will make a resolution to the multifaceted tensions surrounding

the **GBS** both necessary and desirable for all concerned. An outcome that only addresses English language content must be seen as a partial and interim solution. 🐾

#### Endnotes

1. “Objection of Canadian Standards Association to Proposed Settlement” filed on 09/08/2009 with the U.S. District Court, Southern District of New York, p 1-2.
2. *Ibid.*, p 5.
3. Letter from **Jeff Barber**, **CULC** Chair, to **Judge Chin** of the U.S. District Court for the Southern District of New York, August 31, 2009.
4. Writers' Union of Canada Statement of Objections, filed with the U.S. District Court for the Southern District of New York, 09/11/2009.
5. Quoted in “Authors lobby U.S. court to reject Google deal,” *Globe and Mail*, 7 Jan 2010, pR3.
6. **Norman Oder**, “Revised Google Settlement Offers Minor Changes on Antitrust Issue, No Response on Library Pricing”, *Library Journal* (online), 11/14/2009.
7. Quoted in “Authors lobby U.S. court to reject Google deal,” *Globe and Mail*, 7 January 2010, pR3.
8. Letter from **James Turk**, Executive Director of **CAUT**, to **Judge Chin** of the U.S. District Court for the Southern District of New York, 28 January 2010.
9. Quoted in “PW's Publishing Person of the Year: Richard Sarnoff,” *Publishers Weekly*, 7 December 2009, p22.

## The Google Book Settlement: An International Library View

by **Stuart Hamilton** (Senior Policy Advisor, International Federation of Library Associations (IFLA), 2509 CH, The Hague, Netherlands)

Ever since **Google** began digitizing millions of books in 2002, the **Google Book** project has fascinated the international library community. The tantalizing possibility of universal access to a massive number of books from American and European libraries, with further expansion to institutions elsewhere in the world — this is the stuff of librarians' dreams. Even as the years have gone by, and more books have been digitized, at the same time louder voices are heard against the **Google** initiative. The

idea of universal access seems to have faded somewhat from librarians' minds, even if the possibilities **Google Book** offers remain attractive and seemingly within reach.

The **International Federation of Library Associations and Institutions (IFLA)** is the leading international body representing the interests of library and information services and their users. Founded in 1927, **IFLA** has 1600 member associations and institutions in approximately 150 countries around the world. In its 83-year history, **IFLA**

has authored and published many books, and therefore has a great interest in the resolution of the **Google Book** question. Furthermore, some **IFLA** members are partners in the digitization programme itself, and as such are keen to see the success of the project and increase access to their collections.

