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A Modern Library Class Action: 
The Google Book Settlement and the Future of Digital Books

by
COURTNEY NGUYEN

I. 'In the beginning, there was Google Books'

The Library of Alexandria was an attempt to gather all of the knowledge contained in extant books into one convenient location.  

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2. JAMES J. O'DONNELL, AVATARS OF THE WORD: FROM PAPYRUS TO CYBERSPACE 27 (1998). O'Donnell writes that "legends of Western Civilization need Alexandria as the mother ship, as it were, of the western library tradition." Id. He later suggests that the "library at Alexandria has long loomed as a chimera of power and mystery on the horizon of our culture, but the real makings of our tradition are less
However, the Alexandrian library was eventually destroyed over time, leaving nothing but scattered texts. Though nothing remains of this library of antiquity, the quixotic desire for a one-stop shop for information and knowledge has not left the modern, digital world.

Enter Google.

The origin story of Google’s foray into the digital book world is not without a certain romantic panache of its own. According to the Google Books website, the Google Book Project originated in 1996 when company co-founders Sergey Brin and Larry Page were still graduate computer science students. With a tongue-in-cheek tone fitting Google’s public image, the website declares that the two students’ “goal was to make digital libraries work” and lays forth their big idea: “in a future world in which vast collections of books are digitized, people would use a ‘web crawler’ to index the books’ content and analyze the connections between them, determining any given book’s relevance and usefulness by tracking the number and quality of citations from other books.”

Even then, the website claims, Brin and Page envisioned people around the world being able to search through all the world’s books to find their desired book. With these lofty aspirations, the Google Book Project (“Project”) was born.

There have been a few precursors to this proposed plan, but none have the same ambitious scope as that of the Project. Websites such as Project Gutenberg also have digital texts available to the public, but only those works which are part of the public domain and thus already accessible to the public. The Google Project expands this basic concept. Not only would public domain works be available, but

ancient than that and clearly betray again the presence of the fantasy of the virtual library.” *Id.* at 33.
3. *Id.* at 27.
4. O’Donnell claims that “[i]f the essential feature of the idea of the virtual library is the combination of total inclusiveness and near-instantaneous access, then the fantasy [of a virtual library] is almost coterminous with the history of the book itself.” *Id.* at 32. He also asserts that “[t]he earliest invocation of such a dream is a famous document of the second century B.C.E., the ‘Letter of Aristeas to Philocrates.’” *Id.*
6. *Id.*
7. *Id.*
copyrighted works in the form of “snippets” or short excerpts would be as well.\textsuperscript{9}

The Google founders honed their idea further and the website provides a handy timeline of the Project.\textsuperscript{10} Beginning with 2002 and leading up to the present, the timeline provides some detailed information—but only concerning the actual mechanics of book scanning. Notably missing among the plethora of “insider detail” is any mention of lawsuits which would have understandably killed the “feel-good” mood of the website.\textsuperscript{11}

And, not surprisingly, the Project has resulted in some controversy. Numerous public interest groups have led a barrage of attacks against what they perceive as an unwarranted overreach by Google. Leading the charge was The Authors Guild of America (“Guild”), which filed a class-action law suit in 2005 against Google. The Guild gave voice to the various problems they had with the proposed Project, including how it would virtually destroy copyright protection for digital works.\textsuperscript{12}

According to the complaint, the plaintiffs were “published authors and The Authors Guild, the nation’s largest organization of book authors, which has as its primary purpose to advocate for and support the copyright and contractual interests of published writers.”\textsuperscript{13} The complaint goes on to state that the “authors’ works are contained in certain public and university libraries, and have not been licensed for commercial use.”\textsuperscript{14} This sets the stage for the primary concern that plaintiffs have concerning this project; namely, overreaching copyright infringement.

\textsuperscript{9} Google Books Library Project, http://books.google.com/googlebooks/library.html (last visited Feb. 5, 2010). Google likens its system to an old school card catalogue system which “show[s] users information about the book, and in many cases, a few snippets—a few sentences to display the search term in context.” This differs from Gutenberg’s method of offering free downloads of public domain works. There are no snippets available, but a reader has the choice of downloading the book onto an e-reader, or simply reading the text in plain HTML format. PROJECT GUTENBERG, supra note 8.

\textsuperscript{10} GOOGLE BOOKS, supra note 1.

\textsuperscript{11} Id. The most notable mention of the ensuing legal troubles the Project encounters is the very tasteful statement regarding how Google responded to “the controversy over the Library Project by engaging in public debate about its underlying principles.” Id.


\textsuperscript{13} Id.

\textsuperscript{14} Id.
The complaint describes the defendant Google as owning and operating "a major Internet search engine that, among other things, provides access to commercial and other sites on the Internet. Google has contracted with several public and university libraries to create digital ‘archives’ of the libraries’ collections of books, including that of the University of Michigan library."15 The complaint also contains a brief description of the Project, stating how “[a]s part of the consideration for creating digital copies of these collections, the agreement entitles Google to reproduce and retain for its own commercial use a digital copy of the libraries’ archives.”16

The initial result of the class action suit was a settlement. This, too, was not without disagreement. After countless delays and extensions, the latest version of the settlement came down on November 9, 2009.17 Even this decision was not allowed to go gentle into that good night, but in turn spurred even more outrage and criticism. At this point in time, the fate of the Project is still unsettled.

Besides the copyright protection facet, there are also anticompetitive concerns surrounding this project. Many questions are being raised: Would this prevent other sellers from entering the market? What kinds of protection will be offered to competitors such as Amazon.com, or any other big bookseller? Concerns over a Google monopoly are very relevant, given the precarious state of the publishing industry as information becomes increasingly digitized.

Given the scope of the project involved and the numerous and almost unwieldy complaints lodged against it, this article proposes that a judicial remedy is an inadequate way to solve this problem. The court’s handling of this issue has taken too long and has been too wasteful. The proper avenue of redress for the ills facing both the public interest groups and Google would be congressional legislation. This will be an important issue for the ages and should not be placed in the hands of the court.

Part II of this note will discuss the settlement, both the events leading up to the agreement as well as the content of the agreement itself and how it pertains to the various interested parties. It will lay out the numerous delays and extensions which have resulted, starting

15. Id.
16. Id.
17. Amended Google Book Settlement Agreement, http://www.googlebooksettlement.com/r/view_settlement_agreement (last visited Feb. 5, 2010). This includes the amended agreement filed on November 9, 2009, as well as files showing changes made to the original agreement.
from the initial filing of the class-action lawsuit and including the various briefs filed both in favor and against the Project, in order to show how inefficient the court route has been. A description of the actual, current settlement and the testimony given before Congress by a variety of interested parties will begin a discussion about how consumers, competitors, and the government will be affected by this outcome.

Part III will briefly touch upon the international response to this project, the majority of it unfavorable. Given the scope of the Project’s ambitions, the recent outcry from all corners of the globe is hardly surprising. A global bird’s-eye view of the situation will offer another perspective on the topic of digital books and place this Project in the context of the greater, worldwide literary community. The current privacy issues between Google and China in particular help to illustrate the complexity of the situation and how the courts are ill-equipped to handle such a problem which touches upon foreign relations.

Part IV takes the threads from Parts II and III and further explains why this judicial settlement is not the proper solution to the digital archives issue. Based on the delays and the briefs filed with regard to this settlement, there is ample evidence that the current route is neither the most efficient way to handle digital works nor as comprehensive as it could or should be. Looking at the problem from an anti-competitive point of view, it becomes clear that the proliferation of electronic readers (“ereaders”) and competitors in the digital book market require broader attention.

Lastly, Part V will offer possible alternative solutions to the problem with the Google Books Settlement. Since the courts are not fully equipped to deal with a situation so broad in scope, a natural answer is to defer to the legislature. Weighing the public interest, business needs, technological advancements, and the rights of Google, Congress should craft sui generis legislation that will address the issue as it now stands while providing a steady path for the future.

II. The Settlement Saga

The road to a final, official settlement agreement has been plagued by delay, doubt, and disagreement. The 2005 class action suit initially resulted in a settlement agreement between the parties in October 2008, but since then there have been numerous

postponements and deferments. There have been a series of subsequent hearing dates set by New York District Court Judge Denny Chin since October 2008, with the latest one scheduled for February 18, 2010. Following this hearing, however, Judge Chin is still unable to make an immediate ruling on the settlement since there is “just too much to digest.”

Judicial review has generally been met by a torrent of protests, and this latest should not be any different. One of the early naysayers to the settlement was the Department of Justice. In September, government lawyers urged the federal court judge to “reject a proposed settlement which would allow Google to digitally scan massive libraries of books and place them online.” The department cited class action, copyright, and antitrust concerns as main reasons for opposing the settlement. Authors and scholars against the Project were quick to hail this decision. However, the department was not wholly opposed to the agreement; rather, it “urged continued negotiations” given the importance of this settlement agreement.

A. What Google Did Next

Google has provided the latest copy of the settlement on its Google Book Project Website. On the surface level, the settlement lays out the logistics for several procedures: authors seeking to opt out of the agreement, author-publisher procedures, and forms for library-registry. The settlement purports to set up an independent “Book Rights Registry” which could provide revenue from sales and

19. Id. The original hearing date was set for October 7, 2009. This was extended, however, to November 13, 2009, and even this was not the final date. Helene Franchineau, Google Library Plans Delayed, WASH. TIMES, Nov. 10, 2009, at 10. The February 18, 2010, date will be followed by Judge Chin’s decision “whether or not to sanction the terms of the arrangement.” Wagner, supra note 18. “[I]t is expected that appeals will follow, dragging an ultimate resolution into next year and possibly beyond.” Id.


23. Id.

24. Id.

25. Id.


27. Id.
advertising for authors and publishers who agree to the Project. Additionally, Google agreed to pay over one hundred million dollars to resolve claims still due.

There are obvious benefits from this Project and the agreement. Greater access to nearly all works existing in the world would provide countless advantages. More people would gain access to more titles, some heretofore nigh impossible to find. The settlement provides ways for authors still opposed to the agreement to opt out, and Google will make some amends for the rights upon which it has already infringed.

Google also testified before the House Committee on the Judiciary Hearing on Competition and Commerce in Digital Books on how this settlement would benefit the public. David Drummond, the Senior Vice President of Corporate Development and the Chief Legal Officer of Google, makes persuasive arguments for why the settlement should stand by focusing on the benefits of the Project. He claims that not only would the Project benefit groups such as students living in rural areas and the blind, but also that Google Books is fully compliant with modern copyright law. He also says that with Google Books, the reading public will benefit by being able to “browse and buy digital copies of millions of books that otherwise might be left behind in the digital age.”

B. Caveat Reader

While this seems like a good idea for the public, caveat reader, the results to the public, both on the consumer side and the seller side, would not be purely beneficial as Google would have us believe. Without proper competition, the public might not be able to get the

28. Id.
29. Id.
30. Rich, supra note 20. Some supporters of the deal, such as the president of the National Federation of the Blind, the librarian of the University of Michigan, and a lawyer for Sony electronics, say that this agreement “would make millions of hard-to-find books available to a vast audience.”
31. Id. According to Daralyn J. Durie, a lawyer for Google, the deal “was fair because it compensated authors and publishers for any works sold through Google.”
33. Id. at 1.
34. Id. at 4.
best price for its books and its readers. This settlement stands to affect many different groups of society, and not in entirely advantageous ways.

The publishing and retail industries stand to be highly affected by this proposal. Based on recent statistics, publishing industry revenues are very low. With visions of Dan Brown books dancing in their heads, publishers and retailers were hoping that the holiday season would pull them out of their slump, but the season proved less than healthy. The digital book industry, on the other hand, seems to be a growing field whereby the ailing industry might be able to make a comeback. Therefore the introduction of a privately run library of sorts would seriously cut short these expectations.

Public libraries might also be affected by this settlement. As the march towards mass digitization continues, what will become of bricks and mortar municipal libraries? In hard economic times, library patronage actually increases. However, also because of the hard economic times, libraries have been forced to cut back costs by taking furloughs, cutting service hours, or shutting down. If this continues, could the Google Book Project step in to fill this void and take the place of municipal libraries?

C. The Ebooks are Coming

Consumers would be hurt and helped by this huge expansion of access to digital books. Though at the moment e-readers are still slightly fringed, their status may soon change. Some might argue that the digital reader technology might price out most people, but at the

35. Kate Ward, et al., *Bookselling Blues*, ENTERTAINMENT WEEKLY, Oct. 30, 2009, at 61. According to Ward, "After a discouraging year left the struggling book industry with no choice but to consolidate imprints and conduct mass layoffs, publishers rallied behind a slew of A-list authors releasing books this fall." However, big-name authors like Dan Brown and Mitch Albom failed to raise sales enough such that "the beleaguered industry is now pinning its hopes on the holiday season." Brown's sales began "sinking like a big action movie in its second weekend."

36. Memorandum of Amicus Curiae Open Book Alliance in Opposition to the Proposed Settlement between the Authors Guild, Inc., Association of American Publishers, Inc., et al, and Google, Inc. at 9, Authors Guild, et al v. Google Inc. (S.D.N.Y. 2005) (No. 05 Civ. 8136), available at http://www.openbookalliance.org/wp-content/uploads/2009/09/OBA09082009googlebrief.pdf. While sales from bookstores "have been flat at best," online sales of "conventional books have shown real gain over the last several years, and publishers have grown increasingly dependent on that channel, although web sales still constitute a minority of overall book sales. *Id.* at 9–10.


38. *Id.*
rate new readers are popping up, this fear should prove to be unfounded. One can analogize to cell phones, computers, or any other new technology which started out available to very few and soon became widely disseminated.

In fact, even publishers who try to downplay the effect electronic books ("ebooks") will have on the traditional medium are admitting that ebooks are the way of the future and that they are ushering in a new development in the world of publishing. Jon Mackinson, the chairman and chief executive of the British publishing house Penguin Books, has acknowledged, for example, that Apple's new iPad "marks a hugely significant development for the industry, 'introducing a large new audience to the reading of electronic books.'"\(^{39}\)

He compares the ebook movement to the invention of the printing press in the fifteenth century, when monks transcribing texts on parchment gave way to moveable type.\(^{40}\) Should this prove to be true, ebooks could someday be as ubiquitous as the paperback. Already, the luxury market has jumped into the fray, with brands such as Cole Haan selling hand-woven, patent leather Amazon Kindle covers.\(^{41}\)

Given the scope and expense of the Project, the question of what Google is getting out of this settlement naturally arises. Google claims that it settled the case mainly to "provide readers greater access to books,"\(^{42}\) which sounds very fine and noble. Yet their advantages might have also played a role in Google's decision to settle. In addition to the fulfillment of two schoolboys' dream,\(^{43}\) the material benefits seem obvious: The first piece of a potentially exponentially growing pie. This digital "bookscape" has the potential to completely change not only how people digest information, but also how the public simply reads, whether for work or for pleasure. Should this be something that we leave in the hands of one company, especially when there are other companies waiting in the wings?

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40. Id.
D. What the Authors Guild Did Next

The Authors Guild ultimately came around to this deal, citing among its reasons that authors and publishers “hope to profit from the market that’s created. We would like to have the Internet work for us, creating a market of the previously unmarketable. We also have a vital interest in keeping books central to our students, scholars, and culture.”64 Paul Aiken, speaking on behalf of the Authors Guild before Congress, enthusiastically counters opposition to criticisms concerning orphan works and the out-of-print market, but remains relatively silent about the issue of using a settlement to effectuate this great change.

While Aiken is very passionate about the reasons for agreeing to such a settlement, he bypasses the means for getting there by invoking the “greater good.” He states that even though the means of achieving this new out-of-print market, namely a class-action settlement, may be “novel,” this should not “distract us from the great good—for readers, students, scholars, authors, and publishers—that this settlement accomplishes. Similar systems, inevitably, will develop around the world.”65 The argument of “everybody else may be doing it so why can’t we” holds no weight in the playground, and likewise, it should not stand in a court of law either.

Aiken’s other argument concerning the validity of the settlement is also a little disturbing in its total lack of concern over the far-reaching consequences of the settlement on the digital book industry and even on the checks and balances of our government. He says that the settlement “doesn’t pre-empt congressional action, but there’s no need to act now, before we see how well this solution works in the real world.”66 While the wait-and-see doctrine is no stranger to common law, applying it to a settlement of this breadth and scope seems nothing less than thoughtless and careless. Allowing two private sector entities to hash out an agreement that affects all digital

45. Id. at 6–9. Aiken emphasizes how small the market of orphan works actually is and points out how “countries around the globe are already dealing with the orphan works issue in a productive way,” though he does not discuss how this has bearing on the settlement issue. Id. at 8.
46. Id. at 10.
47. Id.
books around the world is more than just a throwaway experiment for the courts to try.

Aiken also states that the Authors Guild suspects that “many of the concerns—including all of the major objections—will prove unwarranted as this settlement goes into operation. There’s no need to fix that which likely isn’t broken at all.” If the world worked as it did through Aiken’s rose-colored glasses, then any government intervention might prove unnecessary. But experience, and common sense, has proven this to be false.

It is incredible that Aiken, the executive director of the Author’s Guild and one of the central parties to the settlement, is willing to put everything on the line for his opinion and faith that things will work out somehow. This underscores how inadequate a settlement agreement is to deal with the large issue of the future of digital works. Aiken further claims that “[a]llowing this opportunity to slip through our grasp would be a tragic loss to all those who value riches stored in our nation’s libraries.” Though Aiken might really believe that this is the only way to get a comprehensive digital library, a more level-headed approach reveals other means and ways. There is no real rush to digitize books at this moment in time. While the technology is still being tinkered with, it seems ideal to turn to prophylactic legislation and not a hurriedly cobbled together settlement in court. Not only should Congress step in, but other competitors should be allowed to have a say in what will affect their future business. There are still many gaps in the settlement, suggesting that something more comprehensive, more sweeping, and more extensive is in order.

III. Lost in Translation

Given the inherently global and borderless nature of the internet, it is no surprise that the furor has not been limited to the United States. For example, a few days after the first court extension in October 2009 came down the China Written Works Copyright Society accused Google of scanning Chinese books without authorization. This society is a group which has been tasked by...

48. Id.
49. Id. at 2.
50. Id. at 10.
China’s government with “collecting information on copyrights involving written material.” The deputy general-director, Zhang Hong Bo, stated that Google violated an international copyright rule by not obtaining permission to scan the works without paying a fee before usage. China is not the only country against the Project. The German and French governments filed objections to the original settlement, as did many Canadian groups including the Writers Union of Canada.

But, as in America, some people appear to have been worn down by Google and have come to accept the settlement as inevitable, however grudgingly. Their main lingering concerns seem to be over the increasing piracy of digital books. David Bolt, the leader of one of the Canadian groups still opposed to the settlement, believes otherwise. He does not think that increased piracy is the only possible consequence of failed settlement negotiations. Instead, he hopes that once the settlement is rejected, there will be new copyright laws to address the issue.

The Authors Guild remains sanguine about the settlement’s adherence to international copyright law. It fully believes that the settlement complies with the 1971 Berne Convention for the Protection of Literary & Artistic Works. It focuses on the national treatment provision of Article 5, section 1 and the imposition of

52. Id.
53. Id. Zhang stated that Google “has violated a widely-accepted international copyright rule that any scanning, collecting and using of protected works should obtain permission and pay a fee before usage.”
54. Id. The furor in Europe was so great that authors from Europe and elsewhere have been left out of the amended agreement. Wagner, supra note 18.
55. Wagner, supra note 18.
56. Id. An estimate by a recent U. S. study put the number of illegally downloaded books at around nine million in the last quarter of 2009 alone. The independent study was conducted by the online monitoring and enforcement service Attributor and the study can be found online at http://www.attributor.com/docs/Attributor_Book_Anti-Piracy_Research_Findings.pdf.
57. Wagner, supra note 18. Bolt controls the estate of his late wife, the playwright Carol Bolt. He has generated a list of nearly 450 Canadian authors who oppose this settlement.
58. Id. Bolt says that “[s]ome people think that if the Google settlement is rejected we will return to the lawless digitization of books . . . [o]ur view, however, is that if the Google is rejected it will be replaced by new copyright laws, with teeth put into the enforcement of those law.”
formalities provision of Article 5, section 2, finding that the settlement "is fully consistent with our country's treaty obligations."  

It also believes that should controversy arise over inconsistent laws or provisions, the "only remedy is for another country to take the United States to the International Court of Justice, or to invoke the dispute resolution provisions set forth in the GATT, leading possibly to a WTO panel."  

If the controversy should lead to the courts anyway, why would Congress allow a court to create such a problem that it must solve? It seems better to handle the problem at the statutory level before the international community needs to step in.  

A congressional body is more appropriate and better equipped to study and compare the effects that the settlement and book project will have on international treaties. Since digital works are relatively new, standing treaties may not even address the matter as comprehensively as necessary. Thus, further negotiations may be in order, and Congress would have to take part in these discussions.  

Aiken also states that the District Court "must follow the Copyright Act, and it has no authority to deviate from it in an effort to comply with its understanding of the United States' treaty obligations."  

But there is debate over what the Copyright Act actually says regarding this novel issue. Earlier, Aiken had said that Congress did not need to yet act, suggesting that there is no legislation on point as of yet. But here he refers the District Court to the Copyright Act in defending the settlement against international claims. Aiken appears to be pushing the problems onto Congress only after the parties to the settlement have already benefited from this agreement. Congress should not just clean up the mess; it should prevent the mess by preemptive legislation that will set the course for the future of digital works.  

IV. Why the Settlement Should Not Be Dispositive of the Future of Digital Books  

There does not appear to be any precedent for allowing the courts to make such a momentous decision rather than the legislature. The courts are generally deferential to the legislature on most matters.

60. Id.  
61. Id. at 26–27.  
62. Id. at 27.  
63. See supra text accompanying note 47.
Given its national and international scope, the Google Book settlement seems particularly out of the provenance of the courts. There are a bevy of policy considerations against allowing Google a de facto monopoly over digital books. This class action settlement steps on many toes: copyright, antitrust, unfair competition, standing, and remedies, just to name a few. All sectors of society are involved and would be impacted by this settlement: the public, the private businesses, and the government called upon to regulate and administer these rulings. And yet, only a few parties are involved in working out this agreement.

A. Team Government

The Justice Department’s brief stated that the “Proposed Settlement is one of the most far-reaching class action settlements of which the United States is aware; it should not be a surprise that the parties did not anticipate all of the difficult legal issues such an ambitious undertaking might raise.” Though the Department recognizes the enormity of the issue, it is still willing to let the parties continue to hash out a plan among themselves, regardless of the potentially huge impact such a decision may have in the future. While it hopes to work with the parties, this still falls short of the leading role the government should take in this issue.

What is frustrating is that the Department acknowledges that legislation is the proper avenue of redress. The brief states that a “global disposition of the rights to millions of copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement.” But instead of saying that legislation will be forthcoming, it bunts. Granting that the situation will nonetheless be made through a class action settlement, it “respectfully submits that this Court should undertake a particularly searching analysis to ensure that the requirements of Federal Rule of Civil Procedure 23 . . . are met and that the settlement is consistent with copyright law and antitrust law.” Considering the

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65. Id. The Department continues by saying that the “United States is committed to working with the parties constructively with respect to alterations the parties may propose.”
66. Id. at 6.
67. Id.
contemplated effects of this project, citing to a rule of civil procedure seems anticlimactic.

The Department of Justice has not been the only governmental entity to address the settlement. There have also been congressional hearings, during which a variety of people have given testimony, either as to why this settlement should happen, or why it should not. The top official from the Copyright Office, Marybeth Peters, the Register of Copyrights, testified before the House Judiciary Committee attacking the legal settlement.\(^6\) She stated that the private settlement "amounted to an end-run around copyright law that would wrest control of books from authors and other right holders."\(^6\) Additionally, this could put "diplomatic" stress on the United States since this Project affects foreign authors whose rights are safeguarded by international treaties such as the Berne Convention.\(^7\)

Thus, the top official from the Copyright Office, one who would be directly affected by the outcome of the settlement, believes that the settlement is an inadequate solution to the problem. It makes sense that she, who deals directly with copyright affairs day to day, should have been afforded the opportunity to give her opinion on the matter. Perhaps a better solution would have been to involve her in the decision-making process. Her glaring omission from the settlement proceedings reveals how narrowly tailored and exclusive this settlement is.

**B. Team Private Sector**

The private sector has also mobilized in opposition against Google. The Open Book Alliance ("OBA"), an anti-Google organization which hopes to "promote fair and flexible solutions aimed at achieving a more robust and open system,"\(^7\) filed an amicus brief against the proposed settlement in September 2009.\(^7\) In the brief, the OBA compares the proposed Google settlement to John D.

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69. Id.
70. Id.
72. Open Book Alliance Amicus Curiae, supra note 36, at 38.
Rockefeller's collusive South Improvement Company railroad cartel in that Google and the plaintiff publishers have secretly negotiated "to produce a horizontal price fixing combination, effected and reinforced by digital book distribution monopoly. Their guile has cleared much of the field in digital book distribution, shielding Google from meaningful competition." The allusion to the Gilded Age of non-regulation is apt given the dearth of legislation surrounding e-commerce in general. As in the past, measures need to be taken now in order to ensure that future digital works commerce will not be constrained or tainted by stains like monopoly. Just as it would be incredible to think of antitrust regulations back in the nineteenth century being promulgated by a settlement between two private parties, so too now is it unbelievable for Congress to allow the courts to control this issue of digital works.

The competitors of Google who would be directly affected by the settlement agreement have also spoken out against the agreement. Amazon.com ("Amazon"), a member of the OBA and the purveyor of the popular e-reader, the Kindle, also testified before the House Judiciary Committee, addressing several of Google's claims directly. Whereas Google claims that the settlement does not create any new copyright law, Paul Misener, the Vice President of Global Public Policy of Amazon, stated that the proposal, if approved, would "create national copyright and competition policy with enduring adverse effects on consumers and Google's competitors." He also insisted that "any such efforts be undertaken in the open, grounded in sound public policy, and mindful of the need to promote long-term benefits for consumers rather than those of a few commercial interests."

Misener focuses on two main faults of the settlement agreement, and both illustrate the dangers resulting from letting the issue of digital books be resolved in the courts instead of in Congress. First, he states that the proposal "would create a cartel of rightsholders

73. Id. at 7–8. This South Improvement Company generated great public outcry which eventually produced the Sherman Act of 1890.
74. Id. at 8.
75. Drummond, supra note 32, at 7.
77. Id. at 2.
that, for sales of books to consumers, would set prices to maximize revenues to cartel members. This cartel, called the Books Rights Registry, could never have been established in the ordinary course of business." This would subject prices to Google's standards and leave purveyors with little recourse to competition.

Labeling the Book Rights Registry as a "cartel" also imparts an unsavory flavor to the whole transaction, bringing to mind drug wars and other things people would not want in their schools. Though a little heavy-handed and melodramatic, such language is indicative of the high emotions being raised by the Project and this settlement.

Secondly, and what Misener considers more fatal, the settlement would allow Google a "privileged, exclusive deal, despite lip service to non-exclusivity. Except for works of rightsholders who affirmatively opt out, the settlement would give Google—and only Google—a license to digitize and sell every U.S. book ever written. This means that Google alone would have a permanent and exclusive right to copy, display, or sell digital versions of the millions of orphan works."

He dismissed Google's claims that competitors would have access to the same deal since the Registry "cannot license competitors to scan orphan works because it can only license uses of books whose copyright owners have given express approval." And with the owners of orphan books lost or missing, who would be able to give approval, much less express approval?

Misener makes another compelling point by asking whether the Registry "would be willing to license these registered works to compete with the Google deal." While Google's impulses in starting this project may have been purely idealistic, it stretches the bounds of belief to think that as a profit-seeking business Google would go out of its way to help out competitors. That would be asking too much from even the most altruistic of companies.

C. An Anti-Competitive Aspect

It is not surprising that competitors are against the settlement since they stand to be hurt most directly by it. The Google Book
Project, working in accordance with the settlement, would impair the burgeoning digital book market. As of right now, there are a variety of digital readers available to the public: Amazon's Kindle, Barnes & Noble's NOOK, Sony's Reader, the new Skiff Reader, and the newly launched Apple iPad, just to name a few. These readers are not the only ways to read digital books; book scans can easily be read on any computer, laptop, or cell phone, rendering an actual reader unnecessary.

Even though Google has no plans, as of yet, to launch its own e-reader, putting up a comprehensive library of all available titles worldwide would necessarily hurt the market for those selling ebooks. Not only would Google be putting out its own ebooks, but it would be gaining access to works unavailable to their competitors, such as out-of-print books or university library collections, giving it an unfair advantage.

Companies previously on good terms with Google, such as Amazon, are quick to point out the obvious disadvantages to competitors as a result of this settlement agreement. Misener points out that instead of going to Congress, a natural avenue for the protection of consumers and competition, Google "instead has asked a trial court to approve a class action settlement that would establish national copyright and competition policy exclusively in favor of Google above all potential competitors." He continues by saying that the "exceedingly complex" settlement agreement is "more of a joint venture agreement and establishment of national policy, than a resolution of claims arising from past behavior." He believes that the proposal would also "exonerate Google of future claims based on future actions that would otherwise be prohibited by law." He labels this "an impermissible result of class action litigation" which "makes the proposed settlement less about resolution of a legal dispute than about copyright policymaking and forming a joint venture."

The picture Misener paints of the effects of the settlement is, not surprisingly, bleak. He claims that the proposed settlement would

82. Id. at 2. Misener states that "Amazon takes no pleasure in opposing Google in the class action case or in today's hearing. As you [Mr. Chairman] may recall, we work closely with Google on other matters before your Committee, including net neutrality, where we both want rules to protect consumers in the absence of competition . . ."
83. Id.
84. Id.
85. Id. at 4.
86. Id. at 4–5.
“seriously harm individual book consumers and most libraries and schools because the rightsholders cartel and Google monopoly inevitably would set higher prices or provide worse service than would be available in a competitive market.” 87 These dangers are common to monopolies and it is no wonder that competitors such as Amazon would view them with such distaste. All “existing and potential Google competitors” would then “be denied a fair and reasonable opportunity to license a similar corpus of works under similar terms.” 88

Even consumer groups who see the obvious benefits from a digital scanning project such as the Google Book Project have concerns over the means by which Google is attempting to settle this issue. John Simpson, a consumer advocate for Consumer Watchdog (“Watchdog”), a nationally recognized consumer and taxpayer interest group, 89 testified before the same House Judiciary Committee, expressing his doubts about the settlement. 90 His main contention with the project was the monopolistic flavor of the settlement agreement and implementation. 91

Referencing Watchdog’s amicus brief, Simpson restated that the proposed settlement “is monumentally overbroad and invites the Court to overstep its legal jurisdiction, to the detriment of consumers and the public . . . The proposed Settlement Agreement would strip rights from millions of absent class members, worldwide, in violation of national and international copyright law, for the sole benefit of Google.” 92

All of these disparate groups have united over this battle against Google. Though their interests may vary somewhat, they share a few main points in common: that this is an overexpansion of the role of the courts and that Google would effectively take control of the market for digital books.

87. Id. at 4.
88. Id.
91. Id. at 2.
92. Id.
D. Where Are You, Congress?

With the private sector rallying together, why is the government allowing such an important issue to be settled in the courts instead of in Congress? Google claims that this settlement would not interfere at all with Congress’ legislative powers, though its detractors assert that the settlement usurps the role of Congress to set copyright policy. This is because Google believes that the settlement does not even touch on copyright law at all, instead merely representing the “means by which the class of rightsholders decided to resolve the lawsuit.”

Yet this simplistic view of the problem overlooks the impact the settlement will have on existing law. In a way it is establishing new copyright law since no real law concerning digital books exists as of now. The content of the settlement agreement, with its concessions and compromises, is more than just a technical argument about class action lawsuits.

Why should Congress allow a private sector business like Google to be at the forefront of this digital book revolution without any checks? This reticence seems to reflect Congress’ tendency to be missish about technological issues. With the advent of computers and the accompanying dizzying array of source code and object code, Congress seemed content with allowing courts to beat out a few policies before stepping in once the technology had become a little less foreign.

But courts themselves were quick to point out that their rulings were merely makeshift interpretations of unsettled law. In the computer technology context, the Second Circuit, discussing computer technology, stated that “[t]hus far, many of the decisions in this area reflect the courts’ attempt to fit the proverbial square peg in a round hole.”

This suggests that the Copyright Act might need to be amended in order to meet the demands of new technology, as is the case here for digital books.

93. Drummond, supra note 32, at 7.
94. Id. at 8.
95. Computer Assocs. Int’l, Inc. v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992). This case dealt with “whether and to what extent the ‘non-literal’ aspects of a computer program, that is, those aspects that are not reduced to written code, are protected by copyright.” Id. at 696. Judge Walker also wrote that “the exact contours of copyright protection for non-literal program structure are not completely clear. We trust that as future cases are decided, those limits will become better defined. Indeed, it may be that the Copyright Act serves as a relatively weak barrier against public access to the theoretical interstices behind a program’s source code and object codes.” Id. at 712. This suggests that the Copyright Act might need to be amended in order to meet the demands of new technology, as is the case here for digital books.
is already in place. All Congress would need to do is regulate it properly.

There are other policy reasons why Congress should handle this issue and not the courts. First, Congress is accountable to people directly affected by this settlement; namely, consumers and businesses. Second, the amount of information that is necessary to be digested throughout these proceedings is proving too much for one district court judge to handle. A committee that could consult the necessary experts and engage in thoughtful debate seems better equipped to solve this problem. And third, this settlement touches directly on future copyright law and interpretation, and so the legislature should provide a stronger base from which courts can interpret future cases.

V. Modest Proposals

Since the court settlement appears to be an inadequate response to the issue at hand, Congress should step in to resolve the issue. Ideally, Congress should create sui generis legislation for digital books. Although the digital nature of these works will present new challenges, the same might have been said years ago when the first books left the printing press and began circulating. The legislation can be left as broad as Congress deems necessary in order to allow wiggle room for future developments, such as new technology or treaties with foreign nations.

A. Legislative Exempla

As a guide, Congress can look at laws already in place regarding similar technologies, and snip and tailor as is necessary and in a way that addresses the needs of all parties involved. Legislation should address the parameters of digital book access, copyright, and who can be in charge of distributing and protecting works. Legislation can also be more forward-looking and civic-minded. A digital library, just like a bricks-and-mortar municipal library but on the internet, seems a natural progression.

The most recent, comprehensive legislation concerning the burgeoning digital technologies is the Digital Millennium Copyright Act of 1998. With the evolution of digital technologies for reproduction and distribution came the possibility of increased unlawful copying. After the 1980s, the copyright industries began to

96. See supra text accompanying note 20. This seems to be a classic case of a court’s eyes being bigger than its stomach.
fear circumvention of technological protections for digital works. With the Act, Congress focused mainly on anti-circumvention legislation. In the Google Book Project instance, Congress may wish to broaden its scope to include more than just anti-circumvention rules. The focus should not be so much on digital technology as on the copyright owners' rights with respect to the digital copies of their work. The statutory rights of distribution and reproduction may need to be clarified, and legislation would make that possible.

The Copyright Modernization Act of 2006 also addressed digital technology, but focused mainly on protection of musical works and orphan works. Instead of having to analogize to existing statutes, Congress should create sui generis legislation that deals head-on with the issue of digital books, digital libraries, and the attendant copyright changes.

B. A Modern Library

A digital library seems a natural progression. Libraries offer an example of how to turn this new technology into something that could benefit the public at large. Section 108 of the Copyright Act permits libraries and archives to reproduce or distribute copies of works under certain circumstances. Using this statute as a template, Congress could alter it to conform to the needs and requirements of a digital book. Once the business side of ebooks becomes more established, allowing the public equal access to free ebooks would help bring this new technology to everyone.

97. JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 607 (2d ed. 2006).
98. Id. at 607-08.
99. Id. at 608.
100. 17 U.S.C. § 106 (2010). The statute lists the copyright owner's exclusive rights, which include the rights to reproduce the work, prepare derivative works, to distribute copies, to perform the work publicly, to display the work, and to perform the work by means of a digital transmission.
Just as the printing press enabled an increase in the circulation of books leading to future lending libraries such as England's Mudie's, so too would digital scans of books facilitate an online library. Analogizing to a service like Netflix, people could "rent" book scans, which would self-delete once the allotted time was up. Temporary downloads already exist for media such as movies. Netflix already allows customers to download movies directly onto their computers, doing away with the need for hard copies of DVDs. Subscriptions and passwords are other ways of regulating digital book use.

C. What the Publishing Industry Might Do Next

Publishers can still strive to live in harmony with the new ebook. Just as with the transition from parchment to codex, from codex to moveable type, and from hardback to paperback, these literary format transitions need not completely devastate the preceding market. It does not even necessarily follow that digitization will leave publishers with a vastly diminished role. Makinson actually sees the role of the publisher being extended since the publisher will still make decisions on what to publish, edit, and sell and manage. And given the sheer mass of new potential books that will be able to be produced more cheaply digitally, the need for more discernment on the part of editors seems more important lest would-be authors glut the market.

Consumers, of course, will have different expectations from ebooks. Just as paperbacks cost less than hardbacks, consumers may naturally feel that the more ephemeral byte-sized ebook should cost less than a paperback. With the digital book, the "need for expensive warehouses and distribution networks will diminish," carrying with that an expectation of lower prices as well.

However, the publishing industry has had its own victories which suggest that all is not lost in the future. Recently, the publisher

104. Id.
105. Duke, supra note 39. Duke writes that to "many observers, digitisation [sic] threatens to leave publishers with a vastly diminished role. After all, why would an author need to give Penguin a big slice of their sales if they could connect directly with their readers over the internet?"
106. Id.
107. Id. Markinson conceded that "[p]eople will expect to pay less for an ebook than a physical book, particularly a hardback," but he does not know how much less.
108. Id.
Macmillan “threatened to pull its titles from Amazon’s download stores unless it raised the price to $12.99 [from $9.99] and beyond. Faced with a boycott, the internet retailer capitulated.”109

Additionally, the industry predicts that the book of the future “will contain many additional features embedded in the digital file, such as interviews with the author and critical essays,”110 modern spins on age-old features of the author’s biography and introductions. The idea of sharing ebooks with a reader’s own comments also seems like a viable possibility that could carry on the marginalia tradition. Thus, the publishing industry is putting up a valiant fight to grow side by side with this new technology. This bodes well for the future of the publishing industry.

D. Remember the Google

In balancing the interests of all the parties involved, Congress should also not forget about Google. Google, whatever its motives and methods of execution, began a project that was visionary in its time; its work up until now should not be wasted. The government could offer the company some incentives to continue its mission, which would still fall short of a de facto monopoly.

Perhaps a situation analogous to patent holders could be worked out.111 Just as some patent holders get an exclusive right to sell for any given time, so too can Google enjoy something like a monopoly for a limited amount of time. This would reward Google for taking the initiative in this arena, while still preventing it from taking over the market entirely. As long as there will be some healthy competition in place, the public can rest easy that they will get access and the best prices possible.

In fact, the literary tide may be turning at least slightly in Google’s favor. In addition to the Authors Guild, some parties that had initially opposed the settlement now support it. For example, the family of the author John Steinbeck has publicly stated that “the majority of problems that we found to be troubling have been addressed.”112

109. Id.
110. Id.
111. See Title 35, United States Code.
Even Google’s detractors, such as Watchdog, share in its vision of a comprehensive digital library.113 Simpson testified that his group does “not oppose the concept of digital libraries. Done correctly, they would greatly enhance public access to books. Everyone should be in favor of that.”114 Were Google to continue its project in the correct manner, its legacy as the visionary that began this endeavor would no longer be tainted by accusations of monopoly and other forms of self-dealing.

And perhaps for the most effective change to occur, the public would have to take action. A public, grassroots movement could be the best means to jumpstart congressional activity in this area. The pamphlets could even be published as ebooks.

VI. Conclusion

Despite the numerous delays, the Google Book Project has the potential to do much good in this new digital era. As the digital age comes into its own, the need for a digital library such as the Project proposes is obvious and not without merit. However, the scope and breadth of Google’s aims as played out in court make this Project questionable. As initially viewed, this Project would almost become a second Library of Alexandria of the digital age with Google at the helm.

The digital book is the way of the future and Congress will have to address this issue sooner or later—preferably sooner, before one company gets a stranglehold on the market. While the courts are capable and competent for a variety of issues, such a broad, important topic is much more appropriately the province of Congress. By taking an early stand, Congress will reserve to itself exclusive jurisdiction regarding such an important matter—as it should. The problem is too large and unwieldy a leviathan to entrust to the courts.

The courts have a proper role in this. They will still be called upon to interpret the law and uphold it. They can settle any minutiae and always defer to the legislature for more intricate matters which require more attention. The courts can still act as laboratories and tweak the legislation as they see fit, but a sturdy framework in place is essential for future progress and development.

With such a frame in place, the new bookshelf will be a limitless place for all. With more people being able to access works,

113. Simpson, supra note 90, at 1.
114. Id.
potentially globally, the communication and conversation that will organically occur could lead to even greater innovation and progress. People who would otherwise never have been able to visit the Harvard University Library can have access to all of its titles right at their fingertips. The very notion of the elite, exclusive, and prestigious university library might become obsolete as access to those libraries becomes more equal, democratic, and universal. This would give a “happily ever after” storybook ending to the dreams of two schoolboys.