COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION
Open Markets, Open Systems, Open Networks

Written Statement of the Computer & Communications Industry Association (CCIA)
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Hearing on the Proposed Settlement of *Authors Guild, Inc. v. Google, Inc.*
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The Computer & Communications Industry Association (CCIA) is a trade association dedicated to "open markets, open systems, and open networks." CCIA members, which include Internet, hardware, software, and communications companies, as well as the major search engine providers, employ nearly one million people worldwide and generate annual revenues exceeding 140 billion EUR ($200 billion). CCIA has been an advocate or litigant in many significant disputes over information technology competition for nearly 40 years.

The broad access to information promised by services such as Google's Book product is in the interest of society and the industry. This written statement addresses alleged competition issues surrounding the proposed Google Book Settlement, as well as other points raised in connection with those issues.

Legal Background

Google's digitization of in-copyright books without prior consent of rightsholders, for the purpose of making their content searchable and accessible via the Internet, was challenged in front of U.S. courts in 2005.[1] Google's legal position was and remains that this use of in-copyright books is not copyright infringement, due to the U.S. copyright doctrine of fair use,[2] which the U.S. Supreme Court has indicated is rooted in the American Constitution. This same doctrine is essential to the Internet, as it provides the legal basis for the development of many innovative services improving users' access to information.

In this case, representatives of authors, publishers and Google reached a class action settlement which aims to improve the value of the service for U.S. users. Consistent with U.S. legal practice, individual members of a settlement class – whether the case involves property, tort, contract, or constitutional rights – are required to opt-out or be bound by the settlement.[3] Class action settlements require court approval to ensure that the settlement is fair to those class members who are affected but not present. A hearing for this purpose is scheduled before Judge Denny Chin on October 7, 2009, in the federal U.S. District Court for the Southern District of New York in New York City. Provided that the settlement is approved, the service will significantly expand access to millions of books that are in-copyright but not commercially available.

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[1] *Authors Guild, Inc., Ass'n of American Publishers, Inc., et al., v. Google, Inc.*, No. 05-cv-8136-DC (S.D.N.Y).

[2] 17 U.S.C. § 107.

[3] The Proposed Settlement, appendices, and related documents, including a summary and opt-out forms, are available online at: <http://www.googlebooksettlement.com/>.

Analysis of Competition Issues

Google's service will face stiff competition. Consumers have numerous options in accessing digital books. Notwithstanding the success of Amazon's "Kindle," digital books still account for less than 1% of sales, yet competitors have nevertheless announced various competing devices and related new services.[4] The perceived success of the Kindle has prompted others – including Barnes & Noble, Sony, and Samsung – to announce competing devices in the "increasingly competitive digital book war," the combined non-public-domain libraries of which substantially exceed 1 million.[5] Existing competition recently prompted Sony to cut prices on best-sellers in the library affiliated with its product.[6] At the same time, the sale of printed books online, enabled by industry veterans such as Barnes & Noble and Amazon.com is now being supplemented with innovative new print-on-demand services, some of which will make hundreds of thousands of never-before-accessible books available to the public.[7]

Like these competing services, Google is not a rightsholder, but a licensee. Unlike the copyright holders whose works Google has a non-exclusive license to use, Google does not have a government-backed right to exclude others from accessing, displaying, reproducing, or distributing the books at issue. Given these limitations, as a mere licensee – least of all a *non-exclusive* licensee – Google has little ability to abuse the copyright privilege.

1. Traditional High-Tech Competition Concerns

For nearly 40 years, CCIA has fought against anticompetitive behavior in the technology industries, and brings this experience to its review of this settlement. When one reviews the proposed settlement for anticompetitive threats, however, there is little evidence for concern. CCIA views stated concerns about competition with skepticism. The openness of the Google Book platform presents minimal risk to competition. Google employs the widely accessible, non-proprietary ePub file format, which is based upon open standards, as well the widely adopted PDF file format.[8] In complex-product markets, interoperability and open standards are

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4 Although total sales remain a sliver of the overall market for literary works, sales estimates from the Association of American Publishers show a 57.8% growth rate from 2002-08. *See* Association of American Publishers, "2008 S1 Report, Estimated Book Publishing Industry Net Sales 2002-2008," *available a*t <http://www.publishers.org>.

5 *See* Michelle Megna, "Sony Plans New Kindle Rival, Adopts Open Format," Internet News, Aug. 13, 2009, *available at* <http://www.internetnews.com/ec-news/print.php/3830966>. *See also* Michelle Megna, "Barnes & Noble's Reply to Kindle to Debut in 2010," Internet News, July 21, 2009, *available at* <http://www.internetnews.com/ec-news/print.php/3830966>; "Samsung takes on giant Amazon in e-books," Korea Herald, July 28, 2009, *available at* <http://www.koreaherald.co.kr/NEWKHSITE/data/html_dir/2009/07/28/200907280064.asp>.

6 *See* Brad Stone & Mokoto Rich, "Sony to Cut E-Book Prices and Offer New Readers," N.Y. Times, Aug. 4, 2009, *available at* <http://www.nytimes.com/2009/08/05/technology/personaltech/05sony.html>.

7 *See, e.g.*, "Agreement With Amazon Will Make U-M Digital Books Widely Available," July 21, 2009, *available at* <http://www.lib.umich.edu/news/amazon-agreement>.

8 *See* Chris Snyder, "Sony-Google E-book Deal A Win for ePub, Openness," Wired Magazine, Mar. 19, 2009, *available at* <http://www.wired.com/epicenter/2009/03/sony-google-e-b/>; Brandon Badger, "Inside Google Books: Download Over a Million Public Domain Books from Google Books in the Open EPUB Format," Aug. 26, 2009, *available at* <http://booksearch.blogspot.com/2009/08/download-over-million-public-domain.html> (discussing available file formats).

crucial to promoting competition. Efforts to prevent or enable interoperability should be a key indicator of whether anticompetitive motives are at work. Google's commitment to open file formats indicates that a product or service is unlikely to prevent competitors from interoperating.

Google also supports Creative Commons licensing, providing rightsholders choices between a variety of permissive licensing options, should they choose to distribute works under such terms. Moreover, the fact that the book service will be accessible through a general-purpose web browser means that any web-enabled device can access it. The existing book service is not specifically tied to a proprietary device, unlike some of its competitors, nor have users of the existing book service been forced to purchase unrelated products or services through unnecessary bundling. Additionally, Google has made publicly available a variety of application programming interfaces (APIs) that enable the product to be integrated into third party sites, like publishers or booksellers sites. Instead of walling users into a proprietary ecosystem, the current service is a broadly open platform.

2. The Settlement Promotes Market Entry.

Rather than posing competition concerns, we think this settlement will ease entry into the market for several reasons. The settlement establishes a not-for-profit Books Rights Registry (BRR), which is charged with clarifying the status of in-copyright, out-of-print works. The BRR will be directed to seek out rightsholders of in-copyright books, and also pays out royalties, thus creating for the first time an incentive for rightsholders to step forward and claim potentially orphaned works. Because it may be difficult in some cases to determine who, if anyone, maintains the rights in an out-of-print work, the clarification of a work's rights status would benefit the entire marketplace, worldwide. Potential Google competitors may take advantage of the Registry's labors and license newly clarified books for competing services. By thus lowering risks and licensing costs, the settlement may encourage competitors to enter the market, or may encourage participants who exited the market to reenter.

Some critics have expressed concerns regarding Google's license to use orphan works. This is a counterintuitive argument: Google's license to use books that no one seems to want creates a product against which no one can compete. We think the number of orphan works is overstated, and will be reduced dramatically by the efforts of the Book Rights Registry. In any event, it is not clear that there is much demand for orphan works: as the Authors Guild President Roy Blount has said, orphaned works by definition provided little commercial appeal for print publishers.

Nor do we see significant problems pertaining to the Book Rights Registry. The BRR will license works to other services that will compete with Google. We hope and expect such competition to occur. Because this is a non-exclusive arrangement, Google will *not* have sole access to the benefits created by the BRR. At the same time, the BRR is not the sole source for rights management.

The settlement only affects U.S. copyright interests, and the service will only be available in the United States, although this will include the U.S. copyright interests of European

rightsholders. Because the BRR's activities will be focused on licensing uses inside the United States, this project – if successful – will likely create demand for a European-focused rights-management entity. Moreover, competing registries and competing book services would be able to 'free-ride', so to speak, on the rights clarification activities undertaken by the BRR. Because potential book-scanning competitors cannot be excluded from utilizing knowledge about a work's status acquired by the Registry, the settlement lowers the cost of entry for follow-on book scanning initiatives. In this sense, the settlement encourages market entry, both inside and outside the United States.

2. Concerns About Orphan Works Are Overstated.

Criticism of the settlement related to orphan works likely overstates the number that currently exist and will exist after implementation of the settlement.[9] As noted above, the settlement contains mechanisms designed to decrease the number of orphan works, such that whatever control would exist will diminish over time. By one estimate, there may be as few as 1.4 million true orphan works and Google has likely only scanned about 580,000.[10]

As discussed above, rights-clarification will help establish who owns what rights, and which works have entered the public domain.[11] As one commentator noted, "the combined effect of these rights clarification efforts and financial incentives will be to clarify the copyright status of hundreds of thousands, if not millions of works, which will be an enormous improvement over the status quo."[12] CCIA has thus far reviewed no evidence indicating that the absolute number of orphan works will not substantially diminish as a result of the Registry's efforts.

Criticism of the settlement also appears to implicitly assume there is a separate market for orphaned books over which exclusive control would be economically relevant, an assumption that does not appear to survive scrutiny. The fact that a work is orphaned suggests not only that is it substitutable for other works, but that the work may have gone out of print because other works were superior. At the least, this strongly suggests that many orphaned works are comparable to works that *haven't* been orphaned, and thus do not constitute their own market.

Conclusion

The Google Book product has offered unprecedented access to a wealth of information, and the proposed settlement offers considerable public benefits. It will encourage investment and growth in book digitization. CCIA is not persuaded that it poses threats to competition.

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9 *See* David Balto, *The Earth is Not Flat: the Public Interest and the Google Book Search Settlement: A Reply to Grimmelmann* (Jul. 22, 2009), *available at* <http://www.acslaw.org/node/13812> (hereinafter "Balto").

10 *See* Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, at 6 (2009), *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555> (hereinafter "Lemley").

11 The settlement explicitly has no effect on public domain works. *See* Settlement § 1.16 (excluding various matter, including public domain works, from the definition of "Book" under the Settlement).

12 Balto, *supra*.