



**Testimony
of
JOHN M. SIMPSON
Consumer Advocate
with
CONSUMER WATCHDOG**

**Hearing on
“COMPETITION AND COMMERCE IN DIGITAL BOOKS”
Before the
Committee on the Judiciary
of the
United States House of Representatives
Sept. 10, 2009**

Good morning Chairman Conyers, Ranking Member Smith, and members of the committee. My name is John M. Simpson and I am a consumer advocate with the nonprofit, nonpartisan Consumer Watchdog, formerly the Foundation for Taxpayer and Consumer Rights. Thank you for considering my testimony.

Established in 1985, Consumer Watchdog is a nationally recognized non-partisan, non-profit organization representing the interests of taxpayers and consumers. Our mission is to provide an effective voice for the public interest. Consumer Watchdog’s programs include health care reform, oversight of insurance rates, energy policy, protecting civil justice, corporate reform, and political accountability. Over the past year our Google Privacy Project, funded by The Rose Foundation, a charitable nonprofit organization, has focused on Google’s privacy policies and sought better privacy guarantees from the company for users of its services.

During this project we became aware of the proposed Google Books settlement and were concerned about its impact on consumer privacy and anticompetitive aspects. In April we called upon the Department of Justice to intervene in the proposed settlement because of antitrust concerns and Justice has since announced it is investigating.

Let me absolutely clear. We do not oppose the concept of digital libraries. Done correctly, they would greatly enhance public access to books. Everyone should be in favor of that. I also personally believe, like Google, that in the digital age scanning books to convert them to a digital database and then displaying “snippets” in a search of that database is appropriate fair use. However, that understanding has not been

substantiated by a court and was the initial activity that prompted the suit against Google resulting in the proposed settlement.

The problem is Google's monopolistic digital library and how it would be implemented. As we said in our friend-of-the-court brief in the Google Books case, "The proposed class-action 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."

The parties in the suit negotiated the Google Books settlement in secret and there was no opportunity to represent and protect the broad interests of all consumers. This deal simply furthers the relatively narrow agenda of Google, The Authors Guild and the Association of American Publishers.

The settlement provides a mechanism for Google to deal with "orphan works." Orphan works are works under copyright, but with the rights holders unknown or not found. The danger of using such works is that a rights holder will emerge after the book has been exploited and demand substantial infringement penalties. The proposed settlement protects Google from such potentially damaging exposure, but provides no protection for others. This effectively is an insurmountable barrier for potential competitors who wish to enter the digital book business.

Consumer Watchdog asked U.S. District Court Judge Denny Chin to reject the proposed settlement for four reasons:

- **It is not fair, adequate or reasonable because it far exceeds the actual controversy before the court and abuses the class action process:** "The proposed class action settlement claims to resolve the actual dispute between the parties, but it also goes much, much farther, and purports to enroll millions of absent class members in a series of new business 'opportunities.' For those absent class members who fail to step forward and claim their share, however, this 'opportunity' operates as a theft—essentially the parties propose to sell the copyrighted works of absent class members, and then split the proceeds among themselves.
- **It is an unauthorized attempt to revise the rights and remedies of U.S. Copyright law.** "The proposed Settlement Agreement, if approved, would so massively reallocate the existing rights and remedies under copyright law that it would effectively rewrite the existing statutory regime for the benefit of a single player — Google. But Supreme Court precedent is clear: courts may not modify copyright law. Only Congress has 'the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests' that must be balanced when amending the Copyright Act."
- **It conflicts with international law, specifically The Berne Convention for the Protection of Literary and Artistic Works, an international copyright treaty.** "Not only does the proposed Settlement Agreement attempt to do an end-run around the legislative process, but it also proposes a scheme that Congress could not have adopted because of its clear violation of the United States' international obligations under the Berne Convention for the Protection of Literary and Artistic Works. As Congress has noted, '[a]dherence to [Berne] is in the national interest because it will ensure a strong, credible U.S. presence in the global marketplace...' The Court should not approve what is tantamount to private legislation for the benefit of Google

that would violate an international agreement and jeopardize the public's interest in international copyright relations.”

- **It gives Google an unlawful and anti-competitive monopoly.** “Finally, because the settlement effectively suspends existing copyright law just for Google, it opens the door for Google to become the dominant player in new markets for online book search engines and book Subscription programs. Accordingly, the settlement should be further rejected because it would violate Section 2 of the Sherman Act, which makes it an offense for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”

Consumer Watchdog did not bother to raise privacy concerns in the context of the Google Books settlement because we felt the objections just cited were substantial and well enough grounded in law so as to preclude the settlement. Nonetheless other organizations including the Electronic Frontier Foundation, the American Civil Liberties Foundation and the Samuelson Law, Technology & Public Policy Clinic, and a group of privacy authors and publishers have objected on privacy grounds. They said:

“Courts, libraries and legislatures have fiercely protected the right to read without fear of being watched or reported upon. The settlement, if approved, may enable Google Book Search to become the world’s largest public library, institutional library, book ‘purchasing’ and ongoing access system combined. It is no understatement to say that this settlement may create the central way that books are accessed in the future, and the only way to access certain books. Because of its potential to greatly expand book access, Google Book Search is extremely exciting.

“Yet that future potential will be undermined if this Court allows Google to collect intimate, invasive and previously unavailable information on readers, aggregate that sensitive information with information about them collected by and through other Google products, and by doing so create the real risk of disclosure of that sensitive information to prying governmental entities and private litigants. This chilling effect will hurt authors and publishers, but especially those who write about sensitive or controversial topics. It will also hurt the public interest, as the advance of digitization would come at the cost of reader privacy.

“The privacy authors and publishers were not adequately represented in the settlement negotiations. They would not have agreed to a settlement so bereft of privacy protections. Without additional protections, the settlement is not fair, reasonable or adequate to the class members or to the public. It should not be approved until sufficient privacy protections are put into place.”

Consumer Watchdog shares those concerns about privacy if a settlement without privacy guarantees is implemented.

So what is to be done? The unique and unfair competitive advantage Google receives under the settlement comes from its attempt to pull an end-run around the appropriate legislative solution to the orphan books problem. This is not an issue for court and certainly one that cannot be settled by solving the problem for one large corporation and no one else.

Congress must resolve the “orphan rights” issue. It could also step in with legislation about what exactly constitutes fair use in the digital age, though that matter could be fairly adjudicated by the courts. Privacy guarantees are another area appropriate for legislative action.

Consumer Watchdog supports digitization and digital libraries in a robust competitive market open to all organizations, both for-profit and non-profit, that offer fundamental privacy guarantees to users. But a single entity cannot be allowed to build a digital library based on a unique monopolistic advantage when its answer to serious questions from responsible critics boils down to: “Trust us. Our motto is ‘Don’t be evil.’”