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Amazon.com's Objection to Proposed Settlement in "Authors Guild v. Google, Inc"

"The worth of a book is to be measured by what you can carry away from it." This philosophical statement by James Bryce, a nineteenth century British historian and politician, is simple and succinct. But a constant criticism of philosophy—and philosophical statements such as Bryce's—is that they are abstract; too abstract to have any practical application. We may have difficultly determining a book's intrinsic value but authors, publishers, and bookstores have repeatedly proven that we do not have qualms about arbitrarily assigning commercial value to literary works. While there are philosophical underpinnings, it is this "commercial value" of books that is the subject of the Google Books Settlement that is heating up the airwaves, the news wires, and the offices of Amazon's, Microsoft's, and Yahoo!'s legal representatives.

Various news outlets, both online and off, have provided significant and thorough coverage of the landmark class-action lawsuit styled *The Authors Guild, Inc.*, et al. *v. Google, Inc.*, and otherwise known as the "Google Books" or "Google Library" lawsuit. If you want to get up to speed on the suit and, more importantly, the Proposed Settlement, which has already been preliminarily approved by the federal district court hearing the case, there are hundreds if not thousands of articles, blogs, Wikipedia entries that provide the relevant information (hint: both Google's Google.com and Microsoft's Bing.com work well).

This piece is not written to give you background. Don't get me wrong; the background is interesting. But history is nothing like the present, especially in this convoluted case. In the present, we have the unlikely alliance between information giants such as Microsoft, Yahoo!, and Amazon. This Open Book Alliance only made itself known a few weeks ago but the trifecta of Internet behemoths is already making itself felt—big time. Each will be filing its own objections to Google's Proposed Settlement. Microsoft and Yahoo! were expected to be fully into the fray by September 4th, the objection-deadline. But that deadline has been changed; late on September 2nd, the court ordered an extension to the deadline due to "scheduled maintenance" on the court's electronic filing system. Is the court's Order part of the conspiracy? You tell me. Either way, the new deadline is Tuesday, September 8, 2009. And with additional time, additional objections will surely be coming.

But we don't have to wait for Amazon's first volley in this Goliath versus Goliath fight for digital book publication and distribution supremacy. And Amazon's entry is far more than a warning shot across the bow. Much like James Bryce, Amazon offers up its own, abstract, philosophical statement in opposition to the Settlement. "It [the Settlement] creates a cartel of authors and publishers . . . operating with virtually no restrictions on its actions, with the potential to raise book prices and reduce output to the detriment of consumers and new authors or publishers who would compete with the cartel members." That sounds bad. But from a legal standpoint, it is not particularly compelling. Other than raising the eyebrows of some antitrust aficionados, it is little more than a naked allegation, not something that is likely to unsettle those savvy Google solicitors. To Amazon's credit, however, the fluff ends there.

While the average consumer can comprehend the pitfalls that might result from giving Google a virtual monopoly in the digital publication realm, Amazon's most salient points are teased out in its discussion of the legal implications of the Proposed Settlement and the long-standing traditions surrounding the creation and implementation of intellectual and copyright law in the United States (and really, throughout the world).

In a phrase, class action settlements should not operate as legislative initiatives. Lawsuits are initiated to right past wrongs not to, as Amazon puts it, "release Google [and others] . . . from claims for infringement that took place before the Effective Date of the settlement, *and also for claims arising from future infringement by Google or its library partners* . . . ."

Most first-year law students should be able to tell you that there must be an actual "case and controversy" before judicial intervention is appropriate. Amazon latches onto this fundamental principle and effectively argues that the Proposed Settlement is too expansive because it reaches beyond the scope of the underlying litigation. It is Congress's job to legislate prospectively; the court is concerned with and should only be concerned with addressing what has happened and what may result because of what has happened. We have all heard it before. Congress makes laws. Courts enforce them.

As attorneys, we know that judges are frequently accused of legislating from the bench. Many judges are loath to even approach the boundary between the legislative and judicial branches by entering pseudo-legislative orders. Amazon's play is, therefore, a promising one. Like good lawyers, they buttress this fundamental, easy-to-grasp argument with numerous other technical arguments that delve into the intricacies of antitrust law, copyright complexities, and proposed legislation that might moot the meat of the dispute. The practice of providing these extra pegs on which the court can hang its hat is nothing new in our courtrooms. But how often does one of the alternative arguments carry the day as opposed to allowing the judge to rely on several different theories in reaching the ultimate conclusion?

In the end, Amazon's position is relatively simple and straight-forward. Don't be surprised when Microsoft and Yahoo! to follow suit: "The settlement is not so much a release of claims for past conduct as an agreement on behalf of a class of millions of

authors and publishers, both known and unknown, to engage in a complex business arrangement with Google for perpetual exploitation of millions of copyrighted works." Whether the allegation is true will be decided by a judge (and then the Second Circuit, and then the Second Circuit *en banc*, and then, of course, the Supreme Court). The allegation does fly directly in the face of Google's "don't be evil" motto.

Fortunately, for all of us, the fireworks are just starting and we are far from the finale. Yahoo! and Microsoft will weigh in shortly and the court has scheduled a "fairness hearing" for October 7, 2009, to address the various objections and oppositions. Amazon will be there in person. It is likely that Microsoft and Yahoo! will be there as well. With so many big fishes in a relatively small pond, it will be fun to find out who climbs to the top of the food chain.

So, as this significant issue unfolds, please recognize the importance of and contributions by sites such as JDSupra. In giving everyone access to court filings, decisions, forms, articles, alerts, newsletters, and more, JDSupra and its Executive Team bring public debates that affect "the people" directly to "the people." Your use and contributions to the site, you help protect everyone's interests, including your own.

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