THE LIBRARIAN OF CONGRESS

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Dear Chairman Leahy and Senator Grassley:

Last week, a federal judge rejected the pending settlement of *Authors Guild et al. v. Google Inc.*, the class action in which authors and publishers challenged Google for scanning millions of books for commercial purposes through agreements with several major research libraries. In the much-awaited opinion, Judge Denny Chin said that the settlement would inappropriately implement a forward-looking business arrangement granting Google significant rights to exploit entire books without permission of the copyright owners, while at the same time releasing claims well beyond those presented in the original dispute.[1] The decision provides an opportunity for us to share our own analysis of digitization and the legal framework, in case Congress would like to further explore the issues.

Judge Chin's opinion was very well received at the Library of Congress, as it reflects the significant concerns expressed about the proposed settlement by both the Department of Justice and the Copyright Office. Among these are the basic tenets that exclusive rights afforded by copyright law may not be usurped as a matter of convenience, and policy initiatives, including those that would redefine the relationship of copyright and technology, are the proper domain of Congress, not the courts.[2]

At the same time, Judge Chin acknowledged the potential benefits of Google's book project, noting that books would become more readily accessible to libraries, schools, researchers and disadvantaged populations. He noted the promise of new audiences, new markets and new sources of income for the authors and publishers of older, out-of-print books, in particular. And he openly observed that "the digitization of books and the creation of a universal digital library would benefit many." (Opinion at pages 1 and 3.)

The benefits cited by Judge Chin ring true for the Library of Congress because, in a number of ways, we have been working toward them for many years. Since 1994, we have implemented a variety of digitization projects, always in accordance with, and with respect for, longstanding principles of copyright law. For example, the American Memory project features digital images of more than 16 million items related to U.S. history and culture (organized into more than 100 thematic collections) and the Historic American Newspapers project provides digital

[1] No. 05-8136 (S.D.N.Y. March 22, 2011)(order denying motion for final approval of the amended settlement agreement), available at http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115.

[2] The Copyright Office worked closely with the Department of Justice on both Statements of Interest filed on behalf of the United States on September 18, 2009 and February 4, 2010, respectively, available at http://www.justice.gov/atr/cases/authorsguild.htm. Former Register of Copyrights Marybeth Peters testified before the House Committee on the Judiciary on September 10, 2009. *See Competition and Commerce in Digital Books: The Proposed Google Book Settlement*, available at http://judiciary.house.gov/hearings/pdf/Peters090910.pdf ("Register's Testimony").

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access to 900,000 U.S. newspapers published between 1836 and 1922.[3] The natural next step for some of this work, subject to resources, is to move from a series of projects to a more strategic and comprehensive effort that includes prioritizing content, managing licenses with copyright owners, and coordinating navigation and points of access with other important institutions.[4]

Another Library program—the National Digital Information Infrastructure and Preservation Program (NDIIPP)—is dedicated to capturing and preserving valuable "born digital" materials, such as websites, maps, television broadcasts and digital photographs. Assessing and applying metadata and other standards is a critical aspect of this work. On a related front, we are working with publishers on submission standards for electronic journals and other publications disseminated electronically. Such projects are invaluable for many reasons, not the least of which is their ability to inform policy discussions relating to technology and copyright law.

As an active participant in policy discussions, the Library (and the Copyright Office in particular) is aware of the significant international interest in Judge Chin's opinion. We are also aware of the related and evolving interest among foreign countries in using trusted government entities to build digital libraries. For example, the EU is building "Europeana," as well as a related entity called the European Digital Library, an aggregator of content from several Member States, including the German Digital Library. Similarly, the French National Library's "Gallica" will offer French history and culture and the National Library of China has undertaken the digitization of Chinese cultural heritage. Some projects include commercial partners, as appropriate. In each case, the government is also studying the interplay of copyright law and technology, including the appropriate scope of library exceptions, the possible benefits of collective licensing regimes, and the challenges of orphan works.[5]

Orphan works are a familiar issue in the United States. In 2006, the Copyright Office prepared a major study for Congress, entitled *Report on Orphan Works*. Both the 109th and 110th Congresses introduced legislation adopting the Office's recommendations that (1) orphan works relief be limited to circumstances in which a good-faith user cannot locate the copyright owner or other appropriate rights holder after conducting a diligent search; (2) relief be applied on a case-by-case basis, meaning users could not designate or rely upon permanent orphan status with respect to any work; and (3) the copyright owner or other rights holder could collect reasonable compensation (from the user) if he later emerged.

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[3] The Library's other major digitization initiatives include: (1) the World Digital Library, a joint venture with UNESCO; (2) World Culture and Resources, which presents bilingual digital collections from various media from different regions and countries around the world; and (3) Prints and Photographs, which contains over 1.2 million digitized images.

[4] The Library has had discussions along these lines with the other leading public collecting institutions in the United States—the National Archives and Smithsonian Institution. On another track, the Berkman Center at Harvard has hosted meetings to discuss a "Digital Public Library of America."

[5] For example, one of Europeana's major projects is the Accessible Registries of Rights Information and Orphan Works ("ARROW"), which aims to support the EC's Digital Library Project by finding ways to clarify the rights status of orphan works and out-of-print works, as well as to enhance the interoperability of rights information between rights holders, agents, libraries and users. *See* hhhtp://www.arrow-net.eu/.

As a point of comparison, we note the rejected Google settlement agreement did not incorporate a prior diligent search requirement for out-of-print works. Rather, it would have required copyright owners to claim these works through a registry as a condition of avoiding orphan status, in part because the rights clearance process is costly and time consuming—at least in the context of mass scanning—and in part because many book publishing agreements from the pre-digital era are unclear as to the disposition of electronic rights, as between authors and publishers. Judge Chin deferred expressly to Congress on these issues, stating that the "question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards, are matters more appropriately decided by Congress than through an agreement among private, self-interested parties." (Opinion at page 23.)

As a practical matter, the issue of orphan works cannot reasonably be divorced from the issue of licensing. The premise of an orphan works situation is that a user wants to exploit a copyrighted work in a manner that requires permission of the rights holder. Because licensing on a case-by-case basis can be challenging, at least where many works are at issue, it may be helpful to consider whether the increased availability of collective licensing might be helpful—at least for facilitating certain projects and transactions of interest and importance to the public.[6] To be clear, collective licensing can take several forms and may operate on either an "opt-in" or an "opt-out" basis.

In the United States, we have had some success in the music world with the "opt-in" model, albeit with some pricing problems. ASCAP, BMI and SESAC, for example, license the public performance of many musical works and collect royalties on behalf of copyright owners. (To address competition-related concerns, ASCAP and BMI operate under consent decrees monitored by the Department of Justice and enforced by the courts.) The Copyright Clearance Center has performed a similar function for reprographic rights for nonfiction books and more recently has moved into licensing for the broader publishing industry. In both cases, these organizations engage in reciprocal relationships with collecting organizations overseas on behalf of their members. Collective licensing of this kind does not require legislation, but may benefit from government facilitation or oversight. For new organizations, the start-up costs and other funding challenges may be daunting, as U.S. authors and photographers can attest.[7]

Some countries have legislated "opt out" models (known as *extended* collective licensing) in the context of library and educational uses.[8] This model operates something like a class action settlement, in the sense that representatives of copyright owners and representatives of users negotiate terms that are binding on all members of the group by operation of law, e.g., all textbook publishers, unless a particular copyright owner opts out. The government or a trusted designee administers payments. It is not quite compulsory licensing in that the parties (rather than the government) negotiate the rates, but it requires a legislative framework.

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[6] *See Register's Testimony.* "The creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner."

[7] For example, both the Authors Guild and the American Society of Media Photographers have attempted to offer licensing registries for the benefit of their members and users, with varying degrees of success.

[8] Denmark, Finland, Iceland, Norway, and Sweden have the most experience with this model.

The settlement proposed by the Authors Guild, book publishers and Google would have operated on an extended collective licensing (or opt-out) basis, but it would have done so only for one user (Google) and without the benefit of Congressional oversight as to goals, terms and conditions.[9] If Congress wanted to consider the pros and cons of collective licensing for books and other digitized works, it might want to explore whether the opt-out model is of interest to these parties and other stakeholders legislatively (for example, to facilitate digital markets for out-of-print books).[10] In doing so, Congress might also want to consider the interplay between collective licensing and fair use, as well as the library exceptions codified in Section 108.

Section 108 presents unresolved policy issues that could be reviewed now that Judge Chin has issued his opinion. In 2008, the Copyright Office and NDIIPP co-published an independent report on Section 108, presenting a variety of recommendations to update the law to better reflect digital technology and to ensure better preservation practices. The report also sets forth (but does not resolve) certain issues governing whether and how libraries should provide on-line access to copyrighted works. The study group that produced the report deliberated for almost three years and included representatives from the library, book publishing, motion picture, and government sectors, among others.[11] Stakeholders who were awaiting Judge Chin's decision in the Google settlement may be ready to revisit Section 108 at this time.

Finally, some proponents of the Google settlement observed that it might have provided unprecedented access to books for millions of Americans who are blind or have print disabilities. The Library of Congress has some experience with this population, as we have administered the National Library Service for the Blind and Physically Handicapped (NLS) since 1931. Today, the NLS circulates more than 24 million audio and Braille books and magazines to eligible patrons every year and administers a new Digital Talking Book service, based largely on an exception in the copyright law known as the Chafee Amendment (Section 121).

The Chafee Amendment is an important provision, but it is designed to operate as a safety net for people who cannot obtain access through mainstream libraries or the general market. Because digital technology has made access easier, the Copyright Office and other Library staff are collaborating on new initiatives to promote access for persons who are blind or print disabled —for example, by evaluating pilot projects that would allow for cross-border sharing of digital files between designated libraries under the guidance and permission of the publishers. We are also serving on a commission administered by the Department of Education charged with making recommendations to Congress to improve accessibility for print-disabled college students. In each case, we are working to better serve these communities by encouraging the creation of better technical standards, new digital products, and innovative agreements between libraries and publishers.

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[9] Unless Congress decides otherwise, Judge Chin has underscored voluntary licensing as a reasonable route to settle the litigation under current law. ("As the United States and other objectors have noted, many of the concerns raised in the objections would be ameliorated if the [settlement] were converted from an "opt-out" settlement to an "opt-in" settlement.)(Opinion at page 46.)

[10] *See, e.g.,* Editorial, *Google's Book Deal*, N.Y. TIMES, Mar. 30, 2011 (stating Congress should consider both "giving all comers similar legal protection to that which Google got in its agreement," and "promoting a nonprofit digital library"), available at http://www.nytimes.com/2011/03/31/opinion/31thu2.html.

[11] *See* United States Copyright Office & National Digital Information Infrastructure and Preservation Program, Section 108 Study Group Report (2008), available at http://www.section108.gov.

In closing, we note that the landscape of digitization projects, copyright law and public access is complex but rich with promise, and we are pleased to provide this report of the pertinent issues that may be of interest to the 112th Congress in the wake of Judge Chin's opinion. We thank you for your longstanding support of the Library of Congress and the Copyright Office and stand ready to assist you if Congress would like to review or further explore any of the developments we have presented here.

Sincerely yours,

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