

**The Authors Guild, AAP, Google Settlement:
Lois Wasoff Returns to Discuss What's Next for the
Google Settlement**

Q: Welcome to everyone today. On behalf of all of us at Copyright Clearance Center, a very good morning, good afternoon, good evening, in fact, because several hundred of the people involved today in our presentation are with us from across North America and indeed across Europe, and we're very happy to have you all join us.

We are here again to discuss the latest news in the Google Book settlement and indeed we'll underscore the word latest, because as of late yesterday afternoon, we received breaking news that the parties involved in the suit have filed a memorandum of support for the unopposed motion to adjourn the October 7 fairness hearing and to schedule a status hearing with the court. Now, that's a mouthful, but you'll be hearing more about it later on from our presenter.

The program today will focus on this late breaking news and the changes we could anticipate in the settlement proposal for this important case. We've got a lot to cover in the next hour and so I want to start by asking you to join me in welcoming Lois Wasoff as she returns to Copyright Clearance Center to help us sort out the extraordinary evolution of this proposed settlement and welcome again, Lois. Nice to see you.

A: Nice to see you, Chris.

Q: We'll tell everybody just briefly about Lois and her background as an attorney in copyright and trademark law. She has been past chair of the copyright committee at AAP, the American Association of Publishers. She was for many years the vice president and corporate council at Houghton Mifflin. She has served as part of study groups that look at a variety of issues related to copyright law and libraries. She's a frequent speaker in this country and abroad on issues related to the copyright practice in the book publishing industry.

Her current clients include nonprofit and commercial publishers and authors who have all got questions about copyright and publishing. And these days, who doesn't have questions about copyright with something like this ahead of us?

So, Lois, let's get right away into the meat of the matter and set for us and the rest of the audience the progression of events that brought us together today.

A: Thank you, Chris. The slide that's up now has been, as you can imagine, evolving over the last couple of days. We've had some interesting recent developments. But I'm going to start by taking us back a little bit.

This whole process began in 2004, which was when Google began its massive library digitization project scanning entire books within the largest academic libraries in the United States. Google's stated intent at that time was to include the scans in a database that would be used for search and with respect to the copyrighted works, to make snippets available in search results.

Google justified its library scanning as a fair use. However, there was a certain amount of controversy about that interpretation of fair use and many authors and publishers disagreed with Google's fair use interpretation, so in 2005, lawsuits were filed against Google by the Authors Guild and by a group of publishers with the support of the AAP. Both of the lawsuits accused Google of copyright infringement.

In October of 2008, it was announced that the parties had agreed to a settlement of both lawsuits. The settlement that was proposed by the parties adopted the class action mechanism that had been used by the Authors Guild in its lawsuit and bore very little resemblance to the initial complaints and to the original issue that had triggered the settlements, which was Google's scanning and display of snippets as a claimed fair use.

Instead, the settlement became a complex business arrangement that is potentially binding upon literally millions of copyright holders – rights holders – and their works.

And now, as of yesterday, we know that that proposed settlement is going to change. The event that occurred just yesterday afternoon was that the proponents of the settlement filed a motion asking the judge to postpone the hearing that had originally been scheduled for October 7 – to adjourn that hearing, actually, without date and to instead set a date for a status hearing in early November. And the reason for that requested adjournment was that the parties are working on a revised settlement agreement.

What we're going to talk about today is how we got to this point and we're going to try and draw some information from the events of the last couple of months about what the revised settlement agreement might look like. And actually, one of our major guideposts in that is going to be this statement of interest that was filed by the U.S. government with respect to the original settlement agreement. That statement of interest was filed on September 18.

Now, because of their broad reach, class action settlements require both a notification to class members to give the class members an opportunity to opt out or object and court approval. So what we'll be discussing today was the process by which the court was going to be considering the terms of this settlement.

Q: Right, Lois, and obviously, given all the media attention to the proposed settlement, it's very clear that thousands of voices have expressed their opinions on all sides of this settlement. Here at Copyright Clearance Center where we represent literally thousands of

authors and publishers, we've heard all of that. But we're delighted to have you to help us sort through it, to understand better what the various parties are trying to say in all of this.

So why don't we get started and take a look at some of the issues that are – or some of the matters that are before the court right now.

A: Well, in the course of considering whether or not to approve the settlement, the judge has the opportunity to consider the views of many interested parties. The slide we have up now breaks out the kinds of – by category, the kinds of materials that were submitted to the court, the categories of filings that were submitted to the court.

To go through them just very briefly, those included amicus briefs. Amicus briefs are statements submitted by individuals or organizations that are not parties to the suit but that have views they'd like the court to consider. There were about 15 amicus briefs filed in this matter.

Objections were submitted to the court. Objections are filings made by members of the class, the putative class, that have not opted out, and these filings run the gamut. There were many of them and they run the gamut from filings by individual authors, by author groups and in some cases, by large corporate entities. Some of these filings specifically discussed narrow issues confronting the particular objector, but many spoke to some of the very broad issues in play that we'll be discussing. As one example, Microsoft filed a very lengthy objection to the settlement, citing many of the issues in the settlement agreement.

Another set of submissions were motions to intervene, and we can dismiss these pretty quickly because the court did. A motion to intervene is a request by a third party to become a party to the action. There were several filed. The judge should not grant any of them, but he did invite those groups that had tried to intervene to submit their views in the form of amicus briefs. So, for example, the Internet Archive's concerns were first raised in the context of a motion to intervene. They're now before the court as part of an amicus brief.

Now, there are some other matters that the court's going to be thinking about. One is the Congressional testimony that occurred on September 10, which isn't technically part of the court record. On September 10, the House Judiciary Committee had a hearing on these issues and of particular interest were the views of the register of copyrights who spoke at some length at the hearing and her views should certainly be given particular weight.

And next but not least is what I think we can properly characterize as the game changer here. That was the statement of interest filed by the U.S. government at the request of the judge. We're going to go into detail on that a bit later.

The final item that is before the court now is that motion that was made just yesterday by the proponents by the settlement – made actually by the Authors Guild and the AAP, but unopposed by Google – to seek an adjournment to give the parties time to negotiate a revised agreement.

Q: Well, you clearly made it pretty clear that there are, as I say, thousands of voices involved here, the loudest, the last, if you will, being the government's voice expressed just last week.

What are the concerns that people have raised? Kind of sort those out for us.

A: Well, just to give you a quick overview, Chris, they fall into several categories, the five major categories that we have up on this slide. There were antitrust concerns, issues related to the class action rules, Rule 23 of the Federal Rules of Civil Procedure and whether those have been complied with in this circumstance. Issues about copyright law and policy have been raised, issues about how the settlement will be funded and issues about public policy.

Q: Let's get started and move straight into the first and perhaps the most important concern. That's the antitrust issues.

A: Well, the debate over the antitrust issues has been quite heated. The proponents feel that the aspects of the agreement are in fact pro-competitive, that the agreement will help create a robust market for digital books. The opponents say that there is already such a market and that the broad authorizations granted to Google, combined with its already great size and its great reach, will allow it to dominate the market and ultimately foreclose competition.

There's also been a dispute about whether the agreement is in fact exclusive or nonexclusive. The proponents say that the agreement is nonexclusive because the Book Rights Registry, which we'll be discussing in more detail in a few minutes, can deal with parties other than Google when it acts on behalf of the rights holders. And Google also has pointed out that another entity could undertake its own comparable scanning activity.

The response from the other side has been that the Book Rights Registry is in fact limited in its dealings with third parties because it can only give third parties the rights to the works of registered rights holders. By definition, then, only Google will have a right under this settlement to use orphan works without a fear of liability. So with respect to orphan works, Google has an exclusive.

Q: Orphan works is a term of art that we're familiar with here at Copyright Clearance Center, but perhaps not everybody on the call may be. Can you explain briefly just what you mean by orphan works?

A: Sure. Orphan works are works that are still protected by copyright but for which the owners cannot be located. And because of the mechanism used by this settlement, the proposed settlement agreement, which requires an affirmative opt out in order to avoid the reach of the settlement, orphan works are covered by the settlement.

Now, to return to our slide, there have been disputes. There's been great discussion about whether the agreement is going to result in monopolization by Google of certain critical markets such as for example the markets for Internet searching or for products like institutional subscriptions.

Some have pointed out, in support of the argument that there isn't a monopoly potentially created, that competitors could enter this market just as Google has. Others, for example, Yahoo in its filing, have claimed that the settlement creates barriers to entry for future competitors in the scanning, archiving, searching and in presentation of books and inserts online.

And there's also been an argument advanced that the accessibility of this massive database that Google's created through its library scanning project will have impacts on the search market. There are several companies that claim that Google already arguably has monopoly power in that market and they're concerned about the impact of the settlement.

And then finally, pricing, another sensitive area in antitrust law, has been an area of great controversy. The proponents – the supporters of the settlement – have pointed out that the settlement provides that individual rights holders can set prices for uses of their works, like consumer purchases, for example, if they choose to. But nevertheless, concerns have been expressed that the terms of the settlement could encourage horizontal price fixing that violates antitrust laws.

Library associations, in general, have been very supportive of the settlement, but even there, because the settlement in their view creates unprecedented online access to books, but even some of the library associations have expressed concern about potential pricing abuses, particularly in the pricing of institutional subscriptions.

And then adding to the antitrust concerns are the provisions of the most favored nations clause in the settlement agreement. That's been quite controversial. For example, in the Yahoo brief, it was argued that the most favored nations clause guarantees that no competitor can effectively compete with Google for the first 10 years of the proposed settlement because of the restrictions placed on the terms that the Book Rights Registry can offer to a potential competitor.

Q: As I'm listening to you, Lois, I'm struck by just how this proposed settlement brings together the old world and the new world. You hear library associations in almost the same breath as Yahoo, and that's really I think at the bottom of all of this. It's the old world and

the new world coming together and trying to solve some very pressing issues for the publishing industry.

Talk about now, if you would, the composition and the authority of the Book Rights Registry, which has been the subject of a lot of discussion.

- A: Remember, the Book Rights Registry in the originally proposed settlement was envisioned as the intermediary between Google and the rights holders. It was going to be managed by a board that was to be comprised of an equal number of authors and publishers. And as originally conceived, it was going to have very broad powers, including the right to authorize Google to engage in future uses of the works and to agree with Google about the payment for those uses.

There have been some that have objected very strongly to this. In its filing, Amazon, for example, said that the Registry creates a cartel of authors and publishers.

Many of the objectors also have said that they feel they lack adequate representation on the Registry's board of directors, even though the Registry is the entity charged in the originally proposed settlement with negotiating prices and new programs with Google.

This is an area where the non-U.S. rights holders have been particularly vocal. Individual foreign publishers, individual authors and foreign authors, agencies representing those authors, reproductive rights organizations like V.G. Wort in Germany, organizations running the gamut from outside the United States have objected to the settlement on that basis. In fact, two countries, France and Germany, filed objections on behalf of their government on those grounds.

Another group that has expressed concerns are academic authors and also open access proponents. They are concerned that the Book Rights Registry, charged with the responsibility of setting prices and deriving financial benefit from the rights granted to Google, may not sufficiently consider questions involving broad and inexpensive access.

And finally, the interests of orphan works owners, according to some of the commentators, may be in direct conflict with those of the known rights holders who would be making up the Book Rights Registry directorship.

Based on all of these comments and some of the things we'll talk about in a few minutes when we get into the Department of Justice brief, I think we can pretty safely anticipate that the composition of the Registry's board of directors will be changed in any revised agreement that is proposed by the proponents.

Q: OK. And because the settlement is being resolved or attempting to be resolved through class action, that raises its own set of concerns. There are notification requirements and other legal requirements that must be followed. Talk about those.

A: Sure, I'd be happy to.

One of the more controversial areas here is that the original settlement as proposed authorizes future activity, and one of the arguments being made is that the future activities being authorized are activities that would clearly be infringing under current copyright law absent permission from the rights holders.

You can look at Google's past scanning activities and argue whether they were fair use or not, but the future activity, which includes the sale and access of entire works online, would pretty clearly be infringing without permission.

So one question that comes up is, can the class action mechanism be used to address and release future activity that hasn't even started yet? This is a point that was made by a number of the opponents. Microsoft, for example, stated that this would be an inappropriate use of the class action mechanism. So that piece of the settlement has been extremely controversial.

And it is true that typically, class action settlements involve a group that has a common set of grievances and damages, and typically a settlement addresses those grievances retrospectively. The class action settlement provides a release of legal claims arising from past damages and compensation for the activities that occurred in the past.

Both the plaintiffs and the objectors agree that this settlement is far broader in scope than a typical class action settlement, and they both agree that plaintiffs and Google, if this settlement is approved, would be accomplishing certain goals that would not have been accomplished if the original complaint, with its specific claims of copyright infringement and its underlying issues involving fair use, if that original complaint had been litigated to conclusion.

The class action issues were really discussed in detail by an objector named Scott Gant, who's a class action specialist. He filed his brief relatively early in the process. He filed it in mid-August, well ahead of the deadline. And he does a very good job in summarizing the kinds of issues that come up with this use of a class action mechanism.

He asserts that this is predominantly a commercial transaction and that the result of it is to transfer intellectual property rights from the current owners to Google. His argument is that those rights and terms can't be imposed through the class action mechanism. He discusses the notice requirements in Federal Rule of Civil Procedure 23, the applicable law here, and says that they have not been met. He argues that the compensation provided is

not adequate. And he argues that the class cannot be certified as it's currently comprised, and importantly, as it's currently represented.

Q: We've been talking about the class and the previous slide showed us how many people have raised concerns, some of the various potential parties here. What makes this proposed settlement as inclusive as it tries to be? Why are we talking about so many thousands – possibly millions – of rights holders?

A: Well, it comes from Google's original activities. Let's look at that for a minute.

The universe of works covered by this settlement have one thing in common, and that is that they were – or at least one thing in common – and that is that they were on the shelves of the academic libraries that participated as part of the library scanning project.

Since that's the common thread, the creators of these works comprise a very varied group. For example, they're not necessarily U.S. residents or citizens, even though their works were in the collection of U.S. libraries. The commonality of these works really comes from where the work was located, not where the author was located. That, as I mentioned before, has been a major issue for the foreign rights holders who find themselves swept into the scope of this settlement.

There's also questions about the definitions of books versus inserts that have been employed by the settlement, and that's raised concerns on the part of both authors and certain publishers. Many of those objectors consider their works to be unique and as a result, feel that the classification of all of their works in a single category isn't fair. The settlement has a potential significant impact on the viability of their markets and on their bottom line.

What's been very controversial, too, is the determination of whether a work is in print or out of print and what the ramifications are for the rights holder, and this has come up a lot in the objections. These terms, when coupled with the defined terms in the agreement of whether a work is commercially available or not commercially available, do have an effect on what Google can do with the work under the settlement agreement as it was originally proposed.

And these classifications all beg the question. Should Google alone have the sole right to make these determinations and classifications? And if you disagree with the Google determination as an author or other rights holder, what recourse do you have?

Our chart in this slide makes it look as though the lines are quite clear, but in fact, they're blurred and there's a lot of interpretation that's involved in determining where a work goes in that continuum.

The original settlement as proposed used an opt-out mechanism. If you didn't want to be part of the settlement but you were putatively part of the class, if you didn't affirmatively opt out, you're bound. We discussed that at length in the past.

It also imposed certain default rules based on whether a work was deemed to be in print or out of print. Google can only make certain uses of in-print works if the rights holder opts in. The reverse applies to out-of-print works. This portion of the settlement was the focus of a lot of the commentators. Most importantly, it was an important part, this opt-in, opt-out mechanism, was a very important part of the DOJ comments.

Q: That helps shed some light on some of the confusion, indeed, some of the tension in determining what kinds of works are involved and ought to be involved. But as we've learned in the last few weeks and months, there are even tensions and confusion within the sub-classes here. Can you talk about those please?

A: Let's start with the authors. The settlement, as it was originally submitted, contemplates a single-author sub-class. The full classes of rights holders and then there's an author sub-class and a publisher sub-class.

There have been a lot of concerns expressed over the scope and the diversity of the author class and whether or not this particular set of representatives, the particular – the Authors Guild and the named individuals acting as class representatives – whether they could adequately represent the full author sub-class.

In his brief, Scott Gant, who I mentioned earlier, argues that the author sub-class is, at its most basic level, at least four separate classes, each with distinct interests and potential goals for this litigation. But actually, it's even more complicated than that.

When we take a closer look at what the individual filers said, we discover even more disparate interest groups – foreign authors, dissertation authors, comic book authors, nonfiction writers, academic authors. The point here is that they all have different interests and the reason this is important is that the judge has to make a determination that all of these disparate interests are being adequately represented by the named plaintiffs. Given the diversity here, given the complexity here, that could be a tall order.

And finally, there are also authors and other rights holders that felt completely left out of the settlement and some of them have filed statements with the court, the visual arts rights holders, for example, and also authors that have opted out of the settlement.

So I think one of the things we can look for going forward as we see what comes out of these negotiations we now know are going on is perhaps some changes in the class composition on the author side and maybe some changes in the representation on that side as well.

Q: I think that slide is very illustrative of the problem on the author side, the author sub-class side, and as director of author relations here at CCC, I can really understand why these various groups would want to raise questions.

Do we have similar concerns on the publisher sub-class?

A: There are certainly concerns on the publisher's side as well. The question has been raised by a number of commenters on the original settlement agreement, the propriety of having all publishers represented by the five named publishers in the pending action.

The point's been made by some that all of the named publishers are participants in the Google Partner Program, the contractual arrangement between Google and individual publishers that gives Google contractual permission to use works in some of the ways that Google is seeking to use them under the settlement agreement.

Those individual named plaintiff publishers may or may not be intending to keep all of their works within the terms of the settlement. The settlement does provide for works to be removed and for rights holders to opt their works out of particular uses.

Microsoft and Yahoo, for example, have implied that these plaintiff publishers may have goals that are very different from other publishers. There may be other publishers who, for various reasons, may not have either the economic leverage or the economic resources to negotiate separate deals with Google. Yahoo in particular speculated that the terms of these separate deals, which are not public, may in fact be more favorable to the publishers than the terms of the settlement.

So the question arises, if these plaintiffs are not going to be subject to the terms of the agreement, how can they adequately represent the interests of the orphan work holders, orphan works right holders, or of other publishers.

And then there's the very significant question, which we've referred to before and we will again, of the foreign rights holders. Their works have been swept in because they're part of these academic library collections.

There is an argument being advanced that the terms of the settlement as originally proposed imposes the kinds of formalities on the exercise of one's rights as a copyright holder that are prohibited by U.S. treaty obligations and that the U.S. may therefore be put in the position of being in violation of those treaty obligations. We saw that argument made in the objections mounted by both France and Germany.

Q: I think that last point about treaty obligations gets to the heart of the matter. At the core of all of this, of course, is copyright law and public policy. We wouldn't be in court

otherwise. So let's address at the moment those issues, the matters of copyright law and policy and the questions about them that the settlement has raised.

A: This has been a fascinating subject for debate and the commentary and discussion here really has been interesting to follow.

Many of the objectors have stated time and time again that in their view, the U.S. Constitution grants Congress and Congress alone the right to create copyright law and policy. Therefore, according to these particular objectors, this settlement, the matters covered by this settlement, are not the province of the judiciary, they're the province of Congress.

Mary Beth Peters, in her testimony before the House judiciary committee on September 10, stated this very clearly. I'm going to – she said, and I think I'm quoting exactly, that the settlement turns copyright law on its head. She talked about how it swept up the active and the expressed Congressional interest in orphan works legislation and swept it out of the way by eliminating the requirements in the pending orphan works bill that's been before Congress for some time now.

In that bill, there were provisions for the requirement of a diligent search. There were attribution requirements, there were reasonable compensation requirements. Her concern is that this settlement departs from those policy issues that were actually being actively considered by the Congress, and to some degree, supersedes them.

Mary Beth Peters also said that the settlement as originally drafted encroached on the responsibility for copyright policy that has traditionally been the domain of Congress. She acknowledged that there are potential public policy benefits from creating increased access to a broad range of copyrighted works, but she went on to say that that argument does not justify Google being given immediate, unfettered and risk-free access to the copyrighted works of other people.

She, in her testimony, characterized this agreement as it was proposed at that time, as a compulsory license imposed by the judiciary rather than Congress.

Another commenter who's discussed this at great length is James Grimmelmann, who is a professor at New York Law School. His brief was filed on behalf of the Institute for Information Law and Policy at New York Law School. Professor Grimmelmann has been a thoughtful, focused voice on the settlement from the very beginning.

He concedes in his filings that the unavailability of orphan works, because of the difficulty in getting permission for their use, harms the goals of the Copyright Act and the Constitution. But he also goes on to state that the settlement agreement both serves and threatens the public interest in the mechanism it's chosen to make these works more

available. He stated quite clearly that in his view, the settlement inappropriately attempts to solve a legislative problem through a class action settlement.

So, this raises some interesting questions. Will all the increased focus on the orphan works issue and this one proposed solution through a private agreement endorsed by a federal court, will that compel Congress to look more closely at orphan works? Is it possible it would act as an incentive to Congress to actually pass orphan works legislation? We don't know yet.

Q: Right. It's a good question and certainly a lot of what we're hearing here is on the one hand and on the other hand, serves, threatens and so forth, and it's obvious that Judge Denny Chin has a lot on his plate here, but this is a man accustomed to tough decisions. He sentenced Bernie Madoff just a few months ago.

Right now, we're going to look at the funding issues and some of the concerns there.

A: There have been concerns expressed about how the agreement's going to be funded. The objectors are claiming that the settlement is vastly underfunded, that the funds set aside for payments to rights holders and authors are insufficient and that they'll quickly run out.

Others have taken issue with the amount of the attorneys' fees and they've requested specific discovery and a full accounting to test those fees for reasonableness. There have also been concerns expressed about the adequacy of the funding for the Book Rights Registry, which will be supporting itself after its initial funding is exhausted by deducting monies from revenues that would otherwise be paid to rights holders.

And finally, it's very interesting that there have been five state attorneys general who have filed objections to the settlement. Connecticut, I believe, was the first but there are – actually, I'm sorry. There are six. Connecticut was the first and there were five others.

In their filings, they claim that the settlement terms as drafted would result in a misappropriation of unclaimed funds and violate state law, particularly with respect to the way revenues from orphan works are treated. If those objections ultimately require a change in the way the book rights revenues are treated, that may exacerbate concerns about the funding for the Book Rights Registry. So we may see some changes there as well.

Q: Last on the issue of concerns, the public policy issues. What can you tell us about those?

A: Well, this has been a key aspect of the discussion. We've seen concerns expressed about privacy issues, about the necessity in the views of the objectors to safeguard and secure personal data about the users of this large database and about preserving the right for individuals to read anonymously. So those arguments have been advanced quite forcefully.

The library associations have been quick to point out that the class representatives insisted on measures to protect the security of the digital copies, but that the agreement is essentially silent on the protection of user privacy.

The library associations have also been somewhat concerned, though again, they have generally been supportive of the agreement. They've also expressed some concerns that the concentration of power in the Registry and Google could give those entities the ability to manage the content of the database and eliminate certain materials, and that could threaten the library's core values of access, equity, privacy and intellectual freedom.

And finally, one of the most important policy discussions has been around the potential advantages of the settlement for the print-disabled community. In a number of submissions, representatives of this community have argued forcefully that approval of the settlement would provide exponentially increased access for those individuals to the knowledge of the world. And this argument very clearly resonated with the authors of the DOJ brief because the DOJ brief mentioned that particular public policy implication in several places.

Q: DOJ – Department of Justice. You've just brought them up. But let's conclude then with the executive summary that the U.S. government's statement of interest provided. And talk us through the points raised there.

A: As we've been conducting our conversation, Chris, we've been referring to this as the DOJ brief and it's clear that the DOJ – the Department of Justice antitrust division – has been a leader on this. But the statement that was filed with the court is explicitly submitted on behalf of the U.S. government by both the Department of Justice and the U.S. attorney for the Southern District, and the discussion in the brief goes beyond antitrust considerations.

So the submission of this statement of interest and the content is a very significant event, and I think we can pretty safely say that it led directly to the motion that's now pending before the court to adjourn the fairness hearing.

The brief acknowledges at the beginning that the only options, the only procedural options available to the judge right now are to either accept or reject the current form of the settlement agreement. Given those two options, the brief urges the judge to reject the agreement.

However, the brief also suggests that the judge provide guidance to the parties about how the settlement agreement might be modified and then goes on to itself provide some of those suggestions. So the clear implication is that the DOJ believes that some revised form of the settlement agreement might pass muster and might be appropriate for approval.

The brief also – and this is particularly interesting – at several points mentions the ongoing negotiations for modification of the agreement and it even describes some of the changes that are under discussion. And this is very significant.

There have been news and anecdotal reports about negotiations over changes to the agreement, but in this brief, we have both a confirmation of the fact of those negotiations and we're being given a window into the content of those discussions.

Q: Right. Well, there are major concerns and very prominent suggestions for improvement the government has made. Can you go through those, please?

A: I will. First, the government focused very much on the forward-looking aspects of the agreement, and we've discussed this, the future uses that are enabled by the agreement. And the brief really tells a cautionary tale to the proponents.

It talks about how courts in the past have been reluctant to approve class action settlements that regulate or authorize future conduct. The brief also points out that these future-looking sections have the potential to exacerbate conflicts between class members.

The brief doesn't go on to suggest a specific fix, but there's a very clear indication that the current structure, which permits the licensing of entirely new uses and business models without re-notification – there's a very clear indication that the DOJ doesn't think that's going to work.

And what's really interesting too is the brief says – and I'm going to quote it. The parties appear willing to address this problem by limiting the future rights that may be controlled by the Registry and Google. So that's a really important little glimpse into what the parties have been discussing and it may give us some sense of the nature of the changes we'll see in a revised settlement agreement if one is ultimately submitted to the court.

The next point that the brief makes in some detail is the brief discusses the adequacy of class representation, and again, we've gone over this in some detail. But the brief really does spend some time talking about the difference in interest between the known rights holders who under the current structure would potentially benefit financially if other rights holders remain unknown and do not come forward.

And the brief points out, as we have, that the know rights holders are in a position to protect themselves from what the brief calls future uncertainties by, for example, opting out of certain uses, by removing their works. The brief describes these as structural issues and has made some suggestions about ways in which those conflicts could be minimized between the various components of the class.

The brief does talk about class notification. We touched on that, too. But here, what the Department of Justice really does is put the ball back in the court's court and says to the judge quite clearly, we don't think there's enough of a record here for us to make a judgment as to whether or not class notification has been adequate, and the Department of Justice specifically asks the court to undertake what it calls a search and inquiry into the scope of the notice and encourages the court not to hesitate to order more efforts to be undertaken.

Finally – and this is the shoe we've been waiting to see drop – the latter portion of the brief goes into some detail about the antitrust aspects of the settlement. The brief in this portion begins by noting – by confirming – that there is an ongoing Department of Justice investigation. It makes very clear that that investigation is continuing.

But not content to leave it at that, the brief goes on to say that the DOJ's views, on the basis of its investigation so far, are sufficiently well developed so that they can be articulated, at least preliminarily. And they go on to articulate those views to help the court and also to help the parties with their negotiations.

And the views that they articulate are striking. While leaving some room for further modification and refinement, this portion of the brief says that the pricing mechanisms in the current agreement are a horizontal agreement between authors and publishers as to the terms of sale and then goes on to say that that horizontal agreement could be a pro se violation of the Sherman Act, meaning that the violation would appear to violate the Sherman Act on its face. It's a strong statement.

The brief is also no less critical of the other major area that has been the subject of a lot of discussion, and that is the position in which Google would have been placed if the current agreement were to be approved. The brief points out that the agreement as it was originally proposed does in fact give Google de facto exclusivity on the use of orphan works, since, as we've discussed, the Book Rights Registry will have the ability to grant licenses to Google's competitors only where it has authorization from a known rights holder.

According to the Department of Justice brief, this creates a risk of market foreclosure, particularly for markets where only an equally comprehensive database could compete, like, for example, the library market.

The brief suggests that these concerns could be ameliorated if the revised brief somehow provided comparable access to the orphan works for Google's competitors, but also acknowledges that that might not be possible. It might not be possible to do that and still craft a settlement that complies with Rule 23. So it lays out a path, but it certainly doesn't lead the proponents to a clear solution.

Q: We've got about 10 minutes left in our hour program, Lois, and I would like to just take a moment to look ahead. We're at September 23. What's next?

A: Well, that's one of the things that changed yesterday. The judge has taken all of these submissions. It had ordered the proponents – he had ordered the proponents in writing to reply in writing by October 2 to the objections, to the various submissions, all in anticipation of the fairness hearing that was going to take place on October 7.

But the proponents beat their October 2 deadline, and yesterday afternoon, they filed the motion that we've been discussing, asking the judge to adjourn the hearing. In that motion, the parties confirmed what we know from the government's brief, which is that negotiations are going on now to revise the settlement agreement.

They told the judge that they're working with the Department of Justice and that they are no longer going to seek approval of the original settlement, and on that basis, they asked the judge for a status hearing to be scheduled for November 6.

This latest event leaves a lot of questions unanswered. The proponents did not make any predictions about when a new settlement would be submitted. They also wouldn't say whether the new version would require re-notification of the class, which would obviously take some time.

So what we know now is that we'll know more on November 6. We can make some assumptions about what the resubmitted agreement may look like, but we can't be certain.

And then another potential complexity is that Judge Chin – the judge who took the case over from Judge Sprizzo back in December of 2008 – he is likely to be nominated to the Second Circuit Court of Appeals. So whether or not that's going to result in another change in judge, which could potentially create some additional delays, we don't know yet.

Q: There's a lot we don't know, but we do know that you've done a terrific job, Lois, of sorting and sifting through a tremendous amount of information and I really appreciate that. We'll give you a chance to take your breath here with some time left. We've been talking with Lois Wasoff about the latest news in the Google Book settlement case. We've had several hundred – in fact more than 350 participants on this call and I'm sure they appreciate the great work you've done, Lois.

They've also had a lot of questions for you and we're going to try to get to a couple of them right now. We'll see if we can give you a chance to show again your tremendous depth of understanding of the settlement here. There are some questions that are speculative, but you answer them the best as you can.

This one asks us, how substantial does the agreement need to be modified before opt-inners and opt-outers – I like that – are given another chance to review and decide whether to opt in or opt out? Is there a timeframe for that? Do we have any sense of whether we're going to get to go back for a second bite of the apple?

A: That's the whole question of whether or not there needs to be a re-notification and it's very hard to predict at this point what will happen. We can look at the objections. We can look particularly at the Department of Justice brief.

The Department of Justice brief, making specific suggestions for changes, is really instructive. The kinds of suggestions for changes that were outlined in the Department of Justice brief would really change some core assumptions in the structure of the agreement.

So, for example, if we look at questions involving breaking up the class into different subclasses or bringing in representation for some other members of the class to participate in the negotiations, those kinds of changes would probably require a re-notification.

If all that happens is that the future uses piece is dropped out and Google has significantly less rights to make future uses, maybe there's an argument to be made that re-notification wouldn't be necessary.

But it's a good question, it's a fair question, it's a hard question to answer because we don't know yet how extreme the changes will be or would be in a re-submitted settlement agreement.

Q: One more question, then. With all the objections to the current agreements, how likely is it the judge is going to reject it in whole and give guidance on what would be acceptable in a modified agreement? I guess that gets to the point which is that we've had a lot of voices here, a lot of votes for or against the settlement, but this is not up for a vote.

A: No.

Q: Because there's only one judge and he gets to decide.

A: Yeah, the majority doesn't rule. The judge does. But the judge really has made an effort to get a diversity of opinion before him. Let's remember that the reason we have the benefit of the government's thinking on this is that Judge Chin back in July told the government, I want to know what you're thinking. I know there's an investigation going on. I want some guidance about where you're going with this. Submit your statement on September 18.

So, the judge has been reaching out to get a broad range of input on this. But procedurally, the judge does not have a red pen. He can't make changes himself. If he does what the questioner is suggesting he do, he will be doing exactly what the Department of Justice

asked him to do. The Department of Justice said, reject it, but reject it with some information, some guidance, some support. Give the proponents some idea what they would need to do to let them come back to you with an agreement that you did feel you could approve. And we can't – we're speculating here, but that does seem a logical next step.

By asking the judge to adjourn the fairness hearing and by asking him to schedule a status hearing – not another fairness hearing because there's no agreement right now for him to be ruling on the fairness of – by asking the judge to schedule a status hearing, the proponents of the agreement are giving him more time to make that decision.

So we'll know a lot more when that status hearing takes place, if the judge grants the pending motion, and we'll have a better sense of what the judge's thinking is then.

Q: Right. Well, this is Chris Kenneally, director of author relations at Copyright Clearance Center. I've been speaking today in the sixth of our series on the Google Book settlement with Lois Wasoff. I really want to thank her very much indeed.

I want to thank all the participants in the call, to the entire team here at CCC who have put together this remarkable presentation. I have to say again, I can't emphasize enough, if you haven't seen the materials, we're talking about hundreds of pages that have been sorted through very carefully by everybody here. Thank you all for this.

Before you sign off today, if you're on the call right now with us, you have the chat box in the lower right hand corner of your screen. We invite you to submit questions. We plan on continuing this series at Copyright Clearance Center once we've heard more from the court or if other interesting developments occur.

Obviously, at Copyright Clearance Center, where we work with hundreds of publishers and authors – thousands, I should say – and have done for so many years, what's happening with the Google settlement is something that we will be following very closely. And we are also very proud to have brought onto the call here a global network of people, so we're not just concerned, as the settlement is with U.S. rightsholders, but with rights holders around the world. And that's just one of the reasons why CCC is presenting this as a public service.

Thank you all again very much indeed. We have up on the screen – and this is I think very helpful indeed – where you can go for some of the court documents we've been discussing, various links directly to them, to a webcast for the Congressional hearing.

Other sources that are worth checking out of course. The Google Book settlement site itself, googlebooksettlement.com, the AAP's own site, publishers.org and the Authors Guild site, authorsguild.org.

Of course all of this and more at our own site, copyright.com, where you'll be able to re-listen again to the presentation that you've heard today and more. We go back, in fact, all the way to Google No. 1. This has been Google No. 6, as we call it here.

Again, thank you all very much indeed for joining us. On behalf of everyone at Copyright Clearance Center, Chris Kenneally wishing you a very good day.

END OF PRESENTATION