

02I7GOOM  
1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 THE AUTHORS GUILD, et al.,  
3  
4 Plaintiffs,

5 v. 05 Civ. 8136

6 GOOGLE, INC.,  
6  
7 Defendant.

8 -----x

9 February 18, 2010  
9 10:10 a.m.

10 Before:

11 HON. DENNY CHIN

12 District Judge

13 APPEARANCES

14 BONI & ZACK LLC  
15 Attorneys for Plaintiffs  
15 BY: MICHAEL J. BONI  
16 JOANNE ZACK  
17 DEBOVOISE & PLIMPTON LLP  
17 Attorneys for Plaintiffs  
18 BY: JEFFREY P. CUNARD  
18 BRUCE P. KELLER  
19 RICHARD S. LEE  
19 GARY W. KUBEK

20 MILBERG LLP  
21 Attorneys for Plaintiffs  
21 BY: SANFORD P. DUMAIN  
22 JENNIFER S. CZEISLER

23 DURIE TANGRI LEMLEY ROBERTS & KENT LLP  
23 Attorneys for Defendant  
24 BY: DARALYN J. DURIE  
24 JOSEPH C. GRATZ

25 SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

02I7GOOM

1  
2 APPEARANCES (Continued)  
3 HILARY WARE  
3 DAVID DRUMMOND  
4 DAPHNE KELLER  
4 In-house counsel for Google  
5  
5 WILSON SONSINI  
6 Attorneys for Defendant  
6 BY: SUSAN CREIGHTON  
7  
7 WILLIAM F. CAVANAUGH  
8 Deputy Assistant Attorney General  
8 U.S. Department of Justice  
9  
9 PREET BHARARA  
10 United States Attorney  
10 Southern District of New York  
11 BY: JOHN D. CLOPPER  
11 OWEN KNEDLER  
12 Assistant United States Attorneys

13  
14 ALSO PRESENT:

15 SUPPORTERS:  
16 LATEEF MTIMA, Howard University  
17 JANET CULLUM, Cooley Godward Kronish, LLP, on behalf of Sony  
18 MARC MAURER, National Federation of the Blind  
19 PAUL N. COURANT, University of Michigan Library  
20 JOHN B. MORRIS, JR., Center for Democracy & Technology  
21  
22  
23  
24  
25

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

02I7GOOM

1 OBJECTORS:

2 SARAH CANZONERI

2 SCOTT E. GANT

3 THOMAS C. RUBIN, Microsoft

3 DAVID NIMMER, Irell & Manella, LLP, for Amazon

4 RON LAZEBNIK, Lincoln Square Legal Services, Inc. (Fordham

4 University), for Science Fiction & Fantasy

5 Writers of America, American Society for

5 Journalists and Authors

6 PAMELA SAMUELSON, University of California Berkeley

6 CINDY COHN, Electronic Frontier Foundation, for 28 Privacy

7 Authors and Publishers

7 YASUHIRO SAITO, Japan P.E.N. Club, et al.

8 IRENE PAKUSCHER, France and Germany

8 MICHAEL J. GUZMAN, Kellogg, Huber, Hansen, Todd, Evans & Figel,

9 PLLC, for AT&T

9 CYNTHIA S. ARATO, Macht, Shapiro, Arato & Isserles, LLP, for

10 New Zealand Society of Authors, et al.

10 DANIEL J. FETTERMAN, Kasowitz, Benson, Torres & Friedman, LLP,

11 for Consumer Watchdog

11 MARC ROTENBERG, Electronic Privacy Information Center

12 GARY L. REBACK, Carr & Ferrell, LLP, for Open Book Alliance

12 HADRIAN R. KATZ, Arnold & Potter, LLP, for The Internet Archive

13 ANDREW C. DEVORE, for Arlo Guthrie, Julia Wright, Catherine

13 Ryan Hyde, and Eugene Linden

14 PAUL S. ROTHSTEIN, for Darlene Marshall

14 VERONICA MULLALLY, Lovells, for VG Wort

15 NORMAN W. MARDEN, Office of Atty. General for Commonwealth of

15 Pennsylvania

16 LYNN CHU, Writers' Representatives LLC & Richard A. Epstein

16 STUART BERNSTEIN

17 (In open court)

18 THE COURT: All right. Before the Court is

19 plaintiffs' motion to approve the settlement as fair and

20 reasonable.

21 Voluminous materials have been submitted, and we are

22 working our way through them. There is a lot of repetition.

23 Some of the submissions even quote some of the other

24 submissions. I'm reading them twice.

25 To end the suspense, I am not going to rule today.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

02ilgool

1 There is just too much to digest. And however I come out, I  
2 want to write an opinion that explains my reasoning.

3 I have an open mind. I'm going to listen carefully.  
4 I may ask a few questions. There are recurring themes. Let's  
5 try not to be repetitious. Let's try to do this in an  
6 efficient manner.

7 And I think what I'd like to do is hear from nonparty  
8 supporters of the settlement first, then objectors and others  
9 who are opposed. I'm going to limit this to the entities and  
10 individuals listed in my two orders, although we did add one  
11 person who apparently did submit a timely request, just didn't  
12 make it to my chambers in time. Then I will hear from the  
13 United States and then the parties.

14 And before we start, were there any housekeeping  
15 matters?

16 No. All right. Then let's start with those who I  
17 understand to be supporting the proposed amended settlement,  
18 and they are, as I understand it: Lateef Mtima, M-T-I-M-A,  
19 from Howard University; Janet Cullum from Sony Electronics;  
20 Marc Maurer, M-A-U-R-E-R, from the National Federation of the  
21 Blind; Paul Courant, C-O-U-R-A-N-T, from the University of  
22 Michigan Library; and John Morris, from the Center for  
23 Democracy and Technology. So we'll go in that order. And  
24 please speak at the podium. We have an overflow room  
25 downstairs, which I understand is filled to capacity, and so we

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

02ilgoo3

1 contemplated by the settlement were made by Congress and not  
2 through a class action settlement that favors one competitor.

3 And I think the rest of my remarks have been covered  
4 by other speakers, your Honor. I will rely on our papers.

5 THE COURT: All right. Thank you.

6 Okay. The next four are Marc Rotenberg of the  
7 Electronic Privacy Information Center; Gary Reback for the Open  
8 Book Alliance; Hadrian Katz for the Internet Archive; and  
9 Andrew Devore for a number of class members.

10 Mr. Rotenberg?

11 MR. ROTENBERG: Thank you, your Honor. Very briefly,  
12 I'm also a professor of law at Georgetown and testified before  
13 Congress on emerging privacy and civil liberties issues. And  
14 while I agree with the organizations that have said to you that  
15 there are substantial privacy concerns raised in the revised  
16 settlement that are not adequately addressed, I disagree with  
17 these organizations that that problem can be cured by change in  
18 the settlement terms for reasons I'm about to set out and as  
19 are described in our brief.

20 Objectors to the settlement have focused on the  
21 concern that Google has essentially untethered the books stored  
22 in the libraries from the copyright interests they believe that  
23 the authors claim. But they have also untethered the privacy  
24 obligations that otherwise attach to the access and use of this  
25 information that public libraries are currently subject to. We

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

02ilgoo3

1 have in this country a system of privacy protection established  
2 in 48 state laws that provide very strong protection for reader  
3 confidentiality, and libraries are obligated to safeguard the  
4 collection of information, to limit its disclosure, to oppose  
5 requests from government unless a warrant is obtained, and in  
6 many circumstances to delete user information when they no  
7 longer need it to protect the property interests of the  
8 institution. The practices in the library profession emphasize  
9 and underscore the need to safeguard the confidentiality of  
10 their patrons' access to this information, and critically, your  
11 Honor, at this moment in time, when new technologies are being  
12 introduced to promote access to electronic information, there  
13 is a movement under way within the libraries to introduce  
14 technologies that promote access while safeguarding patron  
15 privacy.

16 This settlement, your Honor, turns every one of these  
17 safeguards on its head. Google effectively eviscerates the  
18 privacy protections that otherwise exist in state privacy law  
19 by substituting a provision that says simply, in 66F, will not  
20 transfer personally identifiable information to the registry,  
21 without ever saying what the PII is, and without any other  
22 limitations on what Google may or may not do with the  
23 information it collects. It removes all obligations that would  
24 otherwise exist for a library to safeguard information about  
25 those people who seek access to knowledge.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

02ilgoo3

1           And where the effort today in the technical community  
2 is to support techniques that enable access and minimize  
3 privacy risks, Google moves in the opposite direction and does  
4 so radically. This settlement mandates user authentication,  
5 watermarking, tracking techniques, and data collection that  
6 have never previously existed in any electronic library. A  
7 person under this settlement who goes into any library or  
8 university in this country and tries to download, through the  
9 proposed user subscription model, some information that he or  
10 she seeks to examine, will get a piece of paper with a  
11 watermark that will uniquely identify that person's access to  
12 knowledge. There is simply no precedent to track people in  
13 this fashion who are simply exploring their right of  
14 intellectual freedom.

15           As I said, your Honor, there are some who believe that  
16 privacy defects in the settlement can be cured through  
17 additional terms. That was my view at the outset. I  
18 frequently go before Congress and recommend ways in which  
19 statutes can be developed to safeguard privacy interests and  
20 enable some other important commercial or social benefit. But  
21 I don't see how that can be done here. I don't see how it's  
22 possible to transfer this much information to a company that  
23 already knows more about internet users than any other company  
24 in the world, that for its business model relies on the  
25 commercial extraction of that information and has designed a

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

02ilgoo3

1 system to track access to this new digital library and believe  
2 that privacy safeguards could be adequate. And so it's for  
3 this reason, your Honor, that I urge you to reject the  
4 settlement.

5 And I would also point out that in the remarks of  
6 Professor Samuelson, she noted that under the open access  
7 model, as opposed to the escrow model, there could be greater  
8 public access to this new digital library. I think that  
9 statement is true, but the corollary is also true. There would  
10 be less invasion of personal privacy under the open access  
11 model than under the escrow model proposed today. Thank you.

12 THE COURT: All right. You're saying any digital  
13 library must have protections.

14 MR. ROTENBERG: But it must be in the design of the  
15 technology, which is why the legal terms will not be  
16 sufficient.

17 THE COURT: Okay. I understand. Thank you.

18 MR. ROTENBERG: Thank you.

19 THE COURT: Yes?

20 MR. REBACK: Good afternoon, your Honor. Gary Reback  
21 on behalf of the Open Book Alliance. Among the members of the  
22 Open Book Alliance is the New York Library Association, which  
23 is the umbrella library association for all the libraries in  
24 this city and this state.

25 THE COURT: Yes.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300