

Association of College & Research Libraries
50 E. Huron St. Chicago, IL 60611
800-545-2433, ext. 2523
acrl@ala.org, <http://www.acrl.org>



Board of Directors Action Form

To: ACRL Board of Directors
Subject: Confirmation of Email Vote, Google Book Search Amicus Brief
Date submitted: April 24, 2009

ACTION RECOMMENDED: That the ACRL Board of Directors confirm its email vote of March 20-27, 2009 that approved the filing an amicus brief in concert with ALA and ARL effective immediately as described in the attached ACRL Board of Directors Action form dated March 4, 2009.

STRATEGIC GOAL AREA SUPPORTED: Please add additional sheets as needed to explain. (Select the goal area that will be affected most by this action.)

Strategic Area: Higher Education and Research

- Goal Area: Learning**
ACRL and its members are recognized as collaborative leaders and partners in ensuring that students graduate with lifelong learning skills, improving techniques for assessing learning outcomes, and in creating environments for discovery.
- Goal Area: Scholarship**
ACRL and its members are recognized as authorities on knowledge management; and the creation, collection, preservation, access, and exchange of information.
- Goal Area: Advocacy**
ACRL has greater influence on the higher education and research environment.

Strategic Area: The Profession

- Goal Area: Continuous Learning**
ACRL provides continuous learning opportunities enabling members to strengthen their effectiveness and achieve recognition as valued contributors to their academic and research communities.
- Goal Area: Leadership**
ACRL members achieve recognition as leaders and advocates for academic and research libraries.
- Goal Area: Information Technology**
Academic and research librarians are leaders in using information and academic technologies to create and manage information resources and to deliver library and information services.

Strategic Area: The Association

Goal Area: Membership

ACRL's membership growth builds on retaining core membership while recruiting from new and diverse communities.

Goal Area: Sustainability

ACRL will have the fiscal resources, staff expertise, and organizational structure to advance the association's strategic plan.

FISCAL AND STAFFING IMPACT: Cost is estimated to be \$3,300, assuming it is split with ARL and ACRL.
Minimal staff time would be involved to manage logistics of review.

MOTION: Above recommendation moved No motion made Motion revised (see motion form)

ACTION TAKEN: Motion Approved Motion Defeated Other: _____

ACRL AC09 Doc 4.5a
ACRL Virtual Action—Google Book Search
Voting Period: February 13-20, 2009

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Board of Directors Action Form

To: ACRL Board of Directors
Subject: Google Book Search Settlement
Submitted by: Erika Linke, ACRL President
Date submitted: February 13, 2008

BACKGROUND: Members of the library community discussed the implications of the Google Book Search settlement in a meeting hosted on February 9, 2009, in Washington, D.C. by the American Library Association Washington Office, the Association of Research Libraries, and the Association of College & Research Libraries. Under the settlement, Google and the American Association of Publishers and Authors Guild resolve their legal dispute over the scanning of millions of books provided by research libraries. The settlement still requires approval of the presiding judge. Although this is a private settlement, the result has very real implications for public policy and the way libraries of all types will operate.

The attached report explores key issues in the areas of access, privacy, intellectual freedom, equitable treatment and terms of use. It lays out six potential actions and recommends filing an amicus brief as friend of the court.

ACTION RECOMMENDED: That the ACRL Board of Directors vote by Friday, February 20, to support filing an amicus brief in concert with ALA and ARL.

IF PERTINENT: Have other stakeholders been consulted? If so, please identify stakeholders and their comments about this action.

STRATEGIC GOAL AREA SUPPORTED: Please add additional sheets as needed to explain.
(Select the goal area that will be affected most by this action.)

Strategic Area: Higher Education and Research

Goal Area: Learning

ACRL and its members are recognized as collaborative leaders and partners in ensuring that students graduate with lifelong learning skills, improving techniques for assessing learning outcomes, and in creating environments for discovery.

Goal Area: Scholarship

ACRL and its members are recognized as authorities on knowledge management; and the creation, collection, preservation, access, and exchange of information.

Electronic submission is preferred for all Board actions. If electronic submission of the entire document is not possible, please send the Action Form to ACRL Program Officer Katie Coombes electronically at kcoombes@ala.org and the remainder in hard copy.

ACRL AC09 Doc 4.5a
ACRL Virtual Action—Google Book Search
Voting Period: February 13-20, 2009

- X Goal Area: Advocacy**
ACRL has greater influence on the higher education and research environment.

Strategic Area: The Profession

- Goal Area: Continuous Learning**
ACRL provides continuous learning opportunities enabling members to strengthen their effectiveness and achieve recognition as valued contributors to their academic and research communities.
- X Goal Area: Leadership**
ACRL members achieve recognition as leaders and advocates for academic and research libraries.
- Goal Area: Information Technology**
Academic and research librarians are leaders in using information and academic technologies to create and manage information resources and to deliver library and information services.

Strategic Area: The Association

- Goal Area: Membership**
ACRL's membership growth builds on retaining core membership while recruiting from new and diverse communities.
- Goal Area: Sustainability**
ACRL will have the fiscal resources, staff expertise, and organizational structure to advance the association's strategic plan.

FISCAL AND STAFFING IMPACT: Cost is estimated to be \$3,300, assuming it is split with ARL and ACRL.
Minimal staff time would be involved to manage logistics of review.

MOTION: Above recommendation moved No motion made Motion revised (see motion form)

ACTION TAKEN: Motion Approved Motion Defeated Other: _____

ACRL AC09 Doc 4.5b
ACRL Virtual Action—Google Book Search

Attachment
Voting period: February 13-20, 2009

Strategies and Options for ALA, ARL and ACRL with Regard to the Google Book Search Settlement Agreement

Summary:

The precise fallout from the proposed Google Book Search settlement of litigation concerning the Google Library Project is unknown. But many in the library community believe the implications stemming from the agreement will likely be far-reaching and long-term. To assist with library community deliberations, the ALA Washington Office, ARL and ACRL have provided a variety of resources to the community. These efforts are designed to help the community understand the terms and conditions of the proposed agreement, to evaluate its long-term implications on library services and on access to information by our users.

The most recent joint effort was a meeting on February 9th to review strategies and options available to the community with regards to the settlement. Six strategies were identified and discussed by members of the community, legal experts and leadership of ALA, ARL and ACRL. Overall, there was consensus on both the need for collective action by these associations in response to the agreement and on a specific legal strategy.

Background and Issues:

While this is a private settlement between Google, the Authors Guild, and the Association of American Publishers, it has a very real impact on public policy. It resolves the legal dispute over the scanning of millions of books provided by research libraries. Yet, many believe that the settlement ossifies the law by sanctioning a new framework by which digital information flows through libraries. It establishes a licensing arrangement between Google, authors and publishers that could limit the kind of access library users currently enjoy.

The project will be of immense good for society, digitizing a vast collection of works and making them available to the public. To many, the benefits of such access are significant. But concerns remain that a single corporation is poised to control the digital dissemination of this vast trove of published works and with publishers and participating authors, could place restrictions on what is available and at what cost.

Participants at the February 9 meeting identified a number of key issues with regard to the settlement. The primary issues of interest and concern include:

-*Access.* There are a number of issues regarding how the settlement will affect the public's ability to access and use digital resources included in the settlement.

Because libraries are not a part of the settlement, they had no direct voice in the terms of the settlement nor will have influence over many aspects of its implementation. For example, the new Book Rights Registry (BRR), established as a condition of the settlement, represents the interests of the authors and publishers. There is no voice to champion the interests of the libraries and the public. As a consequence, libraries will have no mechanism via the BRR to influence the pricing of the institutional subscription. Overall, concerns have been raised that without competition and with lack of representation of library interests, the costs of access could put at risk libraries' mission to provide the broadest public access to information.

-Privacy. There is real concern that the years of hard-fought effort to protect library users' confidentiality could be compromised as a for-profit company has new capabilities to monitor and track user reading habits.

-Intellectual freedom. The settlement gives significant power or leeway to the parties to control what material is available and to whom. For example, Google can remove works at its editorial discretion and it is unclear if it will notify the public of its decisions. In addition, scholars and researchers are concerned about possible access to and use restrictions on the Research Corpus.

-Equitable treatment. Not all libraries are addressed in the settlement - the terms and conditions of use by public libraries differ from those of academic libraries and school libraries are barely mentioned. By failing to include the diverse landscape of libraries and/or differentiating between types of libraries, there could be a gap in services to the public. This is seen as expanding the digital divide, particularly in this economic climate.

-Terms of use. Libraries seek to ensure that users, under the settlement, will continue to enjoy the same rights to information that they do under current law. There is significant debate regarding the impact of the settlement on copyright law, with a particular focus on library and educational exemptions that allow for library lending, limited copying and preservation.

Options and Recommendation:

Because libraries are not a party to the agreement, six options or strategies were identified and discussed, with a particular focus in determining how to make library community concerns known to the Court.

First, the community could decide to take no collective action. This was not seen as a viable strategy given the import of the settlement to the library community and the public.

Second, the library community could oppose the agreement. Although there are some who prefer this strategy, the value of access to the digitized content was seen as too useful and important. Thus opposing the settlement was not seen as the best course to follow.

Third, a request could be made urging the presiding judge allow for more time to consider the implications of the settlement. A delay in the proceedings would permit more time for authors to understand the settlement and their interests. It would also allow members of the library community to consider the settlement terms and conditions vis-a-vis libraries. As libraries are not part of the agreement, the likelihood of success was not seen as high nor particularly helpful.

Fourth, there was extensive discussion regarding the possibility of libraries intervening by asking to become a party to the settlement, and if so, how. The value of this strategy was that if successful, libraries would have a voice in how the overall agreement would be fashioned. A preliminary analysis by legal experts concluded that the addition of libraries as a formal party to the settlement would most likely be strongly opposed by other members of the agreement, thus negating the current settlement. Were this to happen new negotiations between the parties (Google, publishers, authors and libraries) would then begin. It was warned that negotiations would be long and very expensive. Moreover, it is possible that the publishers and the Authors Guild could choose to again pursue its legal action against Google. It is also possible that libraries could then be named as defendants in a new case. Although there was support by some for this strategy, the costs and uncertainty of such a strategy ultimately weighed against its adoption.

Fifth, a legislative strategy was proposed whereby some show of interest by legislators would signal to the Court that modifications to the settlement were necessary and that legislation could better ensure that the needs of all interests were met. The likelihood of success of undertaking this strategy was not seen as high and resources needed would be extensive. This option was not endorsed.

Finally, the option was proposed of filing an amicus brief before the Court that would allow the library community to outline key concerns. Although there is no guarantee that the Court will take library concerns under active consideration, given the impact of the settlement on libraries, the likelihood appears high that the Court would be deeply interested in library issues. The cost of filing an amicus is low (\$10,000), especially in comparison to the other options. In addition, the costs would be shared by the three library associations and possibly other organizations. A joint filing would ensure that library concerns are heard and our collective members expect their organizations to represent their interests in this landmark agreement.

Recommendation:

The sense of the participants in the February 9 meeting was that it was critically important that the associations take collective action. The best means available is to file an amicus brief. Not only would this put the concerns of the community before the Court but it would also make the library community concerns more broadly available. Documenting concerns now and being able to point to them in the future could prove useful if, for example, legislation or policy around digitization were to arise. There was also a strongly held view that the members of these associations expect their organizations to undertake this role on behalf of libraries.

Next Steps:

The settlement requires approval of the presiding judge. Members of the class and interested parties can submit comments until May 5, 2009 following which the Court will conduct a hearing to consider the fairness of the settlement. If the leadership of ARL, ALA and ACRL agree that submitting an amicus brief is the preferred strategy, a filing would occur well before the May deadline. A lawyer has been identified and additional research and legal support from the American University intellectual property clinic have been offered.