Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Christine Varney
Assistant Attorney General for Antitrust Division
950 Pennsylvania Avenue, NW
Room 3322
Washington, DC 20530

James J. Tierney
Department of Justice, Antitrust Division
Chief, Networks and Technology Enforcement Section
600 E Street, NW
Rm. 9300
Washington, DC, 20530

April 1, 2009

Dear Mr. Attorney General and Associates:

We are writing to express concerns raised by the proposed settlement between Google Inc., and The Authors Guild and the Association of American Publishers (AAP). We call on the Justice Department to intervene in the case, *Authors Guild Inc. v. Google Inc.* (S.D.N.Y., 05-CV-8136) and delay the settlement until these issues are resolved and needed consumer protections are added.

Implementing such major changes in the way the publishing industry would function through a class action settlement is unprecedented. Normally Congress or regulatory bodies would be involved in a transformation of this magnitude and the interests of all stakeholders could be considered. Because that has not been the case, it is all the more important for the Justice Department to intervene in the proposed settlement.

When rights holders balked, Google negotiated a settlement that simply rewards the most vocal dissidents and gives the Internet giant an effective monopoly over digitized books. No party to the settlement represents consumers and public interest.
The settlement agreement creates the nonprofit Book Rights Registry to manage book digital rights issues. Among the deal’s most troubling aspects is a “most favored nation” clause. It guarantees Google the same terms that any future competitor might be offered. Under the most favored nation clause the registry would be prevented from offering more advantageous terms to, for example, Yahoo! or Microsoft, even if it thought better terms would be necessary to enable either to enter into the digital books business and provide competition to Google. The most favored nation provision should be eliminated to remove barriers of entry. It is inappropriate for the resolution of a class action lawsuit to effectively create an “anti-compete” clause, which precludes smaller competitors from entering a market. Given the dominance of Google over the digital book market, it would no doubt take more advantageous terms to allow another smaller competitor to enter the market.

The settlement also provides a mechanism for Google to deal with “orphan works.” Orphan works are works under copyright, but with the rights holders unknown. The danger of using and selling such works is that a rights holder will emerge after the book has been exploited and demand substantial infringement penalties. The proposed settlement protects Google from such potentially damaging exposure, but provides no protection for others. This effectively is a barrier for competitors to enter the digital book business. The orphan works provision of this settlement should be extended to protect all who might enter the business under the same terms Google enjoys.

Because the settlement was negotiated between the parties in a class action suit, there has been little opportunity to represent the interests of consumers. A class action settlement must serve the entire public interest, not merely those of the litigants. This deal furthers the relatively narrow agenda of Google, The Authors Guild and the Association of American Publishers. We call on the Justice Department to intervene and bring about changes that will truly serve the public interest.

Sincerely,

John M. Simpson
Consumer Advocate