



Written Statement of the  
American Civil Liberties Union

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Acting Director, Washington Legislative Office

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Technology and Civil Liberties Policy Director  
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Christopher Calabrese  
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before the  
House Judiciary Committee

September 10, 2009

*Hearing on Google Book Settlement*



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Chairman Conyers, Ranking Member Smith, and Members of the Committee:

The American Civil Liberties Union (ACLU) has more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide. We are one of the nation's oldest and largest organizations advocating in support of individual rights in the courts and before the executive and legislative branches of government. In particular, throughout our history, we have been the nation's pre-eminent advocate in support of individual free speech rights and one of the foremost protectors of individual privacy. We write today to bring to your attention the serious First Amendment and privacy concerns raised by the proposed Google Book Search settlement and to urge you to consider regulatory and legislative measures to address these issues.<sup>1</sup> We strongly support efforts to expand the availability of knowledge, but the public must not be forced to pay for books with their privacy and free speech rights.

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<sup>1</sup> On September 8, 2009, we filed an Objection to the Settlement on behalf of authors and publishers because the Settlement fails to adequately protect their interests by failing to safeguard reader privacy. Filing available at

The fundamental problem inherent in the Settlement is the complete absence of any limitations on collection and use of reader information and no privacy standards for retention, modification, deletion or disclosure of that information to third parties or the government.<sup>2</sup> Without those limitations, an unprecedented quantity of granular information about readers' activities will be, and indeed already is, being collected - including the identity of readers, every book searched for, browsed, purchased, and read. The data even includes which pages the user reads and for how long. For example, in a New York Times article in January 2009, a senior member of Google's Book Search engineering team admitted that he "was monitoring search queries recently when one... caught his attention." The engineer could easily tell that the reader spent four hours perusing 350 pages of an obscure 1910 book.<sup>3</sup> Most of this tracking is something bookstores and libraries could never do short of hiring an agent to follow patrons around the stacks, during activities throughout their day, and then into their homes.

This granular tracking will create a chilling effect, especially for readers seeking, browsing or reading books on controversial or sensitive subjects such as politics, religion, sexuality and health. This chilling effect, which is well documented in contexts involving physical books, serves as the basis for a long line of legal precedents, statutes and policies strongly protecting reader privacy. Federal and state courts have consistently safeguarded readers from the chilling effect of forced disclosure.<sup>4</sup> Recognizing the importance of a citizenry that is not forced to worry about who is looking over their shoulder when they read, 48 states protect public library reading records by statute.<sup>5</sup> Rhode Island and Michigan further have state laws prohibiting book

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[http://www.aclu.org/pdfs/freespeech/authorsguildvgoogle\\_objection.pdf](http://www.aclu.org/pdfs/freespeech/authorsguildvgoogle_objection.pdf)

<sup>2</sup> Including allowing aggregation of information Google learns from Book Search with other information it knows about readers from its other services, such as its DoubleClick product that places cookie-traced advertising on millions of non-Google websites across the Internet. *See* Google Privacy Policy ("We may combine the information you submit under your account with information from other Google services or third parties").

<sup>3</sup> Motoko Rich, *Google Hopes to Open Trove of Little-Seen Books*, New York Times, January 4, 2009, <http://www.nytimes.com/2009/01/05/technology/internet/05google.html>.

<sup>4</sup> *In re Grand Jury Subpoena to Amazon.com*, 246 F.R.D. 570, at 573 (quashing a government subpoena seeking the identities of 120 book buyers because "it is an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else."); *In re Kramerbooks*, 26 Media L. Rep. (BNA) 1599, 1601 (First Amendment requires government to "demonstrate a compelling interest in the information sought . . . [and] a sufficient connection between the information sought and the grand jury investigation" prior to obtaining book records); *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1059 (Colo., 2002) (government access to book records only passes muster under Colorado Constitution if "warrant plus" standard is met by the government).

<sup>5</sup> *See, e.g.*, N.Y. C.P.L.R. § 4509; Cal. Gov. Code §§ 6267, 6254(j). The two states that do not have library confidentiality laws are Hawaii and Kentucky. However, the Attorney Generals' Offices in each state have issued opinions in support of reader privacy. Haw. OIP Opinion Letter No. 90-30 (1990) (disclosure of library circulation records "would result in a clearly unwarranted invasion of personal privacy"); Ky. OAG 82-149 (1982) ("all libraries may refuse to disclose for public inspection their circulation records. . . . [W]e believe that the privacy

sellers from disclosing information.<sup>6</sup> Congress has already recognized the privacy interests of users of expressive material and created strong protections in several other contexts. The Video Privacy Protection Act prohibits disclosure of video rental records without a warrant or court order.<sup>7</sup> The Cable Communications Policy Act similarly prohibits disclosure of cable records absent a court order.<sup>8</sup> It would be strange indeed for reading privacy, long safeguarded in this country, to be extinguished simply because the books have been converted into digital form.

The Settlement completely ignores these constitutional and statutory issues and essentially leaves it to Google's discretion what information to collect and whether and when to disclose reader records. Google's recently issued Google Books Privacy Policy does not correct the deficiencies in the Settlement. The Privacy Policy can be changed by Google at any time, lacks the enforcement power of the Settlement, and continues to lack robust reader safeguards related to the collection, retention, and use of reader information. Most glaringly, Google continues to fail to make any commitment to require any judicial oversight in the form of a warrant or court order prior to disclosure of reading records to the government or third parties- simply directing the public to its general Privacy Policy language.

The failure of the Settlement to include protections for book records and limitations on data collection, retention, use, and disclosure should be of great concern to this Committee, particularly given the tremendous breadth of the Google Book Search services that will emerge from the Settlement and the likely impact they will have on future authors, readers, libraries, the book market, and broader competition in the online services market.

The ACLU believes the Committee should address the following issues:

- **Government Access.** Information about Google Book Search users must not be disclosed to government entities or third parties in a pending civil or administrative action absent a warrant or court order.
- **Use of Data.** Just as readers may anonymously browse books in a library or bookstore, readers should be able to search, browse, and preview books on Google Book Search without being forced to identify themselves to Google. Readers should be able to search and preview books without user registration or the affirmative disclosure of any personal information and Google will not connect any information it

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rights which are inherent in a democratic society should constrain all libraries to keep their circulation lists confidential.”).

<sup>6</sup> Mich. Comp. Laws Ann. § 445.1712 (2009), R.I. Gen. Laws § 11-18-32 (2009).

<sup>7</sup> 18 U.S.C. §§ 2710(b)(2)(C), 2710(b)(2)(F), 2710(b)(3).

<sup>8</sup> 47 U.S.C. § 551(h).

collects from an individual's use of Google Book Search with the same individual's use of other Google services without her or his specific, informed consent

- **Data Retention.** All logging and other information related to individual uses of Google Book Search must be purged no later than 30 days after their use in a manner that ensures that this information cannot be used to connect particular books viewed to particular computers or users.<sup>9</sup>
- **Notice.** Consumers must have access to a robust, easy-to-read notice of Google Book Search privacy provisions on the Google Book Search pages themselves.
- **Oversight.** Consumers must have access to a document, published annually by Google and available online in a conspicuous and easily accessible area of the Google Book Search website, detailing the type and number of requests Google have received from government entities or third parties seeking information about Google Book Search Users.

Thank you for your efforts to highlight this important First Amendment and privacy issue.

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<sup>9</sup> Google already does this for other sensitive user information. See Google Health Privacy Policy, available at <http://www.google.com/intl/en-US/health/privacy.html> (last accessed Apr. 28, 2009); See Google Mobile Help, Privacy: Location History, available at <http://www.google.com/support/mobile/bin/answer.py?hl=en&answer=136652> (last accessed Apr. 28, 2009).