

GOOGLE BOOK SETTLEMENT AS PRIVATE © REFORM

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OVERVIEW

- Basic elements of Authors Guild v. Google lawsuit & proposed settlement
- Respects in which the GBS lawsuit & settlement are due to & exacerbate © dysfunctions
- Respects in which the proposed GBS settlement resembles legislation & constitutes © reform
- Effects that the GBS settlement may have on the future of © litigation & legislation

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BOOK SEARCH PROJECT

- G began Book Search project in 2004
- G made arrangements with several major university research libraries to scan Ms of books in their collections
 - libraries to get back a digital library of books G scans
 - only G would have the corpus of all books
 - G willing to litigate fair use issue, indemnify libraries
- G providing “snippets” to users with links to libraries & book vendors to get the whole book
- G also making “non-display uses” of GBS to refine search, develop automated translation & other tools (main reason for GBS)

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AUTHORS GUILD v. GOOGLE

- In Sept. 2005, AG + 3 of its authors sued G for © infringement for scanning books & displaying snippets
- Class action on behalf of all rights holders whose books were scanned from Michigan library
- G claimed fair use, but also not clear class action is viable because different interests of class members
 - Academic authors more likely to think scan-to-index = fair use
- 5 publishers brought similar suit vs. G a month later; not initially a class action
- Settlement was in progress for more than 2 years, during which Google kept scanning books

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WHERE WE ARE TODAY

- @12M books in GBS corpus at this point
- @2M are in the public domain
 - G currently makes the whole book available for download in pdf
- @2M are in-print and in partner program
 - © owners negotiate with G about how much of their books to make available, on what terms (e.g., revenue-sharing)
- @8M are out-of-print
 - At least 20% are likely “orphans,” maybe many more
 - Snippets available now
- G willing to “remove” book from GBS corpus if © owner objects, also maintains a “no scan” list
 - “remove” does not really mean remove

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CORE OF SETTLEMENT

- G to provide \$45M to compensate © owners as to books scanned as of May 2009
 - \$60 per book, \$15 per insert (e.g., chapter)
 - For US works, only those registered with © office as of 1/5/09
- G to fund creation of a new collecting society, the Book Rights Registry, out of \$34.5M set aside for administrat'n
 - But has already spent \$12M on notice
- Authors and publishers can sign up to get payments from that \$45M + to share in any new revenues BRR collects that are subject to the revenue split
 - BRR to get 67% for BRR-registered and unclaimed books
- \$45.5M to be paid to class lawyers
- G would get a license to scan all books covered by the settlement, make “non-display” uses of them

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GBS REVENUE GENERATION

- G would be able to make “display uses” of OOP books (unless RH said no)
 - Up to 20% of OOP book contents could be displayed in response to searches
 - Whole of OOP books to be available through public access terminals in public libraries, higher ed
- Revenue-generation from 4 sources for OOP:
 - certain ads run vs. queries yielding book results
 - sale of books to individuals “in the cloud”
 - institutional subscriptions fees to OOP book database
 - print-out fees from public access terminals

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GBS SCHEDULE

- Original settlement announced 10/28/08
- First round of objections/opt-outs due 9/4/09
 - @400 submissions, @95% critical
 - Anecdotal evidence suggesting large # of opt-outs
- Then DOJ recommended vs. settlement, fairness hearing postponed
- Amended settlement filed 11/13/09
- New round of objections/opt-outs due 1/28/10
- Fairness hearing scheduled 1/18/10

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© DYSFUNCTIONS AS CAUSE

- SCT's 11th A jurisprudence: no damage actions can be brought vs. state entities
 - U Michigan, UC, U Wisconsin are among G's library partners
- Overly narrow, outdated library & archive exceptions
 - Should at least be able to digitize to preserve, make fair uses
- Congress unable (so far) to pass orphan works legislation
 - Problem largely due to © term extensions
 - All books published before 1953 would be in PD by now
 - Many books published before 1978 also if © not renewed
- © office renewal records not automated, so can't tell which works from '23-'63 are in public domain

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PROCEDURAL DYSFUNCTIONS

- Statutory damage risks
 - G facing potential liability of \$3.6 trillion because of per-work liability up to \$150K, even though no actual damages to RHs from scanning books, making snippets available
- Registration as jurisdictional requirement for US works
 - Affected scope of settlement—only registered US works are eligible for “benefits” of the settlement
 - Muchnick v. Elsevier case pending before SCT
 - Authors Guild did not try to get anything for unregistered works
- Litigation is expensive, so settlement creates private law
 - Safe harbors for G, releases of liability for past and future acts
 - Only actual damages recoverable
 - Compulsory arbitration of most disputes

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OWNERSHIP DYSFUNCTIONS

- Disputes over who owns rights in e-books
 - Random House v. Rosetta interpreted assignment to publishers of rights to publish the work “in book form” did not extend to e-book rights
 - Publishers contest this; one reason for separate publisher lawsuit vs. G (so AG can’t get 2d ruling that authors own them)
 - Settlement adopts a revenue split model:
 - 65-35 split in favor of authors as to pre-1987 works
 - 50-50 split for works after 1987
- Reversion policies not working well, so settlement establishes procedure to ensure reversions happen
- Formalistic termination-of-transfer provisions also contribute to ownership uncertainties

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WHY LIKE © LEGISLATION?

- Class action would bind all © owners in books
 - Unless opt-out, but G will still scan your books, make non-display uses even if you do
- Solution to orphan works problem, at least for G
 - “fiduciary” to control funds from unclaimed works
- Grant of compulsory license to in-© works
- Determining author/publisher splits as to e-book rights, reversion procedures
- New formalities regime
- Non-consumptive research regime
- Safe harbors for G, for libraries
- Damage limitations, releases from liability
- Compulsory arbitration regime

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SHOULD COURT APPROVE?

- Pragmatic arguments for approving settlement:
 - Overcomes transaction costs of rights clearances for digitization of books
 - More books will be more widely available
 - More \$ to rights holders
 - Reasons to think G will price cheaply, at least initially
 - Compromises on many issues
 - Perhaps provides better terms than would prevail in Congress
- Many risks, such as price gouging for institutional subscriptions, inadequate privacy protections, entrench Google monopoly in search, control book ecosystem
- Is this really a proper use of class action procedure?

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IMPLICATIONS OF GBSS

- Orphan works legislation less likely
 - Will skew orphan works bill toward paid uses of orphans if did pass; CO recommended vs. this
- Likely to lead to more class action lawsuits in © cases, efforts to achieve legislative-like resolution of disputed issues
- G can use settlement as leverage with rights holders of © in other types of works
- Why not use class action to achieve health care reform? What do we need a legislature for anyway since it is so dysfunctional? What does this mean for democracy?

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