

HOW FAIR IS THE GOOGLE BOOK SEARCH SETTLEMENT?

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FAIR TO WHOM?

- ? before Judge Chin is whether the amended settlement is “fair, reasonable, and adequate” as to the class that would be bound by its approval
 - As to non-Anglophone RHs, the answer is surely no
 - Very difficult to know if they are in or out because class membership depends on whether their books were registered with US © Office or had a place of publication that includes UK, Canada, Australia
 - Settlement agreement was never translated to other languages
 - Notices sent in other languages incoherent, many didn't get
 - Only acceptable if deal is opt-in, rather than compulsory license from which it's possible to opt-out
 - Germany: ASA “destroys the landscape of world © law”

MOTIVATIONS TO SETTLE

- Litigation is expensive, takes years to resolve definitively
- Outcome in doubt because scanning may be fair use, but maybe not
- Unclear whether class could be certified
 - if class was not certified, G could take objecting authors' books out of the corpus, and reduce its exposure
- G facing very big damage exposure, possible injunction or order to destroy its scans of in-© works if class certified & lost fair use claim
- AAP very worried about scanning-as-fair-use precedent
- Settlement created an opportunity for a “win-win” because G willing to share revenue streams with authors & publishers
 - Opportunity for monopoly rents because settlement would give G a license to all books in © that none of its competitors could get
- Settlement also gave AG & AAP chance to reach a compromise about digital rights ownership for ambiguous publishing contracts
 - Appendix A: 65% to authors for pre-87 books, 50-50 split for post-86 books

SETTLEMENT BENEFITS

- Remove a dark cloud of liability from the heads of G and cooperating libraries
- Would allow more public access to more books than if G had not undertaken to make GBS at all or if only public domain books
 - ISD for universities, public access terminals in public libraries
 - Up to 20% of contents of out-of-print (OOP) books could be viewed through Internet searches (unless RH says no)
- Revenues would flow to authors and publishers who register with the BRR or sign up through G's Partner Program
- Authors and publishers who do not want their books in GBS can ask for removal or instruct G not to scan
- New business models, choices for consumers
- Commitment to provide access to reading-disabled
- Non-consumptive research on corpus @ 2 sites
- Libraries could better serve patrons for whom if texts are not digital, as if they don't exist

OBJECTIONS TO GBSS

- @ 400 submissions to Judge Chin on GBSS 1.0
 - 60 new ones on GBSS 2.0
- Some support (@ 40)
 - GBS library partners
 - Civil rights, disabilities groups
 - Some academics who want to do non-consumptive research
- Overwhelming majority object or oppose
 - Antitrust, class action defects
 - States over unclaimed fund provisions
 - France, Germany, foreign RH groups: violates treaties, inadequate notice, anti-© (supposed to get permission first)
 - Authors: anti-©, unfair terms, inadequate compensation
 - Some publishers say unfair burden on them to correct errors

ATTACHMENT A

- One of the most important, but least commented on, parts of GBSS is Att. A
- Addresses big dispute between authors & publishers over who owns e-book rights (new use not foreseen under original K)
 - *Random House v. Rosetta Books*: “to publish the work in book form” is a limited grant; e-book rights remain with authors
 - Publishers dispute e-book rights with authors
 - Compromise in Att. A: 65% for authors of pre-87 books; 50-50 split for post-86 books
- DOJ: this gives G a huge advantage over others

ACADEMIC AUTHOR OBJ'S

- 2 letters submitted to Judge Chin on behalf of academic authors, one in Sept for 65, one in Jan for 150, objecting to GBSS:
 - Risks of price gouging for ISD because of G's de facto monopoly over corpus of millions of OOP books
 - Need for backup plan for research library access
 - Inadequate privacy protections
 - Censorship risks
 - Wrong solution to the orphan book problem
 - Publisher plaintiffs may be undermining the deal

PRICE GOUGING RISK

- Prices of ISD to be set based on: # of books in the corpus, services provided, & prices of comparable products & services
 - More books, more services = higher prices
 - There are NO comparable products, services, & cannot be unless Congress gives others same right “class” would give G
- Prices may be modest at first to get institutions to subscribe, but history suggests will rise over time to supra-competitive levels, as journal prices have done
- Only check on price-gouging is byzantinely complicated arbitration process in U Michigan side agreement
 - Libraries can complain to UM that prices they are being charged are excessive; UM may initiate arbitration, but will it?
 - No criteria for restraining price, so how can this be effective?

TOO BIG TO FAIL

- Let's assume that GBSS is approved in modified form and works as intended for 10-15 years
 - Libraries, researchers become dependent on it, get rid of books since no longer necessary
 - G could decide to sell the corpus or at least institutional subscriptions to anyone w/o consent
 - G could go out of business, decide ISD is not a good business
 - What happens then?
 - Third party provider could take over, but what if no one willing?
 - Need for public-regarding backup plan (e.g., library partners can get together and reconstruct the corpus and make it available)
- What if the servers go down?
 - “404 Google Books not found”
 - Hackers may find GBS an attractive target for attacks

USER PRIVACY

- Libraries who supplied the books to G have longstanding policies of respecting patron privacy as to books
 - Many librarians would take a bullet (metaphorically) before violating user privacy
- Many provisions in the GBSS call for monitoring of user behaviors, including reading books in the cloud
- G has thus far been unwilling to make significant commitments about respecting GBS user privacy
 - even though willing to do so with other services, such as Google Health
 - GBSS 2.0 says G won't give personal data to BRR w/o legal process
 - Privacy Author Objection gives examples of what G should do

CENSORSHIP RISKS

- Google has power under the settlement to remove books from the GBS corpus for editorial or non-editorial reasons
 - Some governments might object to books, ask G to remove; G has bowed to such pressure before
- Google only obliged to make available 85% of the books eligible for the ISD
 - Would be as though the books left out never existed
- Settlement gives Google power to alter the texts of books with permission of the rights holder or the unclaimed work fiduciary

ORPHAN BOOKS

- Google will have a monopoly on “orphan books”
 - GBSS would give G the right to scan and make all OOP books available (unless RH says no)
 - G able to monetize them through sales of books “in the cloud,” institutional subscriptions, ads next to displays + future revenue models
 - BRR can only license uses of books whose © owners have registered with it
 - Financial Times has estimated that 2.8-5 M of the 32 M U.S. in-© books are orphans
 - Likely to make up big part of ISD
 - Would take act of Congress to give rights to others

ORPHAN FUNDS

- GBSS 1.0 would have allowed funds from unclaimed books to be paid out to BRR-registered rights holders after 5 years
 - Blatant conflict of interest among class members
 - Inconsistent with state unclaimed funds laws
- GBSS 2.0 envisions appointment of unclaimed work “fiduciary” (UWF) to handle this
 - Use funds to find RHs, sign them up
 - After 10 years, pay out \$\$ to literacy charities

UWF POWERS

- Can switch default from “no display” to “display” but not the reverse
 - This means unclaimed books could be commercialized even if they are in-print!
 - Need to sign up with BRR to ensure this default isn’t switched
- Can advise about pricing bins, but no control over prices of individual books or ISD pricing
- Can veto discounts, but not recommend them
- Cannot make books available on open access basis

WRONG SOLUTION

- Congress, not private parties, should address the orphan book problem
- Inconceivable that Congress would give one company, Google, a compulsory license of this breadth
- If RHs can't be found after 10 years of looking for them, books should either be available for all to use freely or at least be available for licensing by more than G
- GBSS would interfere with legislative prerogatives by setting up escrow regime

PUBLISHER EXITS

- G will not make full corpus of 12M (or eventual 50M) books available to the public
 - In-print books not in ISD, available through Google Editions
 - ½ of books in GBS corpus are foreign books from research libraries, most of which are out of GBSS 2.0
 - Many publishers are opting out of the settlement
 - Many, including AAP litigants, excluding OOP books from GBS
 - If settlement is such a good deal, why aren't they staying in?
 - Any rights holder can ask for non-display, removal, or no scan
 - G reserves right to remove up to 15% of books from corpus for editorial or non-editorial reasons
 - Orphan books may end up as the bulk of the corpus
- Universal digital library—“a library to last forever”—unlikely to be achieved through the GBS settlement

GOOGLE'S GLOBAL PLAY

- If G can get US court to approve a settlement that includes a license to in-© books, it can ship books to US, scan them there, grow the corpus to 50M books
- Only US institutions would initially be able to get access to the corpus under GBSS 2.0
 - Court's power to approve license to G is limited to US
- G believes other nations won't want to be left behind
 - G would like to make GBS available worldwide
 - AAP and AG have been wooing foreign RHs & collecting societies re benefits of GBS, with some success in UK, Canada, Australia
 - G: "Just give us a © waiver, and we'd be happy to oblige"

CONCLUSION

- So is GBSS “fair”?
 - To Google? More than fair
 - AG, AAP, & library partners seem to believe it’s fair to them, and say it’s fair to everybody else
 - Most others think it’s unfair or not fair enough, although they differ considerably about why
 - Not fair use of class action settlement process
- Yet, it would be sad—perhaps even tragic—if the chance to create a tremendous public good of a digital library of millions of books from major research libraries is not fulfilled