



The Google Book Settlement: Real Magic or a Trick?

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Paul Courant has made a pragmatic argument in favor of the proposed settlement of the Authors Guild v. Google lawsuit that charged Google with copyright infringement for digitizing millions of books for its Google Book Search (GBS) initiative.

I agree with Courant that it is socially desirable for millions of out-of-print books in the collections of major research libraries, such as University of Michigan's of which he is head librarian, to be digitized and made more widely accessible. And, indeed the approval

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of the settlement would bring about greater access to these books.

Courant, like other proponents of the proposed settlement announced last October 28, cast it as a win-win-win: for Google, the public, and rights holders who stand to benefit from Google's commercialization of books in the GBS corpus if they sign up with the Google Partner Program or the new collecting society, the Book Rights Registry (BRR), that would be established upon approval of the settlement. However, a closer examination of the terms of the proposed settlement casts the deal in a far different and more troubling light.

There are three main problems with the settlement. First, there are insufficient checks and balances in the settlement agreement to prevent abuses that seem likely to manifest

themselves over time. Second, this settlement is deeply unfair to tens, if not hundreds, of thousands of members of the class on whose behalf the plaintiffs in the Authors Guild case purport to be acting. The third which I won't address here are the antitrust objections of the Department of Justice (for which Courant proposes a partial fix).

I DON'T BELIEVE IN MAGIC

Courant professes to be disinterested in legal process issues. At the "D is for Digitize" conference at New York Law School on October 9, he characterized the GBS class action settlement as "a magic trick." For Google to get a license to every in-copyright book on the planet for a mere \$125 million—\$45.5 million of which will go to the

lawyers representing the author and publisher subclasses, and \$34.5 million to fund BRR's initial operations—by settling this lawsuit does seem like 'magic.' Google plans to set aside only \$45 million to pay registered rights holders \$60 each for scanning their in-copyright books. (Contrast this sum with the \$1.65 billion Google paid to acquire YouTube which at the time featured fewer than three million amateur videos.)

But the law is not magic and magic is not the law. The GBS settlement contravenes core rule of law principles of our society. To accomplish such an extraordinarily comprehensive restructuring of the future market for digitized books requires legislative action. If the GBS deal really is the complete win-win its proponents believe, then it shouldn't be difficult for those who negotiated the deal to persuade Congress to bless it.

INSUFFICIENT CHECKS AND BALANCES

The most serious and widely shared concern expressed by academic author and library commentators on the GBS settlement is the risk that GBS institutional license fees will rise to exorbitant levels because the

proposed settlement lacks meaningful constraints on price hikes.

The settlement agreement establishes four criteria for determining prices of institutional subscriptions: the number of books available, the quality of the scans, features offered as part of the subscription, and prices of similar products and services available from third parties. The more books Google scans and the more features it adds, the more justification it will have to raise prices. Google's chief spokesman for GBS, Dan Clancy, has publicly stated that there are no comparable products or services to the GBS institutional subscriptions, so this too will not serve as a check on price hikes. And it is doubtful that a similar product or service can ever be developed because no other firm can realistically get a comparably broad (let alone, inexpensive) license to in-copyright books as that which Google would get from the settling class.

Google founder Sergey Brin has said that "anyone can do what we did." This is misleading because GBS began as a scan-to-index project—for which there was, at least before this settlement, a plausible fair use defense—that has now morphed into a joint

venture to sell books. The DOJ rejected the argument that "a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement. Even if there were reasons to think that history could repeat itself in this unlikely fashion, it would scarcely be sound policy to encourage deliberate copyright violations and additional litigation as a means of obtaining approval for licensing provisions that could otherwise not be negotiated lawfully."¹

Although institutional subscription prices may be quite modest initially in order to attract customers, my letter to the court on behalf of sixty-five academic authors expressed concern that "ten, twenty, thirty or more years from now, when institutions have become ever more dependent on GBS subscriptions and have consequently shed books from their physical collections, and indeed when electronic publishing begins to supplant traditional methods of publication for some texts, the temptation to raise prices to excessive levels will be very high."² Universities have suffered gravely from exorbitant price hikes of

scholarly journals and bundling practices of for-profit publishers. Major library associations have told the court they perceive GBS subscriptions to pose similar risks.

Courant's recent essay downplayed the risk of price-gouging. Yet, he must once have believed that this risk was quite real. Otherwise, the University of Michigan would not have negotiated for an arbitration procedure to challenge excessive pricing in its May 2009 agreement with Google. This procedure, which can be invoked by any university library, not just by Michigan, is truly byzantine, even Kafkaesque, in its complexity and limitations (e.g., there is no right to appeal). Yet, even ignoring its opacity, the fundamental problem is that the settlement agreement contains no criteria for meaningful limitations on price hikes. It is, therefore, unlikely that the arbitration procedure in the Google-Michigan agreement will prove to be more than a symbolic gesture.

Courant agreed with me at the "D is for Digitize" conference that libraries would be over a barrel with Google insofar as they shed physical books from their collection as unneeded after GBS becomes available. Books take up a lot of valuable real estate in libraries,

and they are also costly to maintain and process. So the temptation to get rid of books will be high once people take for granted that GBS is available.

Even if one believes that Google will not price-gouge any time soon, it is important to realize that Google cannot set prices alone; it must do so in conjunction with the BRR, which will be dominated by trade publishers and professional writers who can be expected to press for ever higher prices.

Ten or twenty years from now, moreover, Google may lose interest in GBS and sell the corpus and its license to in-copyright books to the highest bidder. There is nothing in the settlement agreement to stop the highest bidder from raising prices to exorbitant levels. And presumably the only reason to bid on the corpus would be to extract more rents than Google had been doing. Nor does the agreement seem to preclude Google or its successor from shutting down the GBS service or destroying the GBS corpus. It would be tragic for this substantial public good to fall into the wrong hands or be destroyed.

The settlement agreement is also disturbingly silent about user privacy issues. It calls

for lots of monitoring of individual uses of books, but says nothing about what can or will be done with the data collected. Linguist Geoff Nunberg has characterized GBS as a "disaster for scholars" because its metadata (name of the book, the author, etc.) is pervasively erroneous. Also troubling is the right Google has to remove up to 15 percent of the books from the corpus for editorial or non-editorial reasons. (When Google wants to appease China, what will happen to GBS books critical of the Chinese government?)

The settlement will also erode fair use and first sale rights. Access to GBS books at public access terminals may be free, but printing out pages will require paying a tax to BRR, even though photocopying those pages from a physical book would be fair use. Although consumers can purchase out-of-print books from GBS, these books, unlike those bought for the Kindle, can merely be accessed in the cloud. GBS books cannot be lent or freely annotated in the same way real books can be. I could go on, but you get the point. The devil in this agreement lies in its details which Courant and other proponents ignore.

UNFAIRNESS TO CLASS MEMBERS

Foreign rights holders would be seriously harmed if the October 28 settlement were approved as is, so it is no wonder that the governments of France and Germany, as well as dozens of publishers from Denmark, the Netherlands, Sweden, Japan, and New Zealand, are among the hundreds of objectors to the settlement.

Among their most serious concerns is that the settlement gives Google the right to make unilateral determinations about whether a book is in- or out-of-print by looking at various U.S.-based information resources. If Google concludes that a book is out-of-print, it automatically has the right to commercialize the book by selling ads against its contents, selling individual copies, and including the book in institutional subscriptions. Google will keep 37 percent of these revenues for itself. If foreign rights holders wish to contest an out-of-print determination or ask Google not to commercialize the book, they will have to provide significant documentation to accomplish these objectives. Courant is right that the settlement eases transactions costs for Google, but it imposes significant

transaction costs on rights holders, especially on foreigners.

Consider also that if foreign rights holders want to share in GBS revenues generated by their books, they must sign up either as a Google partner or with BRR, get a U.S. tax ID number, and pay U.S. taxes on Google's commercializations of their books. This may not be a significant hardship for big publishers like Bertelsmann, but for individual author-rights holders, it may be very burdensome. One Australian objector estimated that it would cost almost \$300 to get a U.S. tax ID in order to qualify for the \$60 payout available from BRR for the scanning of an Australian author's book.

Nor are serious hardships imposed only on foreign rights holders. Small and specialized American publishers, as well as hundreds of individual American authors—including Harold Bloom and Jonathan Lethem—objected to the settlement as unfair to them. Google has misclassified some of their books as out-of-print, and they feel burdened by the paperwork that must be undertaken to overcome Google's default settings. Some authors object also to the loss of control over their books and

worry about how their books will be presented online (e.g., what kinds of ads will run along side their texts). Some also worry that BRR will spend a high proportion of the income from Google on its own operations, leaving little to pay out to rights holders.

Consider also that Google has the right to negotiate future revenue models with BRR. Suppose Google decided it wanted to license translations of out-of-print books or make translations with its automatic translation tools. There is nothing in the settlement agreement to stop Google from doing this, or even licensing motion picture versions of GBS books, as long as the BRR agrees.

Other victims of the October 28 settlement agreement include those who own rights in 'orphan' books—that is, books whose copyright owner cannot be found through a reasonably diligent search. The settlement directs BRR to hold onto orphan book revenues for five years after which BRR is to pay the monies to registered rights holders, a pure windfall for them. The DOJ observed that this would create a conflict of interest between registered and unregistered rights holders, contravening basic norms of class action

lawsuits: that all members of the class must be treated fairly. Several states claim that this windfall payment scheme is inconsistent with their unclaimed funds laws.

CONCLUSION

The October 28 settlement agreement was withdrawn a week after the DOJ recommended against its approval. An amended agreement is expected to be filed with the court on November 9, and the parties' lawyers have asked the judge to hold the hearing about approval by the end of the year.

It is too early to know whether the amended agreement will be substantively different enough from the October 28 version to respond effectively to the wide range of concerns raised in the objection submissions. Based on public statements made by Google in recent weeks, one gets the impression that the lawyers are only tweaking a few details (e.g., giving one or two foreign rights holders a seat on the BRR board and directing orphan work revenues to be spent on trying to locate the orphans' 'parents'). Courant expresses hope that amendments to the GBS deal will allow others besides Google to get a license

to make orphan books available; I agree that this would ease some competition policy concerns about the deal, but I am not betting this will be part of the new deal.

Even if the amended settlement accommodated core objections, I question whether the class action settlement process can be used to achieve such a massive restructuring of the market for digital books as the GBS deal would bring about. Typically such settlements resolve only the specific dispute between the parties after the judge has assessed the merits of the lawsuit and determined that the class representatives and their lawyers adequately represented the interests of the class as a whole. The broader the settlement's scope, the greater the size of the class, the more forward-looking are its terms, and the more the agreement releases the defendant from liability for future conduct, especially conduct different in kind from the issue in litigation, the less likely it is that a judge will or should approve it. The GBS deal is troublesome on all of these grounds, so the parties should be seeking a legislative, not a judicial, blessing for it.

Come to think of it, Courant may be right in perceiving Google to be working some

magic with the GBS deal: If we all concentrate intensely on the immediate public access benefits of the deal, maybe we'll be distracted enough not to notice the sleight of hand in the background.

Letters commenting on this piece or others may be submitted at <http://www.bepress.com/cgi/submit.cgi?context=ev>.

NOTES

1. U.S. Dept. of Justice (2009) "Statement of Interest Regarding the Proposed Settlement." Authors Guild, Inc. v. Google, Inc. Available at <http://thepublicindex.org/docs/letters/usa.pdf>. (Case 1:05-cv-08136-DC Document 720. Filed 9/18/2009.)
2. Samuelson, Pamela (2009) "Letter to Judge Denny Chin, on behalf of academic author objectors to the Google Book Search Settlement," Authors Guild v. Google Inc. Available at: <http://thepublicindex.org/docs/letters/samuelson.pdf>. (Case 1:05-cv-08136-DC. Filed 9/3/2009.)

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