

GOOGLE BOOK SETTLEMENT: BRILLIANT BUT EVIL?

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OVERVIEW

- Google Book Search Project, the lawsuit it provoked, & reasons for settling it
- Core parts of the proposed settlement
- Why is the settlement so brilliant?
- Why does it seem evil?
- What choices does the judge have about the settlement, & what is he likely to do?
- What happens then?

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BOOK SEARCH PROJECT

- Book Search began in 2004
- It now includes @2M books scanned with authorization under the Google Partner Program
- It also includes millions of books from university research library collections
 - Michigan & UC, in part because of large collections & likely 11th A immunity from damage awards
- @ 12M books now in GBS corpus
- Varying estimates of eventual size of corpus
 - Ranging from @20M to 174M

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GBS PRE-SETTLEMENT

- For @2M books in the public domain, G makes whole book available for download in pdf (with G's watermark)
- As to books in ©, G now makes “snippets” available
 - It has not run ads vs. the snippets so far, but wants to
 - It provides links so users could buy relevant books from Amazon or find them in libraries
- G also willing to remove book of GBS corpus if © owner so requests
- @2M in-print books in partner program
 - © owners can negotiate with G about how much of their books to make available, with revenue-sharing arrangements
- GBS settlement mainly about 8M out-of-print books
 - At least 20% are likely “orphans” whose © owner can't readily be found, maybe many more

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AUTHORS GUILD v. GOOGLE

- In Sept. 2005, AG + 3 members sued G for © infringement for scanning books, storing and processing the scanned books, & displaying snippets
- Class action brought on behalf of all rights holders whose books were scanned from U Michigan library
- G raised fair use defense
- 5 publishers brought similar suit vs. G a month later; not initially a class action
- Both lawsuits are actually in early stages because parties negotiated a settlement quite early on; spent 2 ½ years drafting fine details
- Initial settlement was announced Oct 28, 2008

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MOTIVATIONS TO SETTLE

- Litigation is expensive, takes years to resolve definitively
- Outcome in doubt because dispute over fair use
- Unclear whether class could be certified
 - if class not certified, G would take objecting authors' books out of the repository; exposure much smaller than with class action
- G facing very big damage exposure, possible injunction or order to destroy its scans of in-© works
- G had better technology & ideas about how to create new markets for books in digital environment than AAP, AG
- Settlement created an opportunity for a “win-win” if G willing to share revenue streams with AAP, AG
 - Oh, and incidentally to give G a license to all books in © that none of its competitors could get

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CORE OF SETTLEMENT

- G to provide \$45M to compensate © owners as to books already scanned (\$60 per book)
- G to fund creation of a new collecting society, the Book Rights Registry, for \$34.5M
- Authors and publishers to sign up with BRR to share in any new revenues from G (BRR gets 63% for © owners, G gets 37%)
- 3 initial services:
 - display parts of books in response to user queries (ads run vs. queries)
 - sale of books to individuals (accessible only in the cloud)
 - sale of subscriptions to institutions
- BRR can authorize G to adopt additional revenue models
- G free to scan all books within the settlement, make non-display uses of them
- Class action lawyers get \$45.5 M in fees

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DEFAULT RULES OF GBS

- G will determine if book is in or out of print
- If in-print, default is no-display of contents
 - © owner must opt in to display uses
 - Most in-print © owners likely to sign up for GPP
- If OOP, default is display uses OK (including all commercializations)
 - Display of 20% of contents for preview uses
 - Registered © owner can opt out, insist on no-display
- © owner can ask for removal of books from corpus
 - But “remove” only means these books are dark-archived
 - Right to remove will expire in 2011

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WHAT ABOUT LIBRARIES?

- Those who have contributed books to GBS corpus will get back from G a digital copy of those books
 - Settlement means they will no longer be risking liability for having contributed books to G or taking back digital copy
- Public libraries will be given 1 terminal each for accessing OOP book corpus, but pay for print-outs
- Many research libraries will be institutional subscribers to GBS; their users will be able to view whole books, able to print out small # of pages (but fee for printing)
- No special deal for public school libraries, gov't libraries, other libraries; institutional subscriptions available to them too, also discipline-specific subscriptions to co's
- G can give discounts to libraries that supply them with books for scanning

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BENEFITS

- Removes a dark cloud of liability from the heads of G and cooperating libraries
- Will lead to more public access to more books than if G had not undertaken to make GBS at all or if G restricted GBS to public domain books
 - Likely to show that "orphan" books have real value
- Revenues will flow to authors and publishers who register with the BRR
- Those authors and publishers who do not want their books in GBS can ask for removal
- New business models, choices for consumers
- Commitment to provide access to reading-disabled
- Non-consumptive research on corpus possible @ 2 sites

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CLASS ACTION PROCESS

- Provisional approval of settlement class for purposes of giving notice to class members
- Next 6 months, parties must send notice of settlement to class members, giving them a chance to opt-out, object, or comment
- Settling parties respond to objections
- Judge holds a hearing to determine whether the settlement is “fair, reasonable, & adequate” to class members
- GBS fairness hearing was held Feb. 18, 2010
- Decision is expected any day now

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WHY IS GBSS BRILLIANT?

- Ingenious way to deal with orphan works problem
- Addresses the “who owns e-book rights” problem
- Privileges non-display uses & allows non-consumptive research
- Sets up dispute resolution without statutory damages or injunctions
- Establishes safe harbors for future conduct
- Clever way to facilitate collusive pricing by publishers

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GBS AS OW SOLUTION

- Many books, especially older ones, are in-© but must incur high transactions costs to locate owner, seek rights clearance for book-scanning
- GBS: let's generate \$ from commercializing the books, give 63% to BRR, & let it use part of this \$ to look for rights holders
 - When © owners located, they will likely sign up to get \$\$\$; no need to get advance permission
 - G only commercializing OOP books w/o permission
- Initial plan was for \$ from orphan books to be paid out to BRR rights holders after 5 years
 - DOJ objected, so now plan is to escrow for 10 years, then give away to charities

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WHO OWNS e-BOOK RIGHTS?

- Publishers & authors deeply dispute who owns rights to authorize e-books
 - New & unforeseen use not contemplated when parties contracted
 - Disputes over scope of contract language
 - Lost contracts means uncertainty
- *Random House v. Rosetta*: grant to publisher of rights to publish works “in book form” was a limited grant; OK for authors to license others to make e-books
- Contributes to the orphan work problem
 - Even if publisher agrees, does author actually hold rights?
- Att. A of GBSS addresses where K ambiguous:
 - 65% to author if pre-1987, 35% to publisher
 - 50-50 split for post-1986 books

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NON-DISPLAY USES

- GBSS will allow G to make “non-display” uses of books in GBS corpus
 - Improve search engine technologies, develop new products & services (e.g., automatic translation tools)
- GBSS envisions 2 universities as host sites for GBS corpus to allow “non-consumptive research” to be carried out by non-profit educational researchers who submit proposal (e.g., linguist wants to study word usage over time through corpus of books) in advance

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DISPUTES & SAFE HARBORS

- Disputes about whether book is in-© or in public domain, who owns ©, what revenue split should be, etc. must be resolved through mandatory arbitration under BRR umbrella for any rights holder who is within the GBSS class
- G gets a safe harbor from liability if it acted in good faith in determining © status, who was owner, whether book is in-print, etc.

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WHY MIGHT GBSS BE EVIL?

@500 submissions to the Court on the settlement, > than 90% critical of it:

- Antitrust problems with GBSS
- International rights holder objections
- US author & author group objections
- G's competitors' objections
- PA & CT: violates unclaimed funds laws
- Abuse of class action process

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ANTITRUST ISSUES

- Price fixing
 - G as designated sales agent for class of © owners & algorithmic pricing coordination risks for OOP books
 - 63/37 split fixed for all OOP books
 - Limits on discount provisions = price-fixing
- Horizontal agreement because AAP and AG dreamed up the scheme and brought it to G for endorsement; price fixing will help them
- Att. A will give G an advantage that no other competitor can get
 - Solves the digital rights ownership issues on which publishers and authors disagree

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EXCLUSIVITY?

- GBSS states that it is non-exclusive
 - Sort of true, sort of not true
- Any RH can make a deal with any of G's competitors for their in-© books
- But approval of GBSS will give G, and G alone, a license to make non-display uses of every book in-© within the settlement
- GBSS will also give G a license to commercialize all OOP books (unless © owner says no)
- Rivals cannot get the benefit of this license, large transaction costs for them cf. G to go out and license books one-by-one
- Comprehensive ISD depends on inclusion of orphan books
 - no one but G will have a license broad enough to offer such a deal
 - De facto exclusivity, as DOJ has recognized in both submissions
 - ISD is where AG & AAP thinks “the big money” is

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PRICE GOUGING RISK

- Prices of ISD to be set based on: # of books in the corpus, services provided, & prices of comparable products & services
 - But there are NO comparable products, services; CAN'T BE!
- Prices likely to be modest at first to get institutions to subscribe, but history suggests will rise over time to supra-competitive levels (analogy to journal prices)
- Only check on this is complicated arbitration process in Michigan side agreement
 - Libraries can complain to UM that prices they are being charged are excessive, and if UM agrees to initiate arbitration, it can
- 3 major library ass'ns filed briefs with the court to express concern about this risk

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INTERNATIONAL OBJECTIONS

- France & Germany + publishers & author groups from many countries objected to initial class definition
 - Would have given G a license to all in-© books in the world
 - If books not commercially available in the US, treated as OOP, so G can commercialize
- Class narrowed to Canadian, UK, Australian © owners + US-registered © owners
 - But many foreign books are still affected
- Not adequately represented during negotiations
- Inadequate notice because GBSS not translated into other languages
- Berne Convention violation

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AUTHOR OBJECTIONS

- I filed objections on behalf of academic authors about several provisions inconsistent with academic norms
- Authors of books on sensitive subjects objected because of insufficient privacy protections
- Writers Guild, Sci Fi Writers, among others, objected to unfairness of terms for authors

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COMPETITOR OBJECTIONS

- Yahoo!, Microsoft, Open Book Alliance: GBSS would give G an unfair advantage because non-display uses of books to fine-tune search engine technologies to satisfy “tail” queries
 - Risk of entrenching G’s search monopoly
 - Risk that G would leverage this monopoly to other realms
- Amazon.com: we only scan books with permission; G should get permission too; abuse of class action

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DOJ: ABUSE OF CLASS ACTION

- Class counsel has obligation to litigate the claims they brought vs. G or to settle THOSE claims
- Complaint alleges infringement for scanning for purposes of snippet-providing
 - GBSS goes far beyond this to address issues that were not in litigation, no plausible fair use defense for selling books or ISD licensing
 - Would give G a benefit that it could get neither from winning the litigation nor from private negotiations
- GBSS does not further the purposes of ©
 - © norm that must ask permission first
- DOJ’s conclusion: judge lacks the power to approve this settlement because it is “a bridge too far”

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GBSS: PRIVATE LEGISLATION?

- Congress, not private parties, should address the orphan book problem
- Inconceivable that Congress would give one company a compulsory license of this breadth
- If © owners can't be found after 10 years, books should either be available for all to use freely or at least be available for licensing by more than G
 - Free use endorsed by © office, in bills in Congress
- Approval of GBSS would interfere with legislative prerogatives by setting up escrow regime
- Important to universities because substantial part of the ISD will be orphan books
 - If open access after 10 years, ISD prices will fall
 - Under the escrow regime of GBSS, ISD prices would not fall

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CLASS ACTION AS © REFORM?

- GBSS is using the existence of a genuine dispute on one narrow issue to restructure a market and bind absent class members to a far-reaching commercial transaction through the class action mechanism
- Will encourage more uses of class action lawsuits to achieve © reform
 - Even if GBSS was relatively benign, next class action lawsuit may be much less so (e.g., sue small maker of DVRs, settle with tech mandate binding class)

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LEGISLATION v. SETTLEMENT?

- No clear criteria for when a matter is legislative in nature cf. suitable for litigation and settlement
- Clear that sometimes matters start in litigation and get resolved through legislation
 - ClearPlay exception for “family-friendly” DVD viewing
- Legislation is more appropriate than class action settlement when:
 - 1) the larger the # of people in the class
 - 2) class interests are diverse
 - 3) the settlement goes well beyond the matter in litigation
 - 4) the externalities for third parties are large

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WHAT WILL JUDGE DO?

- 3 main options:
 - Approve GBSS as is (unlikely)
 - Disapprove it as an abuse of class action (quite likely given DOJ's position)
 - Inadequate notice to the class; too many conflicting interests among class members; etc.
 - Identify # of troubling aspects of GBSS and indicate an unwillingness to settle unless they are appropriately addressed (possible)

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NEXT STEPS?

- Likely to be an appeal, whatever Judge Chin rules
- Litigation may resume, but parties cannot be looking forward to this
- Parties may try to negotiate further changes to the proposed settlement
 - DOJ urged an opt-in vs. opt-out approach
 - Fairer to class, more consistent with © norms
 - But opt-in would exclude the orphans & settlement is mainly valuable to G because of them
- Seek legislation to approve?

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CONCLUSION

- GBS settlement is one of the most significant developments in © & class actions for decades
- Even if settlement isn't approved, GBS has dramatically changed the landscape in the US & abroad
- Many aspects of the settlement agreement are brilliant
- But other aspects are deeply troubling, maybe even evil
- Is it possible to get the good parts of GBS while averting the evil?

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