

# GOOGLE BOOK SEARCH & THE FUTURE OF BOOKS IN CYBERSPACE

Pamela Samuelson, Berkeley Law  
School

IP Scholarship Seminar, U Mich. LS.  
Feb. 24, 2010

## INITIAL REACTIONS TO GBSS

- Like many of you, I was initially OK with the proposed settlement
- The pragmatic argument in favor seems pretty strong
  - Millions of books would become available to the public
  - Authors & publishers would get paid for their works
  - Google could recoup its costs by commercializing the books
  - We expect Google to price things low because that's what they've done so far so library fears seemed exaggerated
  - Civil rights & disabilities groups spoke favorably about it, as have many of Google's library partners such as UM
- I thought that critics such as the Internet Archive were exaggerating the risks
- Then I read the agreement, and that's when I started to get concerned

Feb. 24, 2010

ip sch'p seminar

2

## DEAD SOULS

- My first article on this subject was “The Dead Souls of the Google Book Settlement”
- Gogol’s book “Dead Souls” imagined Chichikov as going around Russian countryside buying up “dead souls” from Russian landowners, planned to get loan on portfolio
  - In Gogol’s story, the scheme falls apart and Chichikov is run out of town
- In Google’s story, the “dead souls” (i.e., the orphan books) will be commercialized, & G will make significant revenues from them
  - Privately negotiated compulsory license for G

Feb. 24, 2010

ip sch’p seminar

3

## NEXT STEPS

- Letter to Judge Chin asking for extension of time
  - Few academics understand it, little chance to deliberate
  - Reason for concern because some terms diverged from academic norms
- Meetings with Google and librarians
- UC Academic Council letter
- My objection letters: condition approval on modifications that make it more consistent with academic norms
- After Sept. filings, I sought to map the space
  - Struck by the stark contrasts between proponents and critics
  - Article aimed at articulating pros and cons so that I and others could think together about it
  - Earnestly hoped that the downsides would not materialize, but let’s not go into this with our eyes closed

Feb. 24, 2010

ip sch’p seminar

4

## HOW MANY BOOKS?

- G has digitized 12M books, aiming for 50M?
  - @ 2M in the public domain, @ 2M in-© & in-print
    - Most in-print books likely to be sold through GPP, not SA
  - @8M in-© but OOP, OOP #s will rise as G approaches 50M
    - hard to know how many orphans
- Financial Times estimate: 32M in-© U.S. published books in the US, 2.8-5M will likely be orphans
- SA would have given G a license to all books in-© in the world, & allowed G to commercialize them as long as not sold in the US
  - After objections from many foreign RHs, class scaled back, but many foreign books still in
- ISD will, if SA approved, include all orphans; likely substantial proportion of ISD

Feb. 24, 2010

ip sch'p seminar

5

## OPT-IN vs. OPT-OUT

- Grimmelmann: GBSS is “all about the orphans”
  - Those who can't opt out because they can't be found
- DOJ has suggested that a settlement could be approved if it was reconfigured:
  - \$60 per book for past infringement, releases by absent class members OK
  - Forward-looking commercial transactions OK if opt-in instead of opt-out, need consent to release claims for future infring'm't
- G and AG: no settlement unless ASA remains opt-out
  - G argues transaction costs of clearing rights too high
  - G says it cannot make an effective market for OOP books without a license to all of them
- Will they be more receptive if the judge says opt-in is the only viable option?

Feb. 24, 2010

ip sch'p seminar

6

## 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 ASA will give G, and G alone, a license to make non-display uses of every book in-© within the class
  - Others might be able to make a fair use argument to do the same, but this is uncertain, untested
- GBSS will also give G a license to commercialize all OOP books (unless RH 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

Feb. 24, 2010

ip sch'p seminar

7

## ANYONE CAN DO?

- Several of you ?'d whether GBSS will undermine the next guy's fair use defense
- Publishers will strongly argue that Google's willingness to settle shows that it has acknowledged that unlicensed scanning is infringement, setting a precedent
  - G continues to argue such scanning IS fair use, but not at all clear will maintain that position if others start
- DOJ: irresponsible to assert that G's rivals should engage in massive © infringement, & hope for a similar settlement
- NOT FU if scanning to become G's rival in selling OOP books
  - Snippet-providing will not compete well with 20% of OOP books that G will provide for every search; G has 5 year head-start

Feb. 24, 2010

ip sch'p seminar

8

# ANTITRUST ISSUES

- Price fixing
  - Designated sales agent & 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

Feb. 24, 2010

ip sch'p seminar

9

# OK UNDER *BMI*?

- Some of you think that the *BMI* decision supports G's view that ASA not anti-competitive
- DOJ disagrees:
  - Voluntary participation by RHs
  - Coordination essential for the market to work efficiently; not so here
  - Antitrust consent decree in place to prevent anti-competitive conduct
  - This is more a horizontal than a vertical agreement
  - Delegation to G of pricing as to future rights

Feb. 24, 2010

ip sch'p seminar

10

## ATTACHMENT A

- One of the most important, but least commented on, parts of GBSS is Att. A
- Addresses dispute between authors & publishers over who owns e-book rights as new use not foreseen under original K
  - Compromise in Att. A:
    - 65% for authors of pre-87 books
    - 50-50 split for post-86 books
  - But only applies if both Au & Pubr stay in the ASA
- DOJ: this gives G a huge advantage over others
  - Resolves © ownership & revenue split for G, but not for rivals
  - Compulsory arbitration to allow au/pubr to contest claims
  - Not directly in issue in *AG v. G*, so beyond complaint

Feb. 24, 2010

ip sch'p seminar

11

## ORPHAN BOOKS

- Settling class will be giving G a license to all books in ©, including orphans
- AG says orphan book concept is a myth
  - BRR will find RHs and sign them up
- But even G's chief lawyer estimates 20% are likely to be orphans
  - When talking about a corpus of 50M books, that would be 10M; that's a lot of books
- Important part of the ISD, maybe most of it

Feb. 24, 2010

ip sch'p seminar

12

## ORPHAN FUNDS

- SA 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
- ASA 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
  - Not clear how independent UWF will be, what fiduciary responsibilities it will have

Feb. 24, 2010

ip sch'p seminar

13

## WRONG SOLUTION

- Congress, not private parties, should address the orphan book problem
- Inconceivable that Congress would give one company 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
  - Free use endorsed by © office, in bills in Congress
- Approval of ASA 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

Feb. 24, 2010

ip sch'p seminar

14

## PRICE GOUGING RISK

- Prices of IS 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)
  - G says no, we'll make \$ from ads, we want expanded access
- 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 (not just me)

Feb. 24, 2010

ip sch'p seminar

15

## DEACCESSION RISK?

- Some of you suggested that the price gouging risk lessens if libraries keep books, & I agree with that in part
- Many may keep books for some years, but if comfort with GBS ISD, it will be hard to justify the expense of maintaining the physical collection & real estate it occupies
- What about digitizing copies before deaccessioning?
  - Possible, but hard to justify on fair use grounds, since multiplying copies not owned by one person
- Readers of the future may feel if not available digitally, not really available
  - Might not go back to "real" books?

Feb. 24, 2010

ip sch'p seminar

16



## © REFORM BY PRIVATE ORDERING

- One reason to be very concerned about GBS is that it IS private legislation
- It is using the existence of a lawsuit on one issue to restructure an industry and bind the rest of the world on a far broader and more far-reaching commercial future through the class action mechanism
- Will encourage more uses of class action lawsuits to achieve © reform
  - Maybe GBS is relatively benign (we'll see), but next class action lawsuit may be much less so (e.g., sue small maker of DVRs, settle with tech mandate)
- If judge takes Rule 23 seriously, unlikely to approve
  - If he does approve, appeal likely to 2d Cir

Feb. 24, 2010

ip sch'p seminar

17

## DOJ II: A BRIDGE TOO FAR

- Class counsel has obligation to litigate the claims brought vs. D 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
- ASA does not further purposes of ©
  - © norm that must ask permission first
- DOJ's conclusion: judge lacks the power to approve this settlement

Feb. 24, 2010

ip sch'p seminar

18

## CRITERIA FOR 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
- But 1) the larger is the # of people in the class, 2) the greater the diversity of their interests, 3) the extent to which the settlement pertains to the matter in litigation or goes beyond it, & 4) where the externalities for third parties are large
  - Compulsory license to all books in © in US for G?

Feb. 24, 2010

ip sch'p seminar

19