

IS THE GOOGLE BOOK SETTLEMENT THE © REFORM WE NEED?

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THREE STRANDS OF WORK

- This talk brings together three strands of work in which I feel deeply engaged
 - One is my article on the Google Book Search Settlement (GBSS) as © reform, which I will present at U Wisconsin in November
 - A second is the Copyright Principles Project report, which will shortly be published by BTLJ
 - A third is a work-in-progress about modes and venues of © reform
 - As we all know, however desirable it may be for © law to be reformed, Congress is unlikely to do this any time soon
 - This leads me to think about other venues through which some degree of © reform might be achieved

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ANSWER TO MAIN ?

- GBS settlement, if approved, would achieve several laudable © reform objectives
- But there are too few checks & balances embedded in the ASA, which is why I have been so active in objecting to it
 - Significant risk of price-gouging, anti-competitive cartel behavior, inadequate privacy protections, among other things
 - Wrong solution to the orphan work problem
 - Reforms GBSS would achieve are not available to others, would create entry barriers to G's competitors
 - Serious ? about using class action settlement to achieve legislative-type results
- So what © reform do we really need, and what mechanisms might we use to get there?

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GBSS SETTLEMENT OF WHAT?

- In Sept. 2005, Authors Guild + 3 of its authors sued G for © infringement for scanning books & displaying snippets
- Class action on behalf of all rights holders of books in U Michigan library (7.8M to be made available to G)
- G claimed fair use, but would likely challenge class certification as well if the case was litigated
- 5 publishers brought similar suit vs. G a month later; not initially a class action
- Core of settlement reached in April or May of 2006, negotiations went on for 2.5 years, during which Google kept scanning books from partner library collections
- Settlement announced in Oct. 2008, amended in Nov. 2009, awaiting a court ruling on whether to approve

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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 (BRR), out of \$34.5M set aside for administration of it (but \$12M already spent 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
 - G to pay 63% of revenues from commercializing books to BRR
- \$45.5M to be paid to class lawyers

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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 keyed to queries yielding GBS 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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HOW IS GBSS LIKE © REFORM?

- GBSS will give G a license to scan books to index, & make non-display uses of all of them, including in-print books (unless request to remove)
- GBSS will allow G to commercialize all OOP books (unless opt-out), including orphans
 - Institutional subscription database of millions of books—where the “big \$” is likely to be made
 - Nimmer: GBSS flips © on its head!
- GBSS would solve the e-book ownership controversy, at least for Google
- GBSS would allow libraries to make use of LDCs

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MORE ON GBSS AS © REFORM

- Non-consumptive research regime likely to very beneficial for scholars
- Promise of enhanced access to millions of books for print-disabled persons
- Public libraries and higher ed eligible to get free public access terminals
- Limitations on statutory damages, inexpensive venue for adjudicating disputes over e-book rights, public domain status, etc.
- Safe harbor for good faith mistakes about public domain or orphan status

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GBSS & ORPHAN WORKS

- Clever idea: let G commercialize OOP books, valuable ones will generate \$, use some of that \$ to find RHs, sign them up to pay them their due
- Financial Times has estimated that 2.8-5 M of the 32 M U.S. published in-© books are orphans; likely more
- Likely to make up big part of ISD, maybe very big part
- G will have de facto monopoly over the orphans because BRR has no power to license 3d parties except with RH permission
- Under the settlement, orphans will be priced at profit-maximizing rates, even though no RH has been found
- Would take act of Congress to give same rights in orphans to others (e.g., Amazon or Internet Archive)

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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
 - Not clear how independent UWF will be, what fiduciary responsibilities it will have
 - Strange set of powers (& limits on powers)

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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 5-10 years of looking for them, books should either be available for free use 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
- ISD pricing implications
 - If orphans = open access after 10 years, ISD prices will fall
 - Under the escrow regime of GBSS, ISD prices would not fall, would likely rise over time, as BRR pressed G for higher \$\$\$

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ATT. A AS © REFORM

- Att. A to GBSS addresses uncertainties between authors & publishers over who owns e-book rights for new uses not foreseen under original publishing contracts
 - Compromise in Att. A:
 - 65% for authors of pre-87 books
 - 50-50 split for post-86 books
 - Not a great deal for authors if *Random House v. Rosetta Books* case is right!
- DOJ: this gives G a huge advantage over others
 - Resolves © ownership & revenue split for G, but not for rivals
 - Att A allows compulsory arbitration to allow au/pubr to contest claims as to G, but not available to rivals either
- Maybe this is a fair compromise as to ambiguous Ks, but should it be available to all, as would happen with legis?

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DOJ: GBSS = BRIDGE TOO FAR

- Class counsel has obligation to litigate the claims they brought vs. D or to settle THOSE claims
- Complaint alleged 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 purposes of ©
 - © norm that must ask permission first
- For Congress to address OW issues
- DOJ's conclusion: judge lacks the power to approve this settlement

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LEGISLATION v. CLASS ACTION?

- No clear criteria for when a matter is legislative in nature cf. suitable for class action litigation and settlement
- Clear that sometimes matters start in litigation and get resolved through legislation
- Factors suggesting more suitable for legislation than class action settlements:
 - the larger the # of people in the class
 - the greater the diversity of their interests
 - the broader the settlement is compared to the issue in litigation
 - the more comprehensive its impact on the future
 - the more there will be spillover effects on 3d parties
- Heightened scrutiny under Rule 23 when class action settlement is quasi-legislative?

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IMPLICATIONS OF GBSS APPROVAL?

- Will it lead to more class action lawsuits in © cases and efforts to achieve legislative-like resolution of disputed issues and beyond?
- Will G be able to use GBSS approval as leverage with rights holders of © in other types of works?
 - “Who’s next?” (not all of the world’s info is in books)
- Why not use class action to achieve reforms of all laws? What do we need a legislature for anyway since it is so dysfunctional? What does this mean for democracy?

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DO WE NEED © REFORM?

- 76 Act is intellectual work product of mid-1950’s mindset w/o serious thought about computers, let alone digital networks
- It was written when © was really only of concern to one very small segment of society—professional authors + core © industry firms—to protect them against an even smaller segment of society—counterfeiters + commercial infringers
- Things have changed radically since 1976
 - Many new stakeholders (virtually every firm has © assets now—websites, databases, sw, logos)
 - © implicates our daily lives, yet not designed for this

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WHY REFORM?

- Many challenging ?s posed by advances in technology not easy to answer in the 76 Act framework
 - RAM copying as infringement? Backup copying?
- Too many highly industry-specific provisions in the law, cluttering it up
- No easy way to adapt the law apart from legislation or expensive litigation, need more flexibility in the law
- Statutory damages need to be reformed

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CPP

- In Jan. 2007 I decided to organize an effort to engage 20 © professionals for a 3 year effort to consider whether © law was in need of some reform
- At first meeting in July 2007, we chose to call ourselves the Copyright Principles Project
- At a minimum, we hoped to distill some principles for © on which reform could be built
- If © law is to command respect from the population, then it needs to be a law that people can both understand & regard as fair

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CPP REPORT

- Part I articulates principles that should underlie a good © law
- Part II discusses ways in which © law today is consistent or inconsistent with these principles
- Part III considers some reform proposals that might make © more consistent with those principles
 - Consensus on some reform proposals, not on others
 - Willingness to discuss the pros & cons of even those proposals as to which non-consensus on reform
- We hope the report will generate further conversations about reform

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CPP PRINCIPLE 1

1. Copyright law should encourage and support the creation, dissemination, and enjoyment of works of authorship in order to promote the growth and exchange of knowledge and culture.
 - 1.1. A successful copyright “ecosystem” should nurture a diverse range of works. It should encourage creators to make and disseminate new works of authorship and support readers, listeners, viewers and other users in experiencing those works.
 - 1.2. To accomplish these goals most effectively, copyright law should embody rules that are clear and sensible, yet flexible enough to apply in a changing environment.

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CPP PRINCIPLE 2

2. Copyright law should promote the creation and dissemination of new works in three distinct and complementary ways:
 - by encouraging the provision of capital and organization needed for the creation and dissemination of creative works;
 - by promising creators opportunities to convey their works to their intended audiences; and
 - by limiting control over uses of creative works, as appropriate, to aid education, cultural participation, the creation of new works, and the development of new forms of creative output.

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LEGISLATIVE PROPOSALS

- CPPR recommends reinvigoration of registration system that would affect extent of rights & remedies available to © owners
- Some new roles & functions for US © Office
- Orphan works legislation
- Library privileges more suitable to digital networked environment today
- More general attribution right (reasonableness limit on it)
- Termination of transfer rules are too formalistic
 - But nonconsensus on how to reform
 - Some of us would give the termination right to authors after 15 or 20 years, no termination right in heirs

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FORMALITIES & DURATION

- © used to attach upon publication & compliance with registration, notice & deposit for X years, renewable for X years: OPT-IN SYSTEM
- Probably a better system for society as a whole than automatic protection for life + 70 years: OPT-OUT SYSTEM—and not easy to opt out
- Politically infeasible to return to pre-89 status quo
- But may be feasible to tie the availability of certain rights or remedies to certain formalities
 - e.g., no TOT or attribution right or statutory damages without registration
- More needs to be done to induce registrations of © and of transfers, in part because facilitates licensing

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© OFFICE

- It has done some good policymaking
 - Orphan works study was well done
 - Sec. 115 report was thoughtful
 - Some of the last anti-circumvention exceptions were creative interpretations of its 1201 authority
- Time perhaps to re-think its role because © is now part of innovation policy, competition policy, cultural policy, educational policy, & changes to its contours have major economic implications
 - But NOT to meld it into the PTO!!!

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COP OFFICE REFORMS?

- Revamping registration & deposit process?
- Take on new functions?
 - Do empirical studies before legislating or rulemaking?
 - Commission studies on how well © is (or is not) doing its job?
- Widen in-house expertise?
 - Economists, technologists in-house?
- New power in CO to do rulemaking to deal with?
 - Inter-industry disputes: keep these details out of the statute; develop principles to guide decision-making
 - Adapting © to new situations (e.g., webcasting)
 - But if more rulemaking, CO will need greater authority from Congress; may need to spinout it out of LOC
- Adjudication of “small claims”?
 - P2p file sharing, fair uses, individual au v. publisher

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INSTITUTIONAL ISSUES

- New power in CO to do rulemaking to deal with:
 - Inter-industry disputes: keep these details out of the statute; develop principles to guide decision-making
 - Adapting © to new situations (e.g., webcasting)
 - But if more rulemaking, CO will need greater authority from Congress; may need to spun out of LOC
- Adjudication of “small claims”
 - P2p file sharing, fair uses, individual au v. publisher
- Widening expertise of CO in part to mitigate “bad” political economy problems
 - Economists? Creators? Ombudsman for the public?
 - IT, Internet, consumer electronics firms offset today

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© REFORM IN COURTS

- CPP discussed several troublesome parts of © that are susceptible to reform through courts
 - Refining tests for infringement
 - Fleshing unprotectables under sec. 102(b)
 - Need for commercial harm before infringement found
 - Clarifying fair use & de minimis doctrines
 - Rethinking burdens of proof (e.g., automatic presumption of irreparable harm to © owner is difficult to justify post-*eBay*)
 - Taking preemption of K terms more seriously
 - Refining certain remedies
 - Guidelines for statutory damages
 - When to order damages instead of injunctions

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STATUTORY DAMAGE REFORM

- Statutory damages can be awarded in amounts ranging from \$200-\$150,000 per infringed work
 - No guidelines for this, except low range for “innocent” (never used) and high range for “willful” (used too often)
- Conducive to arbitrary & excessive awards
 - \$19.7M award vs. Legg Mason for copying articles from journal to which the firm subscribed
 - Jammie Thomas could have bought 24 songs for @ \$24 on iTunes, but jury awarded \$1.92 M
 - \$80,000 per song! cf. \$750 per song in other p2p cases
- Chilling effects on technology developers & OSPs
 - Google’s potential exposure in the trillions of \$\$\$ in GBS
- CPPR recommends guidelines for awards

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REFORM WITHIN CURRENT LAW

- SD awards are supposed to be “just”
- Courts should develop a jurisprudence of SD awards
- This jurisprudence should respect the tripartite structure of SD regime
 - Higher levels of awards only in counterfeiting-type “exceptional” cases
 - Pay attention to guidelines, awards in other cases
- Need for better jury instructions (e.g., aggravating & mitigating factors) or requirement juries to find specific things (e.g., reprehensibility factors) before SD above actual damages

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GUIDELINES FOR SD AWARDS

- Award minimum when no damage to P or D profits, or P unwilling to offer proof of approximate damages/profits
- Approximate actual damages/D profits when plausible fair use, other non-infringement defense
- 2-3 X actual damages/D profits when reckless or intentional as to infringement, or other reprehensibility
- Up to 10X approximate damages/profits if highly willful (e.g., counterfeiter, repeat offender)
- Or consider what will be necessary to deter THIS D
- Try to be consistent with other SD awards
- If develop guides, no need for SCT due process review, but when SD awards grossly excessive and punitive...

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NEED FOR GBS-LIKE LEGISLATION?

- Allow nonprofit libraries & other qualifying firms to scan books for legitimate purposes
 - Such as to preserve or repair the works, to index them, provide snippets, & make non-display uses (unless request to remove)
- Allow nonprofit libraries and researchers to make nonconsumptive research uses of LDCs
- Resolve the e-book ownership controversy
- Provide open access uses of orphan works
- Develop a database/registry about orphans
- Enhanced access for print-disabled persons
- Safe harbor for good faith determinations that works are in the public domain or orphans

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CONCLUSION

- We do need “© reform” but not GBSS
- Reform talk often focuses on legislative initiatives
- That kind of © reform not likely any time soon
- But there is more than one forum in which © reform can occur; let many flowers bloom
 - Recent burst of scholarship about this
 - CPPR takes a broad look at problem areas, what some options for reform might be
 - NAS © reform study underway today
 - ALI principles or model law project is possible
- Many of us in this room and elsewhere are working on ideas about what a good © law would look like
- Because we can imagine it, reform is possible

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