Legally Speaking: Why the Google Book Settlement Failed—and What Comes Next?

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On October 28, 2008, Google, the Authors Guild and the Association of American Publishers (AAP) announced a settlement of lawsuits charging Google with copyright infringement for scanning in-copyright books from the collections of major research libraries. While litigants can ordinarily settle lawsuits without judicial oversight, different rules apply in class action lawsuits. Because class action settlements affect the rights of many people who were not directly involved in the lawsuit or settlement negotiations, judges must determine whether the proposed settlement is "fair, reasonable, and adequate" to the class on whose behalf the lawsuit was being settled.

Just over thirteen months after the fairness hearing on the proposed Google Book Search (GBS) settlement, Judge Denny Chin finally ruled that this agreement did not satisfy the fairness standard. The litigants did not appeal rejection of the settlement. The default next step is for the case to go back into litigation on fair use or infringement issue.

This column explains why Judge Chin disapproved the GBS settlement and why the fair use issue may not be decided by the courts. It discusses the possibility of a new settlement and of legislation as alternatives.

"A BRIDGE TOO FAR"

The single most important factor in Judge Chin's ruling against the GBS settlement lay in his agreement with the U.S. Department of Justice (DOJ) that it was "a bridge too far."

The actual issue in litigation was whether scanning books to index their contents and provide snippets was copyright infringement or fair use. Yet, the settlement proposed an extremely complex forward-looking commercial regime under which Google could commercialize all out-of-print books (unless rights holders showed up to say no) and display up to twenty percent of contents of these books in response to search queries, as long as it shared sixty-three percent of the revenues with rights holders who registered with a new collecting society to be known as the Book Rights Registry (BRR).

Google never claimed that it would be fair use to sell individual copies of out-of-print works to the public, nor to construct an institutional subscription database (ISD) of out-of-print books to license to institutions of higher education, among others. Nor could it credibly make such a claim. Yet, the proposed GBS settlement would give it rights to do both of these things (and more).

The scope of the settlement, in other words, went far beyond the issue in litigation. At the fairness hearing the DOJ lawyer pointed out that it was the duty of class counsel to litigate the claims that they brought or to settle those claims. They had instead used the existence of a dispute about GBS scanning to remake the market for e-books and change the default rules of copyright law (which generally require a prospective user to get

permission in advance before making commercial uses of the works), as the proposed GBS settlement would arguably do.

LITIGATION OR LEGISLATION?

Judge Chin also agreed with the DOJ that the only legitimate way to restructure rights and e-book markets in the manner proposed in the GBS settlement was through legislation.

The quasi-legislative character of the settlement was most evident in its solution to the so-called "orphan works" problem. Works are deemed orphans when their rights holders cannot be found through a reasonably diligent search. A book published in 1953, for instance, may still be in copyright whose owner is a firm that no longer exists and/or an author who died without heirs.

In 2006, the U.S. Copyright Office proposed legislation to allow orphan works to be made more accessible, but so far this legislation has not been enacted by Congress. (The EU has just recently proposed a directive addressing the orphan works problem.)

The proposed settlement would have given Google the right to commercially exploit all orphan books because their rights holders were members of the class that would have virtually consented to these uses through the judge's approval of the settlement.

Judge Chin decided that it was for Congress, not the courts, to address the orphan works problem.

ADEQUACY OF REPRESENTATION

The *Authors Guild* complaint named three of its member authors as representatives the class of authors affected by GBS scanning. These authors, Guild lawyers, and lawyers designated as counsel for the class have an obligation to represent the interests of all members of the class.

In my submissions to the court, I argued that the plaintiffs and their lawyers had not adequately represented the interests of academic authors. Unlike Guild authors, academic authors would be inclined to think that scanning books to index them was fair use, not copyright infringement. They would, moreover, be likely to want their out-of-print books to be available on an open access basis rather than through a profit-maximizing scheme such as the GBS settlement proposed. Judge Chin agreed with me that academic authors had different interests than Guild authors and that the Guild's lawyers had not adequately represented our interests.

Judge Chin was also plainly affected by the large outpouring of opposition to the GBS settlement from other copyright owners. He noted that 6800 authors had opted out of the settlement because they did not wish to be bound by it. He quoted at length from author objections to GBS and to the settlement. The governments of France and Germany and

many foreign rights holders also opposed it. Although not ruling on contentions that the proposed settlement violated U.S. treaty obligations, Judge Chin made plain he was troubled by these assertions.

Although saying that it was not a ground for disapproval of the settlement, Judge Chin also expressed concern about the lack of user privacy protections. The GBS settlement called for extensive collection of data about individual reader uses of GBS books, but had virtually no provisions limiting what Google could do with this information. In addition, he expressed reservations about the antitrust concerns raised by the DOJ and by Yahoo! and Microsoft about the extra advantage that Google would have in the search market by getting a license to improve its search engine with GBS books.

BENEFITS OF THE PROPOSED SETTLEMENT

Controversial as it was in some respects, the GBS settlement would, if approved, have brought about many socially beneficial results.

Chief among them was a vast expansion of access to out-of-print but in-copyright books. Up to twenty percent of their contents could have been displayed to users in response to search queries. Millions of these books would have been freely accessible at terminals at public libraries (one per library) and at institutions of higher education (one per so many students), as well as through institutional subscriptions available to libraries and other institutions. E-book versions of these out-of-print books would also have been available for purchase by consumers which they could access "in the cloud." In addition, Google pledged in the proposed settlement to make digitized copies of these books available in formats accessible to print-disabled persons (e.g., enlarged fonts, Braille versions).

There are already more than 15 million books in the GBS corpus, the overwhelming majority of which come from the collections of major research libraries. These collections are dense with the accumulated knowledge of the ages, and Google is scanning more of them every single day. It was thus no exaggeration to assert that approval of the settlement would have vastly expanded access to our cultural heritage.

The GBS settlement would have permitted Google to provide its library partners with copies of scans of books from their collections that could be use for preservation purposes and for "non-consumptive research" (e.g., tracing the influence of a thinker over time or the origins of words). Google itself would have been privileged by the settlement to engage in non-display (i.e., computational) uses of books in the GBS corpus for purposes such as improving its search technologies and automated translation tools.

The proposed settlement would also have been socially beneficial in providing new income streams to authors and publishers through the BRR.

These benefits cannot be realized through a class action settlement, but can they be achieved in other ways?

WHAT'S NEXT?

Judge Chin made clear that he would look more favorably on an opt-in settlement (that is, requiring Google to get permission from rights holders before commercializing their books) than he had on the opt-out settlement proposed in 2008. However, lawyers for Google and the Authors Guild have told the judge that Google has no interest in an opt-in settlement. An opt-in settlement would also not bring about the socially beneficial results envisioned in the proposed GBS settlement. Yet, because litigation is very expensive, takes a long time, and poses risks for both sides, settlement is far more likely than resuming litigation at this point.

Legislation would be another way to accomplish some of the socially beneficial aspects of the GBS settlement. Maria Pallante, the newly appointed Register of Copyrights, and James Billington, the Librarian of Congress, have written to key Congressional leaders to indicate their willingness to undertake a study of legislative options in the aftermath of the GBS settlement disapproval.

Having studied the settlement and assessed its possible benefits, I have developed a framework for a legislative proposal that would aim to achieve these objectives [1].

In brief, I recommend: 1) creating a privilege to scan in-copyright works for preservation purposes, to allow their contents to be indexed, and to allow non-display uses of the scans, including non-consumptive research uses, 2) allowing "orphan works" (works whose rights holders cannot be found after a reasonably diligent search) to be made available on an open access basis, 3) expanding the right of libraries and others to improve access for print-disabled persons, and 4) ensuring that reader privacy interests are respected. Unfortunately, the political economy of copyright in the U.S. does not bode well for these proposals.

I also suggest that consideration be given to creating an extended collective licensing regime for out-of-print, non-orphan books so that an ISD such as the GBS settlement proposed might be created. ECLs have been used with considerable success in Nordic countries to provide rights holders with compensation while at the same time allowing users the assurance that they can get a license to make a large number of works available even when transaction costs of clearing all rights, one by one, would be excessive or possibly prohibitive.

Many, even if not all, of the social benefits that would have flowed from approval of the GBS settlement can be achieved in other ways. Some reforms can be done through private ordering (e.g., professors making their books available on an open access basis), some through fair use (e.g., scanning to index contents), and some through legislation. We should not let the failure of the GBS settlement stand in the way of finding new ways to make cultural heritage more widely available.

References

[1] Samuelson, P. Legislative Alternatives to the Google Book Settlement, Columbia Journal of Law & Arts (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126

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