SHOULD AUTHORS OPT OUT OR OBJECT TO GBSS?

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3 PERSPECTIVES

- How should professional writers react to the proposed GBS settlement?
- How does the perspective of academic authors differ from that of non-academic professional writers?
- Can this complex new copyright regime for digital books be brought into being through a class action settlement, or is legislation required?

OPT OUT cf. OBJECT?

- Opting out means the settlement doesn't apply to you at all
  - Don't need to say why you are opting out, although you can tell the judge why if you want
  - Doesn't mean G won't scan your books and make at least non-display uses of them
  - Doesn't mean you can't become a Google partner either
- Objecting means that you explain to the judge why you think the whole or some parts are not "fair, reasonable or adequate" to you as a class member
  - But you are willing to be bound by the agreement if the judge decides to approve it as is
  - Possible you may make an objection that will cause the judge to tell the litigants to renegotiate the deal
  - FWIW, I am objecting, not opting out
- Jan. 28 deadline for both opting out and objecting

SOME BENEFITS TO GBSS

- New commercial life, primarily for OOP books
  - 4 revenue models approved; 3 others in contemplation
  - 63% of revenues G makes are payable to BRR, which will go to RHs (less BRR's administrative costs)
  - BRR will come looking for you if your books are making $ and you haven't claimed them yet
- Appendix A:
  - 65% of revenues from pre-87 books with ambiguous K language goes to Aus; 50-50 split for post-86 books
  - Author reversion procedure
- Low cost adjudication regime as to ownership, splits, etc.
- BRR willing to license your books to others besides G to commercialize if you give them that power

BUT SOME DOWNSIDES

- G can scan & make non-display uses of all books whose RHs haven't opted out
  - If you don't become GPP or sign up for BRR, UWF can allow G to commercialize your in-print books, use the $ to find you to talk you into signing up with BRR
- Give up possible claim to 100% rights in e-books, which you might o/w have under *Random House v. Rosetta*
  - BIG au/pubr debate over this issue; pubrs don't agree; App. A = less
- Waiver of TM, right of publicity, interference with K claims, as well as of future acts that would infringe but for SA
  - You may even have to pay G for use of your name, book or character names as key words for AdSense program
- No rights to control ads that will be run alongside your books
- Authors of inserts (short stories in edited collections, book chapters, & the like) cannot make more than $500 total for all uses of books
- Google will have the right to exclude your books from the ISD for editorial or non-editorial purposes, and even to alter the texts of your books
- Inadequate privacy protections for you as a user and for your users

OTHER CONSIDERATIONS

- LOTS of authors as well as publishers are opting out of the settlement, every author group but AG vs. it
  - How good a deal is it if so many are opting out?
  - Only 1 estate of an author wrote in support of the GBSS by Sept.
- Distrust of Google, AAP, Authors Guild, new BRR
- No longer possible to give exclusive license, as G will have license to your book or insert no matter what
- Some prefer federal courts to compulsory arbitration
- Reverse of usual © norm:
  - No one can use my work w/o making a deal with me
  - My ability to get compensated for my work should not depend on my being forced to join a collecting society
  - G is going to scan your books unless you direct it not to (and even then it only says it will use best efforts to comply)

ACADEMIC AUTHORS

- We want LOTS of books in the ISD
  - The more you take your books out of the GBSS, the less the vision of the universal library will be achieved
- We want prices for the ISD to be low
  - You probably want them to be high!
  - We want competition to be possible; you may not care
- We want to be able to annotate freely, share
  - Some of you won't want this at all
- We want open access opportunities
  - That's not your preference
- We worry about GBS being sold or discontinued
- Most of the books in the corpus were written by scholars for scholars, so our perspective should count too
  - We are also more likely than you to think scanning to make an index of contents is fair use

CLASS ACTION ISSUES

- Simple ideas behind class actions:
  - Sometimes firms do the same bad thing to thousands or millions of people; may be too expensive to have lots of lawsuits on same issue
  - 1 lawsuit to represent the class is not only more economical, but deters firms from wrongdoing
  - Many settle, money set aside for the class, class action lawyers typically get 1/3 (or more) off top
  - Usually relief is related to the harm ($500 for fraud or $50 for defective car part)
  - Ability to opt out if you don't like the settlement
  - Many class members don't file the paperwork to get benefits, cy pres funds given away

WHY IS GBSS UNUSUAL?

- Many millions of class members
  - Significant proportion of books in corpus likely to be "orphans" whose RHs can't be located (@ 20%, according to G)
  - G supposed to give notice to each member of class, but by definition, can't find orphan RHs
- GBSS exceptionally complex, forward-looking deal, involving issues far beyond issue in litigation
- Releases of liability for future infringements
- Many charge AG with inadequately representing author interests
- Deal achieves results that are arguably legislative in nature
- Antitrust issues posed because G will get a license that no one else can get, de facto monopoly

ORPHAN WORKS

- Long duration of ©s mean that many works in-© cannot be used, even though there may not be anyone who claims them
- Socially desirable for those works to be available, especially books, as they
- Mass digitization is efficient way to make a corpus of books
  - Clever idea to allow OOP books to be commercialized, and use revenues from this to find the RHs
- Congress hasn't been able to pass OW legislation, so GBSS provides a solution, at least for G
  - But if Congress legislated, G would be unlikely to be the only licensee