GOOGLE BOOK SETTLEMENT AS © REFORM

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Feb. 28, 2011

REASONS TO DIGITIZE BOOKS

- To preserve books that are falling apart
- To preserve collections more generally
- To make indexes of contents
- To make computational uses (e.g., improve search technologies)
- To engage in non-consumptive research on the corpus of books (e.g., influence of thinker over time)
- To provide snippets and links to sites where books might be lawfully obtained
- To build services for processing texts
- To make corpus of books that could be licensed

ORIGINS OF GBS

- Google had the vision for GBS, the technology & the financial resources to digitize the books
  - Prohibitive transaction costs to clear rights on book-by-book basis for indexing, snippet-providing, or computational uses
- Major research libraries had the books & the desire to digitize the books, but not the resources to do this
  - They were also more cautious about ©
  - Yet 11th A immunity for state universities (no $ damages), so no wonder they offered Ms of books first
- Google was willing to indemnify libraries & give them Library Digital Copies (LDCs) of books from their collection that G scanned
- Several major research libraries signed up for this

© AS AN OBSTACLE

- Scanning books for any purpose = prima facie infringement
  - Reproduction of protected works in copies
  - But fair use may be a defense, depending on purpose & market effect
- Abandonment of © formalities means many more works are protected than before, even after commercial life is over
  - Once had to register © or put notice on works as precondition of ©
  - Unregistered or no-notice works were in PD
  - Renewal requirement for most of 20th c

© AS OBSTACLE

- © duration has been extended
  - 14 years, renewable for 14 years initially
  - 28 + 28 under 1909 Act
  - Life of author + 50 years, or 75 years for corps from publication as of 1978
  - Extended additional 20 years in 1998
  - This has contributed to "orphan work" problem
- Congress has considered but not yet passed OW legislation
  - Would require "reasonably diligent" search on work-by-work basis (high transaction costs)
  - Free use if orphan (unless RH later shows up)

© AS OBSTACLE

- Unclear who owns rights to digitize
  - New use not contemplated when K'd
  - *Rosetta Books* case suggests authors own, but publishers contest
  - © reversion clauses in many pub'g Ks
- Library privileges are out-of-date
  - Not even allowed to digitize to preserve "at risk" works (if falling apart), although fair use might help
  - Let alone to preserve collection as a whole or to allow digital lending of books in collections
- Print-disabled access provision very limited
- Statutory damages as deterrent
  - Up to $150K per infringed work if "willful"

INITIAL GBS PROJECT

- Many in-print books part of Google Partner Program
  - © owners can negotiate with G about how much of their books to make available, with revenue-sharing arrangements
- For @2M books in the public domain, G makes whole book available for download in pdf (with G's watermark)
- For books in ©, G 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
- Google was prepared to argue FU for its scanning, indexing, snippet-providing & computational uses
- Authors Guild + 5 publishers sued in fall of 2005

FAIR USE re BOOK SEARCH?

Publishers/authors:

- Commercial purpose; non-transformative use
- Systematic copying of © works of all genres, creative works
- Whole thing copied, systematic, stored permanently
- Presume harm; harm because lack of control, risk of loss from inadequate security; we want to license such uses; very nature of © to require users to get permission in advance

Google:

+ transformative; promoting public access to information
+ necessary to copy to index, make snippets available; orphan books opened up
+ whole thing, but only snippets available unless au/pubr agrees to more thru partner program
+ transactions costs problems with clearing rights = market failure; GBS enhances market for many books (we'll link to where you can buy them); we'll take your book out if you want; not serving ads

GBS SETTLEMENT

- Motivations to settle all around
  - G risking trillions of $ because of statutory damages, could get more from settlement than if won lawsuit
  - Publishers feared FU loss, AG lawyer on contingency
- Oct. 2008, G, AG, & AAP announced settlement of lawsuits
  - Combined now into 1 lawsuit
  - Class action, with Guild representing Author Subclass & AAP representing Publisher Subclass
  - Initial settlement class: owners of U.S. copyright interests in 1 or more books
    - Including all foreign books in because of treaties

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, out of $34.5M set aside for administrat'n
  - But has already spent more than $12M on notice, etc.
- 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
  - BRR to get 63% for BRR-registered and unclaimed books
- $45.5M to be paid to class lawyers

GBSS 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 institutions
- Revenue-generation from 4 sources for OOP books:
  - institutional subscriptions fees to OOP book database
  - sale of books to individuals “in the cloud”
  - certain ads run vs. queries yielding book results
  - print-out fees from public access terminals
- Other new revenue models possible in future if BRR OKs
- G can make “non-display” (computational uses) for $0

IS SETTLEMENT “FAIR”?

- Class action lawsuits can only be settled if judge is persuaded that settlement is “fair, reasonable, & adequate” to the class
- Thousands of class members objected to the settlement on wide array of grounds
- DOJ vs. it for 3 reasons:
  - “Bridge too far” (matter in litigation cf. scope of settlement)
  - Serious questions about adequacy of notice to class, representation of foreign RHs
  - Antitrust concerns about pricing, other terms, de facto monopoly
- Fairness hearing held Feb. 18. 2010, still no decision

PRAGMATIC CASE FOR GBSS

- Millions of books would become available to the public
  - 15M books in corpus now
  - G apparently planning to scan more than 100M books
  - Free public access terminals at public libraries & higher ed institutions
  - Institutional subscriptions + consumer purchases
  - Print-disabled persons would get access to Ms of books
- Authors & publishers would get paid for their works
- New collecting society to handle payouts, one-stop shop for clearing rights in books
- Google could recoup its costs in GBS by commercializing the books

INSTITUTIONAL SUBSCRIPTIONS

- Corpus of 10-20M OOP books anticipated to be available in ISD
  - RHs can say no (but why would they? OOP books not making any $$ now)
- Individual books may not sell much, but ISD likely to be very attractive
  - @100K public schools, @10K public libraries, @3500 higher ed institutions
  - @ave ISD price of $10K a year = $145M
  - ISDs for companies, government institutions too
- G to set prices, in consultation with BRR

PRICE GOUGING RISK

- Prices of ISD to be set based on # of books in the corpus, # services provided, & prices of comparable products & services
  - More books + more services = higher prices; no comparables
- Prices may be modest at first to get institutions to subscribe, but history & logic suggest prices will rise over time to excessive levels because G will have a de facto monopoly on ISD (cf. journal prices)
- Only check on price hikes is complicated arbitration process in Michigan side agreement
  - Libraries can complain to UM that prices are excessive
  - UM decide to initiate arbitration, but will it?

GBSS AS © REFORM

- GBSS will give G a license to scan ALL books to index & make non-display uses, including in-print books (unless RH requested removal)
- GBSS will allow G to commercialize all OOP books (unless RH opts out), including orphans
  - Institutional subscription database of millions of books—where the "big $" is likely to be made
  - De facto compulsory license
- Att. A of GBSS would solve the e-book ownership controversy, at least for Google
- GBSS would allow libraries to make many uses of LDCs of books from their collections

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
- But per-page-print-out fees (that would o/w be fair uses)
- Limitations on statutory damages, other remedies
- Compulsory arbitration for virtually all disputes (e.g., over e-book rights, public domain status, etc.)
- Safe harbor for good faith mistakes about public domain or orphan status

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 than that
- 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 through the end of © terms
- Would take act of Congress to give same rights in orphans to others (e.g., Amazon or Internet Archive)

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 within class
  - 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)

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 $$$

DEEP QUESTION #1

- Is the perfect the enemy of the good?
  - The perfect may be Robert Darnton's Digital Public Library proposal, but there are reasons to doubt that Congress would support it
  - GBSS may not be perfect, but if the alternative is that the books in the GBS corpus will not be available online, is opposition to the settlement from people like me cutting off our noses to spite our faces?

DEEP QUESTION #2

- Do the ends justify the means?
  - Dan Clancy's gambit: "Pam, the only way to achieve copyright reform for these books is by this class action settlement because Congress is so broken about ©"
  - Thousands of authors and publishers would say no, as they have objected to the GBSS, asserting that it is not fair, reasonable, and adequate to the class
  - Even if one discounts their concerns, serious questions exist about whether class action settlements can be used to achieve legislative results

DOJ II: A BRIDGE TOO FAR

- Class counsel has obligation to litigate the claims they brought vs. G 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

LEGISLATION v. CLASS ACTION?

- No clear criteria for when a matter is legislative in nature cf. suitable for litigation and settlement
- Clear that some matters start in litigation and get resolved through legislation (e.g., ClearPlay)
- Heightened scrutiny when quasi-legislative?
  - the larger the class, the greater the likelihood of diverse interests among class members
  - the more difficult is the task of getting adequate notice to all class members
  - the broader the settlement is compared to the issue in litigation
  - the more extensive its impact on the future
  - the more there will be spillover effects on 3d parties
  - the more likely the settlement is to confer an unfair advantage to defendant (e.g., giving it more relief than if it won the case)

WHAT IF GBSS IS APPROVED?

- Orphan works legislation less likely
  - Will skew orphan works bill toward paid uses of orphans if did pass; CO recommended vs. this
- Likely to lead to more class action lawsuits in © cases, efforts to achieve legislative-like resolution of disputed issues
- G could use GBSS 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?

PLAN B?

- DOJ has endorsed alternative settlement:
  - $60 for past infringements (as in GBSS now)
  - Opt-in to forward-looking commercial regime envisioned in GBSS
  - Google has said this would "eviscerate" the purpose of the settlement, but may become more receptive if the deal they want is off the table
- Go back to litigation, with G winning (or losing) the fair use defense, or more likely AG unable to certify class
- G starts tracking down RHs to make deals
- Orphan works legislation tailored to deal with problems presented by GBSS
- Initiatives by universities and libraries to promote open access for OOP scholarly books