WHY THE GOOGLE BOOK SETTLEMENT FAILED—AND WHAT COMES NEXT?

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OVERVIEW

• Why did Google undertake the Google Book Search (GBS) project?
• Why did the Authors Guild & certain publishers challenge it?
• Why did the litigants propose to settle this lawsuit, and on what terms?
• What are the main arguments in favor of it?
• Why did Judge Chin reject the settlement?
• What are the options at this point?
• Among those options, what is the most likely? What would be the best outcome?
INITIAL GBS PROJECT

• Google has been scanning books since 2004

• Uncontroversial part: Google Partner Program
  – © owners negotiate with G about how much of which books to make available, on what revenue-sharing terms
  – 2M books scanned as part of GPP

• Controversial part: Google Library Partner Program
  – G has scanned 13M books for GBS from library partner collections so far; scanning more every day

GBS LIBRARY PROGRAM

• Google had the vision for GBS, the technology & the financial resources to digitize books

• Major research libraries had the books & the desire to digitize the books, but not the resources to do this
  – They were also more cautious than G about ©
  – 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 collections that G scanned

• Several major research libraries signed up for this
WHY DID G DIGITIZE BOOKS?

• To make indexes of book contents
• To make computational uses (e.g., improve search technologies, automated translation tools)
• To provide snippets in response to search queries
• To build services for processing texts
• To develop corpus of books that could be licensed?

LIBRARY MOTIVATIONS

• To preserve books that are falling apart
• To preserve collections more generally
• To manage collections more efficiently
• To enable non-consumptive research on the corpus of books (e.g., trace thinker’s influence over time)
• To improve access for print-disabled
• To provide as much access to books as possible
ACCESS TO GBS BOOKS

- G now makes @2-3M public domain books available for free downloads of whole thing in pdf
  - with G’s watermark, noncommercial use restriction

- G has been displaying “snippets” of most in-© books

- Some rights holders (RHs) have agreed to allow G to display more than snippets under GPP

- G is willing to remove book from GBS corpus or stop snippet displays if © owner so requests

GBS POSED © RISKS

- Google was well aware that scanning in-© books without © permission was risky
  - © owners have exclusive right to control reproduction of protected works in copies

- Google thought it had a good fair use defense if anyone decided to sue

- Authors Guild & 5 trade publishers sued in the fall of 2005, claiming scanning-for-snippets infringed ©s; AG lawsuit = class action
AG/AAP: NOT FAIR USE

- Commercial purpose; non-transformative use
- Systematic copying of © works of all genres, creative works
- Whole thing copied, systematic, stored permanently, copies given to library partners
- 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: FAIR USE

+ 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); not serving ads
+ we’ll take your book out if you want
MOTIVATIONS TO SETTLE

- Litigation is expensive, takes years to resolve definitively
- Outcome in doubt because of novel fair use claim
- If AG & AAP won, G was facing very big damage exposure, might have been enjoined from using GBS or even ordered to destroy scans of in-© works
- G had better technology & ideas about how to create new markets for books in digital environment than Ps
- Settlement created an opportunity for a “win-win-win”
  - G, AG, & AAP would get $; libraries/public would get ISD

CORE OF SETTLEMENT

- Settlement was announced Oct. 28, 2008
- G was to provide $45M to compensate © owners as to books already scanned ($60 per book)
- G was to fund creation of a new collecting society, the Book Rights Registry, for $34.5M
- Authors and publishers could sign up with BRR to share in revenues from GBS (63% for © owners)
- Class action lawyers would get $45.5 M in fees
GBSS DEFAULT RULES

- Settlement would mainly affect out-of-print (OOP) books
  - First step: determine if book was in- or out-of-print
  - G to look to specific information resources for this

- If in-print, default rule: G could not display book contents
  - © owner must opt in to display uses by G
  - Most in-print © owners likely to sign up through GPP, not GBSS

- If OOP, default was that G could make “display uses”
  - G would be allowed commercialize all such books
  - Plus G could display of 20% of contents in response to query
  - Registered © owner could opt out, insist on no-display for OOP

GBSS REVENUE GENERATION

- GBSS authorized G to generate revenues from OOP books in 4 ways:
  - Fees for institutional subscription database (ISD)
  - Consumer purchase model (books “in the cloud”)
  - Certain ads run vs. queries yielding book results
  - Print-out fees from public access terminals

- G could propose new revenue models in the future; BRR must agree to them
LIBRARIES UNDER GBSS

- Those who contributed books to GBS corpus would get back from G an LDC of those books
  - Settlement would mean they would no longer be risking liability for having contributed books to G or taking back digital copy
  - Non-consumptive research on LDC privilege
  - Libraries allowed to provide print-disabled access to LDC books

- Public libraries would get 1 terminal for accessing ISD corpus, higher ed 1 terminal per so many students for free

- Many colleges & public libraries expected to become institutional subscribers to GBS ISD

- No special deal for public school libraries, gov’t libraries, other libraries, although institutional subscriptions might be available to them too

BENEFITS OF SETTLEMENT

- Would remove a dark cloud of liability from the heads of G and cooperating libraries

- Would lead to more public access to more books than if G had not undertaken to make GBS at all or if G won the litigation with AG & AAP

- Revenues would begin to flow to authors and publishers who register with the BRR (old books = new life)

- New business models, choices for consumers

- Commitment to provide access to reading-disabled

- Non-consumptive research on whole GBS corpus @ 2 sites
BUT IS GBSS “FAIR”?  

- Class action lawsuits can only be settled if judge is persuaded that settlement is “fair, reasonable, & adequate” to the class on whose behalf settlement was negotiated.
- Class members must be given notice & opportunity to object or opt-out of the settlement.
  - 6800 opted out of GBSS.
  - Thousands more objected to the settlement on wide array of grounds.
- Fairness hearing held Feb. 18, 2010.
- Judge Chin ruled vs. GBSS on March 22, 2011.

6 PROBLEMS WITH GBSS

1. Scope of the settlement cf. issue in litigation.
2. Adequacy of representation by class counsel.
3. Antitrust issues.
4. User privacy concerns.
5. Copyright issues.
1: “BRIDGE TOO FAR”

- DOJ: 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 (e.g., no plausible fair use defense for selling books)
  - Would give G a benefit that it could get neither from winning the litigation nor from private negotiations
- GBSS does not further the purposes of ©
  - © norm that must ask permission first
- DOJ’s conclusion: judge lacks the power to approve this settlement because it is “a bridge too far”; Chin agreed

ORPHAN WORKS

- Millions of books in GBS corpus likely to be “orphans”
  - RHs cannot be found after reasonably diligent search
  - Likely to make up substantial part of ISD
  - G to charge profit-maximizing prices to end of ©
- 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
UWF

• GBSS 2.0 envisioned appointment of unclaimed work “fiduciary” (UWF)
  – After 5 years, BRR can use some unclaimed funds to find RHs, sign them up
  – After 10 years, $$ to be paid out to literacy charities
  – Not clear how independent UWF will be, what fiduciary responsibilities it would have
  – Strange set of powers (& limits on powers)

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OW = LEGISLATIVE ISSUE

• Congress, not private parties, should address the orphan work 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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2: REPRESENTATION

- Authors Guild hired a lawyer to represent some of its members & class of RHs whose books G had scanned or was planning to scan
  - Class reps & counsel have duty to represent interests of all class members, not just the interests of some

- Chin agreed with me that academic authors have different interests than Guild members
  - Academics are more likely to want OOP books available on open access basis; not profit-maximizers like Guild members
  - AAP, Guild brief: interests of open access advocates are "plainly inimical" to the interests of the class
  - But far more books in GBS are scholarly books than are Guild member books, far more academic authors than Guild members

3: ANTITRUST ISSUES

- GBSS would give G a de facto monopoly over commercialization of OOP books
  - This would allow it to offer an ISD of OOP books that no competitor could match
  - Creates risk of excessive pricing

- GBSS would arguably entrench G’s monopoly in the search market
  - GBS will help G better respond to “tail queries,” MS & Yahoo! at disadvantage
  - Implication: should G have to give MS & Yahoo! access to GBS to improve their search technologies?
PRICE GOUGING RISK

- Prices of ISD to be set based on # of books in the corpus, # services provided, & prices of comparable products & services (+ type of institution)
  - More books + more services = higher prices
  - No comparable products or services
  - G arguably planning to scan all 120M+ books in the world
- Prices might be modest at first to get institutions to subscribe, but history & logic suggest prices will rise over time to excessive levels because G would have a de facto monopoly on ISD (cf. journal prices)
- Only check on price hikes was complicated arbitration process in Michigan side agreement
  - Libraries could complain to UM that prices are excessive
  - UM could decide to initiate arbitration, but will it?

4: PRIVACY

- GBSS would require G to collect extensive amounts of information about users’ reading habits

- Almost nothing in the GBSS to protect user privacy interests, to limit G’s reuses of it

- G has said it will apply usual privacy policy, but is this enough?

- Chin: not by itself reason to disapprove GBSS, but troubled by this
  - Hints that revised settlement should address this
5 & 6: ©, INT’L ISSUES

• “Fundamental” to © that reusers have to get RH’s consent

• Many opt-outs and objectors were upset about GBSS because of shift in © default from opt-in (ask me first) to opt-out (I have to come forward to tell you to stop)

• France, Germany, many foreign RHs complained that the settlement violated US treaty obligations

• Chin: not deciding int’l treaty objections are sound, but this disturbed him also; why Congress should deal with

WHAT’S NEXT? OPTIONS

• Appeal
  – possible but unlikely because of 2d Cir precedents

• Revised settlement agreement
  – Guild & AAP want this more than G does
  – Judge has signaled that this is preferred choice

• Resume litigation
  – Guild & AAP have little stomach for this; costly & risk of losing
  – Not clear class can be certified because of divergent interests & legal positions within class

• Legislation
NEW SETTLEMENT?

- At the fairness hearing, G's lawyers said that there would be no settlement unless it was an opt-out regime

- DOJ, among others, suggested GBS settlement could be approved if opt-in regime
  - More consistent with © law, also with antitrust law

- G more likely to agree to this if opt-in only as to commercialization
  - G will want to be able to make non-display uses of books on opt-out basis
  - But is BRR viable under an opt-in regime?

- Need for orphan work legislation?

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OPTIMAL LEGISLATION

- Allow mass digitization of books with tiered access by qualified entities, including sponsors of DPLA, willing to commit to security measures
  - OK to digitize books for preservation purposes
  - OK to display snippets for in-© books (unless RH says no), with links to sources from which books can be lawfully acquired
  - Non-consumptive research privilege, at least for nonprofit researchers
  - Non-expressive uses privilege (e.g., to improve search tools)
  - Full text access for public domain and books known to be "orphans"; opt-in to open access by academics

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PROSPECTS FOR LEGISLATION

• Difficult for Congress to act in general; public choice problems with © well-known

• OW legislation reasonably likely

• More ambitious legislative package would aim to enable the creation of a DPLA

CONCLUSION

• GBS settlement is one of the most significant developments in © & class actions for decades

• Even though the settlement wasn’t approved, GBS has dramatically changed the landscape in the US & abroad

• Many aspects of the settlement agreement are brilliant

• But other aspects are deeply troubling, maybe even evil

• Is it possible to get the good parts of GBS while averting the evil? That’s my next project