GOOGLE BOOK SETTLEMENT
AS PRIVATE © REFORM

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OVERVIEW

• Basic elements of Authors Guild v. Google lawsuit & proposed settlement
• Respects in which the GBS lawsuit & settlement are due to & exacerbate © dysfunctions
• Respects in which the proposed GBS settlement resembles legislation & constitutes © reform
• Effects that the GBS settlement may have on the future of © litigation & legislation
BOOK SEARCH PROJECT

- G began Book Search project in 2004
- G made arrangements with several major university research libraries to scan Ms of books in their collections
  - libraries to get back a digital library of books G scans
  - only G would have the corpus of all books
  - G willing to litigate fair use issue, indemnify libraries
- G providing “snippets” to users with links to libraries & book vendors to get the whole book
- G also making “non-display uses” of GBS to refine search, develop automated translation & other tools (main reason for GBS)

AUTHORS GUILD v. GOOGLE

- In Sept. 2005, AG + 3 of its authors sued G for © infringement for scanning books & displaying snippets
- Class action on behalf of all rights holders whose books were scanned from Michigan library
- G claimed fair use, but also not clear class action is viable because different interests of class members
  - Academic authors more likely to think scan-to-index = fair use
- 5 publishers brought similar suit vs. G a month later; not initially a class action
- Settlement was in progress for more than 2 years, during which Google kept scanning books
WHERE WE ARE TODAY

• @12M books in GBS corpus at this point
• @2M are in the public domain
  – G currently makes the whole book available for download in pdf
• @2M are in-print and in partner program
  – © owners negotiate with G about how much of their books to make available, on what terms (e.g., revenue-sharing)
• @8M are out-of-print
  – At least 20% are likely “orphans,” maybe many more
  – Snippets available now
• G willing to “remove” book from GBS corpus if © owner objects, also maintains a “no scan” list
  – “remove” does not really mean remove

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 $12M 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
  – BRR to get 67% for BRR-registered and unclaimed books
• $45.5M to be paid to class lawyers
• G would get a license to scan all books covered by the settlement, make “non-display” uses of them
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 run vs. queries yielding book results
  - sale of books to individuals “in the cloud”
  - institutional subscriptions fees to OOP book database
  - print-out fees from public access terminals

GBS SCHEDULE

- Original settlement announced 10/28/08
- First round of objections/opt-outs due 9/4/09
  - @400 submissions, @95% critical
  - Anecdotal evidence suggesting large # of opt-outs
- Then DOJ recommended vs. settlement, fairness hearing postponed
- Amended settlement filed 11/13/09
- New round of objections/opt-outs due 1/28/10
- Fairness hearing scheduled 1/18/10
© DYSFUNCTIONS AS CAUSE

• SCT’s 11th A jurisprudence: no damage actions can be brought vs. state entities
  – U Michigan, UC, U Wisconsin are among G’s library partners
• Overly narrow, outdated library & archive exceptions
  – Should at least be able to digitize to preserve, make fair uses
• Congress unable (so far) to pass orphan works legislation
  – Problem largely due to © term extensions
    • All books published before 1953 would be in PD by now
    • Many books published before 1978 also if © not renewed
• © office renewal records not automated, so can’t tell which works from ‘23-’63 are in public domain

PROCEDURAL DYSFUNCTIONS

• Statutory damage risks
  – G facing potential liability of $3.6 trillion because of per-work liability up to $150K, even though no actual damages to RHs from scanning books, making snippets available
• Registration as jurisdictional requirement for US works
  – Affected scope of settlement—only registered US works are eligible for “benefits” of the settlement
  – Muchnick v. Elsevier case pending before SCT
  – Authors Guild did not try to get anything for unregistered works
• Litigation is expensive, so settlement creates private law
  – Safe harbors for G, releases of liability for past and future acts
  – Only actual damages recoverable
  – Compulsory arbitration of most disputes
OWNERSHIP DYSFUNCTIONS

• Disputes over who owns rights in e-books
  – Random House v. Rosetta interpreted assignment to publishers of rights to publish the work “in book form” did not extend to e-book rights
  – Publishers contest this; one reason for separate publisher lawsuit vs. G (so AG can't get 2d ruling that authors own them)
  – Settlement adopts a revenue split model:
    • 65-35 split in favor of authors as to pre-1987 works
    • 50-50 split for works after 1987
• Reversion policies not working well, so settlement establishes procedure to ensure reversions happen
• Formalistic termination-of-transfer provisions also contribute to ownership uncertainties

WHY LIKE © LEGISLATION?

• Class action would bind all © owners in books
  – Unless opt-out, but G will still scan your books, make non-display uses even if you do
• Solution to orphan works problem, at least for G
  – “fiduciary” to control funds from unclaimed works
• Grant of compulsory license to in-© works
• Determining author/publisher splits as to e-book rights, reversion procedures
• New formalities regime
• Non-consumptive research regime
• Safe harbors for G, for libraries
• Damage limitations, releases from liability
• Compulsory arbitration regime
SHOULD COURT APPROVE?

• Pragmatic arguments for approving settlement:
  – Overcomes transaction costs of rights clearances for digitization of books
  – More books will be more widely available
  – More $ to rights holders
  – Reasons to think G will price cheaply, at least initially
  – Compromises on many issues
  – Perhaps provides better terms than would prevail in Congress

• Many risks, such as price gouging for institutional subscriptions, inadequate privacy protections, entrench Google monopoly in search, control book ecosystem

• Is this really a proper use of class action procedure?

IMPLICATIONS OF GBSS

• 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 can use settlement as leverage with rights holders of © in other types of works

• Why not use class action to achieve health care reform? What do we need a legislature for anyway since it is so dysfunctional? What does this mean for democracy?