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Google Book Settlement as Copyright Reform

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GOOGLE BOOK SETTLEMENT AS © REFORM

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Talk at U Michigan iSchool

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DAN CLANCY'S GAMBIT

- The idea of GBSS as © reform 1st came to me from Dan Clancy, Google's chief engineer for GBS
- The first thing he said to me when we discussed GBSS was:
  - "Pam, we have to make this deal happen through a class action settlement process because Congress is so broken about ©."
- Interesting gambit because he had to know I am not a fan of bills like the Copyright Term Extension Act
- But this seemed like saying "let's break the judicial branch of our government because the legislative branch is broken"
- It gave me some qualms, but others find it persuasive

OVERVIEW

- Why © reform is needed to set context
- Ways in which dysfunctional aspects of current © law contributed to the GBSS
- Ways in which GBSS is a kind of © reform
- Reasons why we might want to be worried about achieving this dramatic scope of © reform without legislation

NEED FOR © REFORM?

- Talk of © reform is in the air these days, especially because © so often seems ill-suited as law capable of responding well to the challenges posed by digital technologies
  - 1976 © Act is product of 1950s mindset
  - It was mostly aimed at overcoming problems with the 1909 Act, which was way outdated
  - Some effort to be more forward-looking & general than 1909 Act
  - But 62 revisions to © law since 1976
  - © act now 200+ pages long, mostly impenetrable
  - Public choice problems: concentrated benefits, dispersed costs + collective action inhibited

FAIR USE AS © REFORM

- Has become the most useful doctrine of © law to create flexibility to respond to ?s posed by advances in technologies:
  - *Sony v. Universal*: time-shift copying of TV programs with VCR was fair use
  - *Galoob v. Nintendo*: use of game genie to alter the play of Nintendo games was fair use
  - *Kelly v. Arriba Soft*: search engine's making of "thumbnails" of images was fair use

GOOGLE BOOK SEARCH

- Seemed likely to be the next important fair use case
- Google could reasonably think that its scanning of in-© books to index them was fair use
  - Purpose was to promote better access to books
  - Most books being copied were OOP, not commercially available
  - Whole books copied, but necessary to copy to index; only snippets being shown
  - Links to libraries where available & to book vendors, so might help sell more books
  - High transactions costs made it infeasible to get permission in advance
- G not only had the resources & will to scan the books, but also to defend its acts as fair use if challenged

NEED FOR © REFORM -> GBSS

- Overly narrow, outdated library & archive exceptions
  - Should at least be able to digitize to preserve, make fair & other legitimate uses
- Congress unable (so far) to pass orphan works legislation
  - Problem largely due to © term extensions
    - All books published before 1953 should be in PD
  - GBSS will allow orphan books to become accessible
- © office renewal records not automated, so can't tell which works from '23-'63 are in public domain for failure to file renewal registration

PROCEDURAL DYSFUNCTIONS

- Statutory damage risks
  - G facing potential liability of $3.6 trillion because of per-work liability up to $150K, even though no (or very little) 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 books or inserts

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
  - Who owns rights in new uses of ©'d works not envisioned at K'g?
  - Publishers contest this; one reason for separate publisher lawsuit vs. G (so AG can't get 2d ruling that authors own them)
- Publishers letting author reversion letters pile up
- © rights are divisible, which means there is often more than one RH
- Formalistic termination-of-transfer provisions also contribute to ownership uncertainties

GBSS AS © REFORM

- The most obvious respect in which GBSS is reforming © law is the license that the settling class would give Google—and Google alone—to commercialize all out-of-print books
  - Default rule if OOP = OK for G to sell books, include in ISD, run ads vs. its contents
- Some thousands of OOP book RHs have signed up for settlement, but millions have not
- G obliged to give 63% of the revenues to BRR, whose main task is to search for RHs, sign them up
- Some of these OOPs are "orphans"

GBSS AS TO ORPHAN BOOKS

- Financial Times has estimated that 2.8-5 M of the 32 M U.S. published in-© books are orphans
- Likely to make up big part of ISD
- G will have de facto monopoly over the orphans because BRR has no power to license 3d parties except with RH permission
- Would take act of Congress to give same rights to others
- Approval of GBSS might skew Congressional debate over orphan works

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 among class members
  - 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

UWF POWERS

- Can switch default from “no display” to “display” but not the reverse
  - This means unclaimed books could be commercialized even if they are in-print!
  - Need to sign up with BRR to ensure this default isn’t switched
- Can advise about pricing bins, but no control over prices of individual books or ISD pricing
  - Bizarre because orphans likely to be big part of ISD
- Can veto discounts, but not recommend them
- Cannot make books available on open access basis

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 10 years of looking for them, books should either be available for all to use freely 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 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 $$$

ATT. A AS © REFORM

- Att. A to GBSS addresses uncertainties between authors & publishers over who owns e-book rights for new uses not foreseen under original publishing contracts
  - Compromise in Att. A:
    - 65% for authors of pre-87 books
    - 50-50 split for post-86 books
    - Not a great deal for authors if *Random House* case is right!
- DOJ: this gives G a huge advantage over others
  - Resolves © ownership & revenue split for G, but not for rivals
  - Att A allows compulsory arbitration to allow au/pubr to contest claims as to G, but not available to rivals either
  - Not directly in issue in *AG v. G*, so beyond complaint
- Maybe this is a fair compromise as to ambiguous Ks, but should it be available to all, as would happen with legis?

OTHER LEGISLATION-LIKE

- G will get license to scan books, make non-display uses of all of them, including in-print books
  - G cannot commercialize in-print books, unless RH says yes
- Licenses to libraries for LDCs
- Non-consumptive research regime
- Safe harbors for G, for libraries
- Damage limitations & releases from liability for future conduct
- Compulsory arbitration for virtually all disputes
- Reseller privileges

NON-DISPLAY USES

- G's engineer: we didn't scan these books to be read by people, we scanned them to be read by machines
  - G is likely to make NDUs even as to books not in the settlement (e.g., foreign books, opt-out books) as FU
- NDUs have three major values to G:
  - Improve search technologies because access to more data than other search engines
    - Satisfy "tail" queries that users care about
  - Allow G to develop new products & services (e.g., automated translation tools)
  - Integration with other Google products & services will enhance lock-in effects, allow better targeting of ads

DOJ STATEMENT II

- Worthy objectives:
  - Electronic distribution of out-of-print & orphan books
  - Searchable texts of millions of books
  - Creation of book rights registry
  - Enhancing accessibility of books to print-disabled
  - Overcoming difficulties of achieving goal through other means
  - Addressing unclarity about digital ownership

DOJ II: A BRIDGE TOO FAR

- Class counsel has obligation to litigate the claims brought vs. D 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
- 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 sometimes matters start in litigation and get resolved through legislation
- Factors suggesting more suitable for legislation than class action settlements:
  - the larger the # of people in the class
  - the greater the diversity of their interests
  - the broader the settlement is compared to the issue in litigation
  - the more comprehensive its impact on the future
  - the more there will be spillover effects on 3d parties

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?

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
- Orphan works legislation tailored to deal with problems presented by GBSS
- Initiatives by universities and libraries to promote open access for OOP scholarly books