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Insight

Book Smarts

By Richard E. Posell

In late 2004, in pursuit of its modest goal to "organize the world's knowledge" (and to monetize organized access to it) Google announced a program of digitizing books. The program evolved into two parallel projects: The Partner Program, with publishers covering in-print works, and the Library Project, covering out-of-print (but in-copyright) and public domain works. The latter program involved scanning and indexing the vast number of books owned by several major libraries, providing a searching tool for them and then displaying fuller texts of public domain works, or "snippets" of protected works.

Needless to say, authors and publishers who saw unlicensed music and television scattered across their computer screens thought this was a bad idea, and sued Google in two separate class actions in the Southern District of New York. The libraries that had been providing their works to Google were not sued. Google asserted it had a right to provide indexing as a fair use. Although there are those who think this defense would have prevailed, the parties have now settled, pending a June 11 fairness hearing. The settlement is a prodigious piece of work, and is seen by many as an ambitious change in the organization of written knowledge. The settlement agreement in its entirety is 135 pages without attachments and can be viewed at www.googlebooksettlement.com/agreement.html. For those with less patience, the Notice of Settlement fairly summarizes the terms of the settlement in plain English in less than 30 pages.

The sheer scale of the digitizing project is mind-boggling. Google has already scanned over 7 million books, and continues to scan. Only 10 percent of the world's 32 million books are in-copyright and in-print; the rest are either in the public domain (as to which neither the lawsuits nor the settlement are relevant) or are in-copyright but out of print (about 70 percent of the total number). The settlement also provides for the inclusion of so-called "orphan works" whose copyright owners cannot be found. The anticipated cost of the entire project is about $800 million.

The settlement is both retroactive and forward-looking; it addresses what Google has already done and what it plans to do. On behalf of author and publisher class members, it releases Google from the scanning, searching and displaying of registered U.S. works and unregistered non-U.S. works published on or before Jan. 5, 2009. Google will pay $125 million, plus royalties to the authors and publishers who claim infringement. It will also pay $34.5 million to establish a book rights registry, which will be administered by authors and publishers as a collective rights organization to administer the claims of rights-holders by taking payments from Google and others with whom it negotiates deals, and distributing them to authors and publishers.

This settlement is about to create the world's largest library, and give its owner the opportunity to be the world's largest book dealer.

Registered rights-holders will receive $45 million for past uses, which is about $60 per book, although the share for orphan works rights-holders who fail to make claims will be redistributed to known participants. In the future, rights-holders will receive 63 percent of Google's revenue from book purchases, licensing and advertising. Past and future uses of orphan works are protected by a five-year claim period, Google will be able to sell customer access to individual books as well as institutional subscriptions to its entire data base. There will also be an institutional subscription service for public libraries that would limit access to works, but would provide for "non-consumptive" research on the database (i.e. research on the database qua data, such as statistical analyses). No payment will be made for this use.

These highlights almost fail to do justice to the detailed and comprehensive regime established by the agreement. There are comprehensive provisions on pricing, dispute resolution, safe harbor procedures for determining eligible works (public domain and commercially available works), and the operation of the book rights registry. There are rules for opting in and opting out. For example, an author can opt in for payment for past uses , but opt out for further display, or can opt out of the settlement entirely. In-print works will be excluded unless opted in, while the default for out-of-print works is inclusion.

There are currently two critical dates facing the proponents of this settlement: May 5 is the last day upon which any member of the class can opt out; and June 11 is the date of the approval hearing.

The facts and terms of this settlement in and of themselves may be interesting only to copyright lawyers — at first. After some thought, however, it becomes clear that the consequences of the deal to the public are extraordinary. This settlement is about to create the world's largest library, and give its owner the opportunity to be the world's largest book dealer. Even if Google had prevailed in its fair use defense, it would not have settled the rights to display out-of-print books, research on the corpus

of the data base and license access for libraries and institutions.

Not only did the settlement authorize Google to establish and use the library, it creates a de facto monopoly in access. The class character of the settlement means that any competitor (one who has $800 million to spend on competing) will have to slog through individual negotiations with millions of rights-holders in order to freely scan and display, a difficult task for in-print books and an impossible one for out-of-print and orphan books. Is Yahoo or Microsoft (which actually gave up its scanning program recently) going to start a class action naming a class of defendants in order to receive the blessing of a class settlement? Not likely.

There is currently a public discussion in the blogosphere about whether this settlement gives Google a permanent or temporary monopoly in the market for in-copyright, out-of-print books. This discussion may miss the mark in the long run. Historically, copyright law has worked well as an exclusive right when it was coupled with physical exclusion and price. Vinyl records, books and graphic arts required physical access (retail stores, museums, concert venues) and the cost of reproducing faithful copies was high. Now, of course, the digital genie is out of the bottle, and such quaint concepts as "first and best copy" are a thing of the past.

Google can't realistically believe that it can contain content, once digitized and available, any more than Universal Music or Paramount can do so. The authors and publishers, who sued, knew this instinctively. In the future, what Google is selling is access, not just access to the books themselves, but algorithmic, uniquely organized access to the information in those books, and advertising space addressed to those who use its service.

Imagine what Google will be able to do with its underlying tools of word, character and object recognition applied to this vast database. Anyone will be able to compare the writings on an arcane subject, and obtain instant historical context; determine the optimum translation for a phrase or mine the sources for the provenance of an idiom.

This is not to say that Google does not intend a broader monetization model. The book registry expects to share in revenues from licensing and individual book sales. Google has already struck a deal with Sony to license 500,000 public domain books for display on the Sony Reader. We can expect to see both the Reader and Kindle utilizing this vast and unrivaled library.

Nothing in the settlement agreement prevents rights-holders from using the registry to negotiate with competitors in the book digitization market. For Google, this is hardly bad news. Every business using the Internet to sell books digitized or not, out of print or current, in the public domain, or in-copyright will want to pay Google for contextual advertising. This is Google's wheelhouse, and can be up and running immediately; selling and licensing is not what Google does, so expect glitches in the sales and licensing program.

For those readers who may represent any of Google, rights-holders, the registry or participating libraries now or in the future, we commend your attention to the lengthy and somewhat complex dispute resolution provisions of the settlement agreement. Except for specified excluded subjects, all disputes not resolved during a 30-day resolution period will be subject to arbitration in New York (unless the parties agree otherwise). New York law will apply (there is no reference to U.S. law, which some may find odd in a copyright-based agreement). The parties bear their own fees.

While there will be a database of decisions, stare decisis will not apply, although the arbitrator "may rely on or be guided by such precedent as appropriate". Pretty clearly, there is going to be a learning curve on how this dispute resolution program actually functions, or whether it will have to be revised

Presently, all eyes are on the May 5 opt-out deadline. Will there be a grand gesture, as a prelude to an organized mutiny at the June 11 hearing or will the settlement be supported by a majority of the rights-holder community, and ultimately be approved? Most commentators believe the latter is more likely. Let the revolution begin.

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