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Google: The Benign Monopolist?

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I. INTRODUCTION

There is something about copyright which evokes passion. Copyright holders see any encroachment on their rights as a manifestation of the approaching Apocalypse. *"Untune that string, and, hark, what discord follows!"* Alternatively, infringers of copyright are innocent supporters of free speech and man's right to share knowledge, ideas, and music. Holders of rights in recorded music often appear to be heavy handed when they enforce their rights against defendants who look like normal young people. The lot of the copyright holder is not made easier by the fact that the legal frontiers of his rights are not precise (for example what is "fair use" and what is simple breach of copyright?), and that technology to circumvent obstacles to unauthorized reproduction often shows as much innovation as that deployed by the right holder to hinder the "copying."

There is also something charming and certainly impressive in the history of Google, which reached stardom from a garage in California in about ten years. A benign cottage industry has become the emperor of internet searching. A company which has a motto of doing no evil, and which offers a clean uncluttered search page, without intrusive trashy items of ephemeral news about supposed celebrities (a remark which reveals my grey hair and nervous cantankerousness in the presence of anything more modern than a pencil sharpener) and which has given us a new verb ("to google") must be entitled to sympathetic endorsement.

So why is there a fuss about Google Books? Let us begin with the plan. Five years ago, Google launched an ambitious project: to convert into digital form all the works in a number of the great libraries of the United States. The goal was to offer every user of the internet a chance to read an excerpt from each book via Google's Book Search service. Google was able to scan and digitize huge numbers of books from a number of university libraries. That process was covered by agreements between Google and the libraries. However, authors were not consulted, and indeed a number of dissenting authors and publishers brought a class action in U.S. District Court in New York against Google, when it was planning to digitize the contents of the New York Public Library, as well as the libraries of Harvard, Stanford, and Oxford Universities.

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On October 28th, 2008, the parties reached a “Settlement” of past claims, also making forward-looking licensing provisions to regulate future digitalization and the further commercial exploitation of books by Google. When considering the Settlement, the Court received a substantial number of filings from class members, companies, and individuals, including the Department of Justice, several States, the French and German Governments, Amazon, Microsoft, Yahoo, EMI, several universities, the National Federation for the Blind, and the American Association for People with Disabilities. The Court has now rejected the Settlement and set November 9, 2009 as the date for the filing of an amended Settlement Agreement.

In its un-amended form, the Settlement would authorize Google to scan in-copyright books in the United States, both out-of-print and in-print, and to maintain them on an electronic database. For books which are in-print in the United States, the author’s consent would be necessary. For books that are out-of-print or where the author “cannot be located” consent would be assumed. Google would be able to sell electronic access to individual books as well as institutional subscriptions to the whole database, to place advertisements on any page dedicated to a book (wine beside cookery books, hotels beside travel books, honest lawyers beside law books), and to make other novel uses of books not yet contemplated. Google would pay 63 percent of its revenues to the right holders who made themselves known to the Registry to claim remuneration.

Was the Settlement a Good Thing or a Bad Thing? We must begin by honoring the technical achievement. Google, by creative technology, won the search engine battle for supremacy: it now wants to conquer new worlds. The goals of the Google Book project are heroic: making millions of books widely available, unlocking swathes of human knowledge to everyone with internet access, offering potential benefits to the blind and visually impaired. To quote the librarian of the ancient library at the University of Oxford:

The Google Library Project in Oxford testifies to our ongoing commitment to enable and facilitate access to our content for the scholarly community and beyond. The initiative will carry forward ... the ethos of the Bodleian Library into the digital age allowing readers from around the world to access the Library’s collections over the World Wide Web.

Googleization is commensurate with openness, access, and learning. Who could possibly be in doubt? A significant number of authors, librarians, officials, and legal experts. There seem to be three adjoining areas of concern: fairness, copyright law, and competition law.

As to the fairness of the procedure, this ambitious project, creating the most complete library and bookstore in history, would be regulated not by a law—indeed it would violate a number of legal principles—but by how an American litigation was settled. Foreign authors (I happen to be one) whose books are found in U.S. libraries would thus be bound by the scope of the Settlement, as would authors that cannot be reached. A Lithuanian poet whose book of poems happens to sit on a shelf of the Harvard University library would be bound financially and otherwise by whatever his American peers negotiated for him. The poet’s sister who embellished the book with photographs from Lithuania would see her work scanned by Google. The poet and his sister are both bound by the Settlement unless they opt out; they are

“absent” class members whose rights in the work will be capable of an open-ended exploitation by Google. But in order to opt out, they would need to be aware of the Settlement and have adequate notice. I must suspect that Google would find it easier to scan ten million books than to track down and get informed consent from say half a million living authors (or their estates) whose books are out-of-print in the United States. If there is no such consent, under the Settlement silence would be deemed as implied consent.

We must wonder whether foreign authors are adequately represented in the proceedings. The Authors Guild, the leading association of U.S. authors which is a party to the Settlement, represents all authors bound by its scope; but its membership is not open to authors that have not been published by an established U.S. publisher. It may be that U.S. authors have an identical interest to the Lithuanian poet, and would make similar demands or voice similar concerns, but we cannot be sure of this. Maybe the poet will take steps to claim some income (assuming he knows of the Settlement and knows where to go). Perhaps he does not care to see his work used as a vehicle to promote purchases of souvenirs or rental cars in Vilnius. He might well feel unhappy that a U.S. judge would be deciding how his poems are to be exploited digitally. Will his heirs be disappointed to discover that the Settlement provides that unclaimed revenues for unknown authors will pass to the benefit of the Registry, for the benefit of a pool of authors who are known and registered? So there is a problem of the seemliness and fairness of binding the world’s authors of out-of-print books by an assumption that silence means consent as to the outcome of an American litigation. Maybe the slogan should be: “No digitalization without representation.”

Second, if we are not abolishing copyright law, the proposed project raises several concerns. Some may say that copyright laws are too slow and do not adapt to developments in technology, the demands of teenagers, and the promises of novel technology. True, from the beginning of the twentieth century, content providers have fretted over the encroachment on their interests by new technology. Movie makers and artists worry that peer-to-peer sharing takes a lot of money away from the artists, and the music industry estimates that there has been an immense loss to due to unauthorized reproduction.

On the other hand, the success of the Apple iPod and YouTube prove that new techniques can make music and movies more easily accessible, can increase demand, and can bring extra revenues to the creators or extra levels of audience awareness. There is no obviously correct answer. I am content to observe that opinions are sharply divided, both as to music and moving images. However, creating an equivalent to You Tube for the book industry is a bit startling. One author might be pleased that five thousand enthusiasts had studied his work on-line whereas another author might prefer to see fifty works sold in hard copy: it is easy to understand the two points of view.

This is not the first time that the advent of new techniques means that right holders are faced with some encroachment on their rights while at the same time seeing a great enlargement of access to the work. Authors have historically enjoyed strong rights of exclusivity over their work: the right to publish or not to publish and to control the making of copies. The proposed Settlement seems to discard or at least sharply erode these rights. Technology today

allows the rapid printing of a scanned book and then its binding at high speed. Google can deliver high speed “publishing machines” that can manufacture a paperback book of about 300 pages in five minutes for \$8 a copy, with \$1 for Google. So the digitization permits and enhances the chance of physical reproduction of the work in very large numbers. The universe of the “peers” who could share works is greatly enlarged, and technology will endow every person with the capacity to make numerous perfect physical copies of the book.

By implying consent by the authors of books that are not commercially available, the Settlement violates the classic property rights of an author, or an author’s estate. Distributing unclaimed revenues to other right holders also seems startling. Morally, it excuses the accusation of theft but does not solve the problem of those who get nothing. Taking from the unknown to give to the known is not a comfortable regime for dealing with property rights.

Google is a profit-making enterprise which has thrived on creative commercial ideas. Such commercial ideas may have great social benefits but they also may have anticompetitive drawbacks. Forty years ago, few people studied competition law in Europe. But back then, and still today, common sense is a good substitute for antitrust subtlety. Cartels, price-fixing, and bid-rigging are dangerous; as is entrenched monopoly power. If market forces will remedy the monopoly phenomenon, then antitrust enforcers should stay away. What kind of effects will arise due to Google’s Book Settlement? Google already controls several on-line information access services: Google Search, Google Maps, Google Earth, Google Ads, Google Images, Google News, and others. One can imagine a cascade of interest links from a quotation found on Google Search to the readily available Google Book offering the very page in the very work or the photograph linked to Google Images, and the hotel in the city where the events in the book occurred. It would also be feasible for Google to observe from the titles of the books the interests of buyers so as to orient further advertisements to them. Thus the Settlement would reinforce and enhance multiple strong or very strong market positions.

The proposed Settlement would also affect price competition. It would create an industry-wide revenue-sharing formula at wholesale level applicable to all works. A price floor is set between Google and consenting authors and publishers (a fixed royalty of 63 percent of all revenues). There would also be restrictions on excessive discounting. Google would set a default price if the author does not suggest one (it would choose which price category is appropriate for each book). This may make no difference to poets who are uninterested in money, or academics or legal practitioners who merely want to communicate their ideas. But a successful writer of fiction might object; a professor who writes a textbook might refuse on the grounds that one student could supply 200 classmates with a googleized copy of the professor’s scanned book. Those writers for whom money is important, and publishers—for whom money is always important, are likely to behave differently when proposing price terms to a huge digital retailer as opposed to individual negotiations with multiple booksellers. No individual publisher or bookseller would have the clout of Google.

If the project succeeds, then Google would become one of the world’s largest publishers and would set the price of millions of books. It would impose the selling price and the maximum discounts (there is debate as to whether resale price maintenance is bad or good for

the book market, but the matter is by no means clear). The prices for institutional subscriptions reflect the size of the corpus of the database, the services available, and the prices of comparable products and services. Some universities pay in excess of \$4 million a year for access to thousands of journals, so their anxiety about possible price exploitation is not trivial.

Under the Settlement, Google would have de facto exclusive rights for the digital distribution of "orphan works." Those of Google's competitors which do not have implied consent by unknown authors would not be able to digitize these books. It has to be assumed that when a library or an institution buys a digital database it would prefer Google's more comprehensive product over the incomplete offering of competitors. This could foreclose newcomers to the digital distribution market. One unappetizing way for competitors to enter the digital market would be to violate copyright law and then hope for a lawsuit that would be settled on terms comparable to the Google Settlement. Google would be in the enviable position of offering a unique and comprehensive product with weak competition and free pricing. Fears of Google dominating the market are not fanciful. Although dominance is not in itself bad, its effects in a market may be troublesome. The recent investigation launched by the Italian Competition Authority, regarding Google's alleged abuse of dominance in the online advertising market, reflects a wider concern on both sides of the Atlantic.

The abstract goal of creating easier access to millions of books is an honorable one, as is confirmed by the number of libraries which like the idea. Such an immense collection of works would be immune from fire, which destroyed several ancient libraries, another merit. But the venture is a commercial one with major commercial consequences, whose controversial characteristics are confirmed by the fact that it is being shaped by the outcome of a private litigation. Are the risks worth the benefits? Google would say yes. Copyright experts like Professor Pamela Samuelson would say no. Initiatives which promote cultural heritage and give fresh breath to lost or neglected books are welcome. However, it is not necessarily and obviously a good thing that Google can swallow up the copyright interests of a gazillion of unreachable authors and become a de facto worldwide dominant bookseller. Although Google's ultimate goal is not to circumvent copyright law, it should not be rewarded by legitimation for infringing copyright rights more comprehensively than any other enterprise in history (my formulation shows how copyright engenders passion!).

If the law needs to be changed to respond to those kinds of technological developments, we should take care of that first. There is no need to rush. Europe is facing the cultural and economic challenge of digitizing books in European libraries. Germany and France, through their national digital databases, the Deutsche Digitale Bibliothek and Gallica, have engaged in the digitization of books in German and French public libraries. The European Commission has launched the Europeana project, a digital library which maintains 4.6 million books in electronic form. However, no in-copyright books have been scanned without the author's consent as that would be in violation of European copyright laws. The European Commission is considering adapting copyright rules in order to allow and encourage the digitization of out-of-print and orphan works. We have to be patient for this to arrive. Then Europe can legally digitize or even googleize. But if the Google Settlement goes ahead as proposed, the European project will



become moot. Therefore, maybe the solution to the debate on the Google Books Settlement should be less enthusiasm and more prudence; a *“decent respect to the opinions of mankind.”*