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Revise or Start Anew? Pondering the Google Books Rejection

Timothy J. Brennan
Univ. of Maryland, Baltimore County

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I. INTRODUCTION

At least some of the interested parties in the Google Books case, the authors, are familiar with getting manuscripts rejected by publishers. As winter turned to spring this year, they collectively got yet another “we’re sorry” envelope in the mail. On March 22, 2011, Judge Denny Chin of the U.S. District Court (S.D.N.Y.) issued a long-awaited opinion rejecting the proposed amended settlement of a class action suit brought by the Authors Guild and other groups against Google.² The members of the class had originally claimed that their copyrights would be infringed by Google’s plan to digitize books and make them or substantial portions of them available over the internet through a searchable database.³ Representatives of the parties negotiated a settlement; subsequently modified after extensive criticism from the Department of Justice, numerous *amicus curiae*, and members of the plaintiff class. A hallmark of this amended settlement was a refinement of compensation to copyright holders along with the creation of a fund to facilitate identification of (if possible), and compensation to, unknown copyright holders of works—so called “orphan works.”

Judge Chin and others opposing the amended settlement, notably the U.S. Department of Justice (“DOJ”), actually found much to like about Google’s plan to create a “universal digital library.”⁴ As Judge Chin said on p. 3 of his decision:

The benefits of Google’s book project are many. Books will become more accessible. Libraries, schools, researchers, and disadvantaged populations will gain access to far more books. Digitization will facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers will benefit as well, as new audiences will be generated and new sources of income created. Older books—particularly out-of-print books, many of which are falling apart in library stacks—will be given new life.

The Department of Justice, which advised Judge Chin to reject the settlement, similarly observed

[W]idespread lawful electronic distribution and use of copyrighted works, including in-print, out-of-print, and so-called “orphan” works, holds vast promise.

¹ The author is a professor of public policy and economics at UMBC (University of Maryland, Baltimore County) and a senior fellow at Resources for the Future. Email: brennan@umbc.edu.

² Judge Chin’s decision in *Authors Guild et. al. v. Google*, 05 Civ. 8136 (S.D.N.Y., March 22, 2011), (hereinafter the “Google Books Decision”) is *available* from the Southern District of New York at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=115>.

³ The description of the history of the case and the settlement are from the Google Books Decision.

⁴ Department of Justice, Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement (DOJ Statement), *Authors Guild et. al. v. Google*, U.S. District Court, Southern District of New York, filed Feb. 2, 2010, *available at* <http://www.justice.gov/atr/cases/f255000/255012.pdf>. The phrase comes from p. 1 of the Google Books Decision.

Breathing life into millions of works that are now effectively dormant, allowing users to search the text of millions of books at no cost, creating a rights registry [establishing a database of right holders, including locating ones currently unknown, to receive revenues from online access and advertising] and enhancing the accessibility of such works for the disabled and others are all worthy objectives.

So, with all this in its favor, what went wrong? Judge Chin went through a long list of potential concerns with substance and process and rejected opponents' objections to many of them. His decision to reject the amended settlement ultimately rested on a relatively small number of somewhat related considerations:

- Significant differences exist among members of the class, including commercial authors and publishers seeking profit, academic authors interested in distribution, rights holders who did not participate in the registry, foreign authors, and foreign governments with concerns regarding access to orphan works.
- The settlement goes beyond the Court's authority because the case originally concerned displays of "snippets" (brief excerpts of the material used primarily for search purposes) while the settlement would cover terms and conditions for access to entire works.
- Approving the settlement would effectively reward Google for "wholesale, blatant copying without first obtaining copyright permissions," unlike competitors who undertook such efforts.
- Only Congress has the authority to both determine access rights to orphan works and change the copyright holder's presumptive right to exclude transferring his rights to Google unless the rights holder affirmatively "opts out."
- Regarding antitrust, the settlement "would give Google a *de facto* monopoly over unclaimed works" and control over the markets for searching books and online search more generally.

I earlier commented on economic issues in the proposed settlement.⁵ Here, I want to focus on economic aspects of the specific concerns Judge Chin raised, including "opt in" vs. "opt out," and the potential applicability of a fair use defense. I then look at the scope of his authority especially with regard to orphan books and the antitrust arguments he mentions and raised in the DOJ Statement. I conclude with observations on the antagonisms in the class and why the objectors to Google in the settlement need not be on the side of competition.

II. OPT IN VS. OPT OUT

The importance of opt in vs. opt out has risen in economics in recent years, but for reasons different from those Judge Chin discusses, so it's important to keep them separate. Behavioral economists argue that, in many cases, the costs of opting in or opting out are small; thus differences in decisions people make reflect some sort of cognitive bias that can be corrected by mandating whichever leads to a better outcome. An often-cited example is signing on to employer-subsidized defined contribution pension plans, where rates of acceptance when

⁵ Timothy Brennan, *The Proposed Google Book Settlement: Assessing Exclusionary Effects*, CPI: THE ANTITRUST CHRONICLE (October 2009 Release 2).

employees have to opt in are substantially below opt out acceptance rates, i.e. when the default is getting the contribution.⁶

Whether the difference in those acceptance rates indicates a cognitive bias or something consistent with standard economics, e.g., a rational response to the information contained in whether X or Not X is the default option, and how one identifies whether X or Not X is the better outcome, is not germane here. I mention this only to contrast the behavioral economics view with Judge Chin's, which posits that the effort to opt in or opt out is costly. Requiring that copyright holders opt out of Google's digitizing scheme puts a cost on these holders that is inconsistent with the exclusive use right set out in the copyright laws. But if opting in or out imposes a significant transaction cost, as Judge Chin says, we can apply economics of law principles that state when costs are high, the law should ideally delineate property rights in order to lead to the same efficient outcome as if those costs were low, or minimize the costs of further transactions to get there.⁷

Judge Chin notes that the settlement sets out different opt in and opt out rules among classes of books. In particular, Google could not "display in-print books at all unless and until it receives prior express authorization." To put it perhaps too simply, "opt out" applies only to out-of-print and orphan works, while "opt in" is retained for books still in print.⁸ If so, that looks a lot like what the efficient assignment of rights would be in the face of substantial transaction costs. Out-of-print and orphan books would seem to be just those where the value of retaining control by the copyright holder is low. Either the market value has shrunk below the point where it is worth it to keep the book available (out-of-print) or the copyright holders apparently lack the incentive to keep their ownership clear (orphan books). The value of control, on the other hand, is most apparent for books in print, where the market value suffices to maintain availability.

A defense of fair use could be similarly structured. From a legal perspective, the "opt out" books are those where the market value is presumably low, so Google's digitization and copying has little effect on the statutory factor of effect on market value.⁹ This consequently increases the relative weight of the benefits Judge Chin and DOJ mentioned regarding education, research, disadvantaged groups, and others. From an economic perspective, fair use is a compulsory license at a zero price. It can be efficient if the costs of arranging transactions at a positive price exceed the benefits from doing so.¹⁰ For out-of-print and orphan books, a reasonable presumption is that those benefits are small.

Certainly, some copyright holders may object; Judge Chin quotes some of them. If they have the wherewithal to register an objection with a court, they probably could let Google know

⁶ CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁷ That low transaction costs lead to efficient outcomes regardless of property rights was famously pointed out in Ronald Coase, *The Problem of Social Cost*, (3) *J. L. ECON.* 1-40 (1960). For a discussion of the implied principles for assigning property rights when transaction costs are high, see ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (2000).

⁸ I assume that there is no legal objection to Google or anyone else digitizing and distributing books in the public domain because they were either never copyrighted (e.g., U.S. government publications) or the copyright term has expired.

⁹ The four statutory factors for courts to consider in granting fair use are set out in 17 U.S.C. §107.

¹⁰ Timothy Brennan, *Harper & Row v. The Nation: Copyrightability and Fair Use*, (33) *J. COPYRIGHT SOCIETY OF THE U.S.A.* 368-89 (1986).

that they are opting out, so their interests might remain preserved to some degree. The settlement allows opting out; it does not grant Google unfettered reproduction and distribution rights. The larger point is that, from an economic perspective, the costs and benefits of a general rule depend on general presumptions and are not thwarted by exceptions—unless those exceptions prove the rule.

There is, however, a technological fly in the ointment. Electronically distributed books are becoming more prominent than print book sales. Amazon reports that this year, to date, its electronic book sales (complementing its Kindle e-book reader) have been exceeding its print copy sales.¹¹ As electronic distribution becomes more prominent, the line between “in-print” and “out-of-print” books becomes indistinct, as any book can be kept digitized for subsequent sale. In fact, that is the core of the Google Books business model; there would have been no case had electronic books become a substitute, if not the preferred substitute, to hard copy distribution. The very terms “in-print” and “out-of-print” may become as anachronistic as “dialing” a phone.¹² If so, the opt out or opt in requirements may become harder to condition on whether the market value of the books is minimal or substantial.

III. SCOPE OF AUTHORITY: ADVERSE POSSESSION OF ORPHAN WORKS

Although Judge Chin declined to do so in this case, courts have the authority to transfer property. The common law doctrine of adverse possession is a clear and pertinent example. Under that doctrine, a right holder X loses title to Y if Y uses X’s property in an “open and notorious” way that conflicts with X’s rights, continuously for a period defined by statute, on the order of twenty years.¹³ From an economic perspective, adverse possession can promote efficient use of land when open, conflicting, and continuous use indicates that the adverse possessor values the land more highly and is in a better position to see that it is put to its most highly valued use (including resale), than the original property owner.

Could the adverse possession doctrine apply to copyrighted works? It does not seem too big a stretch to imagine that orphan works are those for which Google’s plan would constitute the open, notorious, and hostile use that would lead the nominal copyright holder to lose his or her right. That at least opens the door to the possibility that Judge Chin could look to general property law to justify accepting the settlement. However, were adverse selection to be the model, it would lead to a potentially undesirable outcome—transfer of copyright of all of the orphan works to Google.

Under adverse possession, continuous open, notorious, and hostile use of property does not lead to that property becoming a commons, where no one has exclusive rights to use it. For real property that would generally be an inefficient outcome, as the right to alienate—facilitated by the right to exclude—is an important criterion for the efficient use of that property. Exported to copyright, however, adverse possession would entail not placing the orphan works in the public domain. Eliminating copyright altogether for such works is likely the most efficient outcome since the marginal cost of another use of information in those works is zero and the

¹¹ Amazon.com, *Amazon.com Now Selling More Kindle Books Than Print Books*, News Release (May 19, 2011), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1565581&highlight=>.

¹² For readers under 35, ask your parents what this refers to.

¹³ The Free Dictionary Legal Dictionary, “adverse possession,” available at <http://legal-dictionary.thefreedictionary.com/adverse+possession>.

apparent value in retaining excludability to facilitate marketing of the works is zero—otherwise they presumably wouldn't have been orphaned. Instead, adverse possession applied to orphan works would transfer the copyright to Google.

To put it simply, Judge Chin may only be able to transfer copyrights in orphan works, when the best remedy would be to void it. The only way to prevent this outcome may be legislation to define a doctrine similar to adverse possession for copyright, but with the result being not transfer of copyright but placement in the public domain. Judge Chin would then be correct in saying that Congress, rather than the courts, has the authority to decide what should happen to orphan works in a digital world. However, his reluctance to apply adverse possession and transfer title of orphan works to Google also presumes that doing so would not be in the public interest. This brings up the antitrust questions.

IV. MONOPOLIZATION, PRICE FIXING ... AND EFFICIENCY?

I have previously reviewed antitrust considerations in the Google Books settlement,¹⁴ so I will only briefly review the antitrust arguments here. Judge Chin's short discussion of these issues begins with concern that Google is acquiring a "*de facto* monopoly" over orphan works. Both Judge Chin and DOJ recognize that rights given to Google in the settlement are non-exclusive, but find nonetheless that Google would acquire a monopoly over these works because it jumped the gun by starting to digitize works before obtaining permissions from copyright holders.

Judge Chin and DOJ provide no argument that firms that might want to offer searchable digital libraries would now be unable to enter this market. The argument seems to be that Google won a race to be the sole source of digital books through an inappropriate early start. If monopoly is inevitable, then from a competitive standpoint it is not obvious what the harm is to consumer welfare from Google being a first mover, assuming the settlement itself is not anticompetitive. The "jumping the gun" contention may raise a question as to whether Google would be guilty of monopolization because that tactic constituted illegal monopolization in violation of Section 2 of the Sherman Act,¹⁵ but no support for such a claim is provided.

As observed above, had Judge Chin employed an adverse possession argument, Google might have ended up holding the copyright to all orphan works. This could have given it a monopoly in a relevant book market or markets. To the extent that the settlement gives Google, and no other entity, the assurance of a lack of copyright liability for digitizing and distributing orphan works, as Judge Chin states on p. 38 of his ruling, competitive concerns could be well founded. This is why legislative determination of rights regarding orphan works seems necessary.

Other aspects are potentially more troubling, although Judge Chin's decision is somewhat confusing. On pp. 6-7, he says that under the settlement, "rights granted to Google are non-exclusive: Rightsholders retain the right to authorize others, including competitors of Google, to use their books in any way." On p. 37, however, he says that third parties could not "display snippets" or "index and search" scanned books without Google's consent. At some risk of being inaccurate, the only way to reconcile those statements is if the later findings refer not to "scanned books" in general but to Google's scans of those books.

¹⁴ Brennan, n. 5 *supra* briefly discusses analogies to ASCAP, resale price maintenance, most-favored nation clauses, delineating relevant book markets, and conditions for foreclosure.

¹⁵ 15 U.S.C. §2.

If so, Judge Chin appears to be saying that Google's competitors should not only have the same ability to scan books as Google has, but should also have rights to use Google's digital copies without payment. Perhaps one could make a case for giving competitors such rights for materials scanned by Google prior to reconciliation of the case, if concerns regarding "jumping the gun" are competitively relevant. But Judge Chin appears to be coming close to saying that Google's scans are an essential facility—a doctrine that so far has failed to support authority in the United States for giving rivals rights to use a dominant competitor's assets.¹⁶

DOJ mentioned two other antitrust concerns that did not surface in Judge Chin's opinion. A first is that the settlement terms constitute price-fixing among the class of authors. That may be, but a rule-of-reason analysis would likely be appropriate to determine if the costs of negotiating rights individually exceeds the benefits of competition, just as collective copyright organizations such as ASCAP and BMI provide rights for public performance of songs. A second point DOJ raised is that "Google's exclusive access to millions and millions of books may well benefit Google's existing online search business" (DOJ Statement, p. 22). This is nothing more than saying that if Google offers a better product, competitors will find it more difficult to compete with it. Judge Chin deserves commendation for not repeating this argument in his decision.

V. ANTAGONISM IN THE CLASS, AND BACK TO CONGRESS

A last point regards Judge Chin's finding that the interests of class members may be too distinct to justify imposition of a settlement affecting all of them. As observed in discussing the opt in vs. opt out aspect of this proposed settlement, the interests of a few dissenters ought not be enough to reject an arrangement that promises a substantial net benefit across society as a whole.¹⁷ But here is one antagonism DOJ mentioned that Judge Chin omitted but should have included—that the plaintiffs who negotiated the settlement effectively set the prices Google would charge for access to orphan books with which the plaintiffs compete.¹⁸ This may be the most compelling competitive reason why Congress needs to step in to resolve the orphan books issue rather than leave it to a judge to accept terms and conditions negotiated by parties who have an economic interest in subverting competition from those same books.

¹⁶ *Verizon v. Trinko*, 540 U.S. 398 (2004).

¹⁷ For non-economists, this is not an appeal to utilitarianism, but to a narrower norm that an arrangement (such as a settlement of a lawsuit) should be adopted if the aggregate benefits to the winners exceed the aggregate cost to the losers, so that the former could, at least in principle, compensate the latter.

¹⁸ As someone chagrined every semester at the prices students pay for textbooks, I can only hope that there's some orphan textbook out there that I could make available to students for a nominal price, if not for free.