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Bringing Google to book

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Bringing Google to book

The proposed settlement leaves big unanswered questions

*by **David Wood***

The proposed Google book settlement raises so many legal issues that it is almost too difficult to know where to begin.

In no particular order, these include: the appropriateness of class actions to solve regulatory problems; the legitimate scope of class action settlements; the reversal of the longstanding principle of prior consent in IP law; the applicability of international IP treaties to court-backed settlements; the court-sanctioned creation of a digital library monopoly; price-fixing for digital distribution of works; and, last but not least, the impact of all this on online search and search advertising. On top of these legal issues, there are significant questions about access to knowledge, preservation of cultural patrimony and how to measure the impact of agreements relating to the worldwide web even in geographical areas where they do not formally apply.

This article focuses on two of these issues: the competition law implications of the proposed settlement and the nature of its effects in Europe and the rest of the world.

The first proposed settlement

Google began digitising books in 2004 and, since then, has scanned millions of works without obtaining licences from the relevant rights holders. These works provide the vast majority of content that is copied, indexed and offered online through Google book search.

In September 2005, a group of authors filed a US class action copyright infringement lawsuit against Google for its book search service, and related litigation was also brought by a group of US publishers: The Authors Guild Inc v Google Inc Case No 05 CV 8137 (SDNY); The McGraw-Hill Companies Inc, Pearson Education Inc, Penguin Group (USA) Inc, Simon & Schuster Inc and John Wiley & Sons Inc v Google Inc Case No 05 CV 8881 (SDNY).

Fast forwarding to October 2008, a negotiated settlement was announced, subject to approval by the US District Court for the Southern District of New York.

In broad terms, the proposed settlement would have enabled Google to digitise virtually any book protected by a US copyright - including effectively every in-copyright book published in Europe (since these books are protected by US copyright law pursuant to various international treaties) unless the relevant rights holder positively and formally opted out of the proposed settlement. Included within the scope of the settlement were "orphan works" - that is to say, works that are within their term of copyright protection but whose rights holder cannot be located.

The proposed settlement would also have granted Google the right to sell online access to these digitised works, as well as to analyse them to produce indices and to improve its internet search and search advertising algorithms. It would also have helped Google to develop new services such as language-based tools, including automatic translation services.

Department of Justice's response

The court was due to hold what is known as "a fairness hearing" in October 2009. Many third parties submitted observations in one form or another to the court. These included not only civil parties (such as authors and publishers), rivals to Google in the online world (such as Microsoft and Amazon) and industry associations (such as the Open Book Alliance) but also the US Department of Justice (Do]) and the French and German

governments. These submissions and other source materials have been helpfully gathered at http://thepublicindex.org/.

Un surprisingly, the DoJ's submission provoked the most interest and had the greatest impact. It was surprisingly hard-hitting. The DoJ's statement of interest on the proposed settlement made the preliminary point that the settlement sought to resolve "matter[s] of public, not merely private, concern" that are "typically the kind of policy change implemented through legislation, not through a private judicial settlement". Further, the Do] also concluded that the proposed settlement raised at least two "serious" competition issues.

First, the settlement would "grant Google de facto exclusive rights for the digital distribution of orphan works" and "create a dangerous probability that only Google would have the ability to market ... a comprehensive digital book subscription". This "is precisely the kind of competitive effect the Sherman Act is designed to address".

Second, the settlement appeared to restrict price competition by: (1) creating an industry-wide revenue-sharing formula at wholesale level applicable to all works; (2) setting default prices and prohibiting discounts at the retail level; and (3) placing control over the pricing of orphan works with publishers and authors whose books might compete with these orphan works. The Do] noted that the settlement "bear[s] an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential per se violations" of US antitrust law.

Shortly after the Do] filed its statement, the plaintiffs filed a motion asking to delay the fairness hearing on the ground that the parties were seeking to revise the settlement to take account of the Dol's concerns.

Revised settlement

On 13 November 2009, the parties filed a revised settlement proposal (perhaps inevitably tagged "version 2.0"). The key changes were that the revised proposed settlement would only include books that were either registered with the US Copyright Office or published in the UK, Australia, or Canada - in other words, the majority of non-English works were excluded unless they had been registered with the US Copyright Office. Other changes included increased possibilities for the commercialisation of works covered by the provision settlement through distribution channels other than Google (such as Amazon and Barnes & Noble) and the removal of the "most-favoured nation" provision whereby third parties could not be offered licensing terms which were better than those available to Google under the settlement.

As with the first version of the proposed settlement, many third parties submitted their observations on version 2.0 to the court. The Do] repeated its earlier concerns that a class action procedure was the wrong way to decide such important issues and noted that:

- The proposed settlement would "confer significant and possibly anticompetitive advantages on a single entity Google".
- In relation to the pricing mechanism, "it is unlawful for competitors to agree with one another to delegate to a common agent pricing authority for all of their wares".
- "There is no serious contention that Google's competitors are likely to obtain comparable rights independently".
- "Google already holds a relatively dominant market share in [the search] market. That dominance may be further entrenched by its exclusive access to content through the [proposed settlement]. Content that can be discovered by only one search engine offers that search engine at least some protection from competition. This outcome has not been achieved by a technological advance in search or by operation of normal market forces; rather, it is the direct product of scanning millions of books without the copyright holders' consent and then using [a class-action procedure] to achieve results not otherwise obtainable in the market."

From various public and private statements made by European Commission officials, it is understood that while DG Competition has been watching this process with interest, it has not received any formal complaints, and has reservations about the impact in the Community of an arrangement which (at one level, at least) purports to be restricted to a US audience.

Nevertheless, the concerns raised by the Do] clearly strike a chord with competition lawyers in Europe. Even if we have no direct equivalent of the "monopolisation" infringement, we do have extensive recent case law relating to leveraging of market power. We also have rules on price-fixing that are every bit as clear as those in the US.

Extraterritorial effects of settlement

In terms of effects, a number of reasons have been put forward as to why it is likely that effects of the proposed settlement would be felt outside the US.

First, although the revised settlement purports to exclude most European books, it would in fact allow Google to scan and profit from large numbers of European and other non-US books. For instance, the revised settlement would expressly apply to all books first published in the UK (and in Canada and Australia). Moreover, it would apply to all works first published elsewhere in Europe (and the world) if those books were at any time registered with the US Copyright Office.

Second, the revised settlement would continue to give Google a de facto monopoly over access to orphan works.

Third, the revised settlement does not prevent Google from continuing unauthorised copying and "snippet display" of European works that fall outside its scope. This means that European rights holders who are now excluded from the settlement would still face unauthorised copying of their works by Google.

Fourth, Google's position as gatekeeper to online access to books for US readers would give it an unparalleled degree of influence over the terms of access for European readers. Its control over the only comprehensive digitised library would give Google massive influence over Europe's development of digitised libraries, in terms of the amounts earned by authors and publishers, charges to consumers and other users, and the types of products and services on offer.

Finally, by enabling Google alone to offer the capability to search millions of books, the proposed settlement would have a major impact on search and search advertising markets, where Google has market shares significantly above 60% in Europe. Even if a rights holder instructed Google not to commercialise a particular book, the proposed settlement would allow Google to digitise the book, include it in its books database, and conduct research on this database - to the benefit of its search and search advertising offerings, among other things. As the proposed settlement specifically prohibits research on the database by any service that competes with Google, there is the clear risk that the revised settlement would stifle innovation and harm the internet. As a representative of Google said about the proposed settlement at a European Commission hearing held in September 2009, "it really is about the cloud" (ie internet-based computing where software, information and services are accessible anywhere on any computer).

Conclusions

It is tempting to be carried away by the prospect of greater access to knowledge and the almost supernatural promise that the proposed settlement would "breathe life into dead books".

However, these benefits need to be weighed against the costs. For IP rights as well as the implications for European cultural patrimony, this balance can only be found through the legislative process at EU or member state level. For the competition law issues, Europe has a tried and tested body of laws that are both flexible and at the same time reasonably clear and predictable.

In the light of the continued objections from around the world, there is a likelihood that version 2.0 of the proposed settlement will be replaced by version 3.0 in the coming months. It is difficult to predict the ways in which the two will differ. It has been rumoured that the parties are considering giving authors and publishers an opt-in rather than requiring them to opt-out. In the meantime, the European Commission is working on preparing legislation for orphan works that would deal with the recognised problem of being unable to obtain consent from rights holders who cannot be identified.

These changes - if they become reality - will clearly need careful consideration, not least as to how they will affect the competitive situation in the US, in Europe and elsewhere. However, it seems clear that unless there are also other changes - such as giving third parties access to the copies authorised under the proposed settlement on fair, reasonable and non-discriminatory terms - possibly insurmountable competition concerns will remain.