

Google Books Settlement: “A Good Thing” or “A Bad Thing”?

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- *"Imagine yourself at your computer, and in less than a second, searching the full text of every book ever written"* (Eric Schmidt, CEO of Google, 2004)
- *"A serious problem with any version of the public interest theory is that the theory contains no linkage or mechanism by which a perception of the public interest is translated into legislative action."* (Richard Posner, *Theories of Economic Regulation*, New York, 1974)
- *"... a decent respect to the opinions of mankind"* (Thomas Jefferson, author of the Declaration of Independence, 1776)

The Facts

- Google wanted to improve the quality of its search engine:
 - Perfect and exclusive access to all the content of most of the world's books
 - Advantages for accuracy, speed and authority of the search, as well as translation features
- 2004: Google entered into agreements with certain leading university libraries (Harvard, Michigan, Oxford, Stanford) to digitize their collections
 - Google Library Project
 - So far more than 12 million books have been digitized*
 - 2 million copyright-free, 2 million in-print (explicit permission by copyright owners)
 - 7 million out-of-print (a lot of them orphans)
 - more than 100 languages represented
 - Google Books: everyone can search the contents and for books free of copyright the entire text
- 2005: Complaint to the U.S. District Court for Southern District of New York by publishers and authors that Google Books violated their copyrights
 - Google answer: fair use of copyright – public benefit
- October 2008: Settlement Agreement between Google and a broad class of authors and publishers, Authors Guild of America/Association of American Publishers
 - Google Books Search (GBS) Settlement
- 28 October 2009: fairness hearing – rejection of the Settlement
 - 400 filings including a Statement of Interest by the DOJ (18 September 2009)
- 13 November 2009: the parties filed an amended Settlement with the Court
- 19 November 2009: the Court preliminarily approved the amended Settlement
 - 4 February: DOJ filed its response
- 18 February 2010: the final fairness hearing will take place

*Source: Electronic Frontier Foundation

Horizontal price fixing? US theories

- **Industry-wide wholesale revenue-sharing formula: 63/37**
 - DOJ: “Price restraints that tend to provide same economic rewards to all practitioners regardless of their skills [...] is a masquerade of price fixing” (Maricopa 1982)
 - Amended Settlement: Google may renegotiate on bilateral basis the wholesale revenue split BUT for commercially available books only
 - DOJ: Should be extended to non-commercially available as well
- **Setting of default prices and effective prohibition of discounting**
 - DOJ: Pricing algorithm OK BUT unlawful for competitors to agree with one another to delegate to a common agent pricing authority for all their wares
 - Amended Settlement: “the pricing algorithm will be designed to stimulate how a rights holder would unilaterally price its Book in a competitive market”
 - DOJ: Preferable to have bilateral negotiations
 - DOJ: **Collective restraints on discounting**
 - No discounting without authorisation from authors and publishers collectively (through the Registry) and discounting up to 40%
 - Amended Settlement: eliminates 40% restriction
 - DOJ: The Registry should not be allowed to block discounts
- **Control orphan book prices by known publishers and authors**
 - DOJ: **Registry which is controlled by known publishers and authors sets prices of orphan books**
 - Amended Settlement: Appointment of Unclaimed Works Fiduciary
 - DOJ: Limited powers as to controlling prices of orphan books

Are these the real antitrust concerns?

- **These competition concerns about horizontal price-fixing seem weak by comparison to the reinforcement of Google vertical monopoly**
- **DoJ's second submission places less emphasis on pricing**

Upstream monopoly on new scannings created by a settlement

- Private Settlement confers a *de facto* monopoly to scan out-of-print books (which can be scanned without permission; known authors may object)
- Barriers to entry – orphan books
 - Neither the Fiduciary nor the Registry has the power to grant a similar licence to a competitor of Google entitling it to do what Google can do in respect of orphan books
 - UNLESS there is some legislative supplement, any company scanning orphan books might be sued (and then hope for a class action settlement)
 - Fiduciary of unclaimed works may grant licences to Google's competitors to the extent permitted by law, meaning only with Congress's authorisation
 - If legislation is needed to fix a competition problem posed by the Settlement then why do we need the Settlement in the first place?

Downstream pricing by the monopolist

- **Lack of competition**
 - No one else could build such a comprehensive digital database
 - Google could raise prices to library users; individuals will have alternatives (Amazon, printed books)

- **Non-charitable entities price competitively**
 - Some universities pay in excess of \$4 million a year for access to thousands of journals – how much would they be willing to spend for the “universal digital library”?
 - The Settlement does not give institutional subscribers the right to go to court to enforce “objectives” and “parameters” of the Settlement Agreement
 - Google entered into side agreements with some of its major library partners that allow only these institutions to challenge Google’s ISD price

Entrenching dominance in the search engine market

- Why did Google start the digitization of books in the first place?
 - To improve its search engine; more books, more text, richer and better searches
- Potential impact on Google's existing search business
 - Dominance in the search market
 - Exclusive rights over upstream database
- Competitive advantage gained
 - Not through innovation or normal market forces
 - But through a settlement procedure
- Its competitors asked for permission before copying; Google asked for forgiveness after copying

More entrenchment: what only Google can do without asking for consent

- Non-Display uses: not displaying any content from a Book to the public
 - Google is prevented from making Non-Display Uses of already-scanned Books only if the rights holders request removal of the Book from the database before March 2012
- Examples of Non-Display uses
 - Display of bibliographic information
 - Full text indexing
 - Geographic indexing
 - Algorithmic listings for key terms for chapters
 - “Internal research and development” by Google
- Google’s search engine’s development through the digitized corpus of most of the world’s books
 - Better searches; better understanding of the words
 - Developing translation abilities

Should US settlements be exported worldwide?

- **Google:**
 - Built monopoly through innovation: hugely dominant
 - New resources of new rights in an adjoining area of activity: new intellectual market
 - Entrenching dominant position through litigation!
- What would be the result if we tried to create Google's exclusive rights through legislation?
 - Howls of protest? Murmurs? Joy?
- What we would do in Europe in case of a legal monopoly?
 - Claim a market failure: essential facility – deal on reasonable terms?
- An analogy: the European public monopoly
 - Privatisation: heirs of public incumbents
 - Huge new powers over adjoining areas of activity
 - Entrenched dominant position through legislation

Consider proportionality

- Are there less restrictive ways of achieving the huge public good?
 - Least restrictive alternative – public interest
 - Is this monopoly necessary and appropriate?
- Shared rights
 - Librarians?
 - Competitors?
 - Yahoo, Microsoft, BBC, publishers
- Google: 110% for creativity?
 - \$125 million to control the digitization of most of the world's books?
 - Tariff rather modest
- Less enthusiasm and more prudence
 - The social benefits must be weighed against the anti-competitive drawbacks

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The Pros

- Unprecedented online access to books
 - Bring out-of-print books back to life
 - Access to specialized sources
 - "Library that lasts forever"
- Innovative, new uses of the information inside the books?
- Access for the visually impaired
 - Screen enlargement, read-aloud, Braille displays
- A huge public benefit

The Cons

- Fairness
 - Forward-looking provisions that go beyond the dispute in litigation
- Legislation through litigation
- Antitrust concerns
 - Broadening a monopoly?
- Copyright concerns
- Privacy concerns
- Ethnocentric project: focus on US
- A huge private benefit

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