

# 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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