

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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