Overcoming Copyright Obstacles in a Post-Google Book Settlement World

by Pamela Samuelson
June 15, 2011

This post is part of "CDT Fellows Focus," [1] a series that presents the views of notable experts on tech policy issues. This month, CDT Fellow Pamela Samuelson [2] is our guest contributor. Posts featured in "CDT Fellows Focus" don't necessarily reflect the views of CDT; the goal of the series is to present diverse, well-informed views on significant tech policy issues.

Controversial as it was in some respects, the proposed Google Book Search (GBS) settlement of two copyright lawsuits arising from Google's scanning of in-copyright books from the collections of major research libraries, such as the University of Michigan's, would have brought about many socially beneficial results.

Chief among these was a vast expansion in access to out-of-print but still in-copyright works. Up to twenty percent of the contents of these books could have been displayed to users in response to search queries (unless the rights holder objected). The full contents of millions of these books would have been freely accessible at terminals at public libraries (one per library) and at institutions of higher education (one per so many students), as well as through institutional subscriptions available to libraries and other institutions. E-book versions of these out-of-print books would also have been available for purchase by consumers which they could access "in the cloud." In addition, Google pledged in the proposed settlement to make digitized copies of these books available in formats accessible to print-disabled persons (e.g., enlarged fonts, Braille versions).

By the time Judge Chin held a hearing about the proposed settlement in mid-February 2010, Google had already scanned 12 million books. One expert estimated that Google would scan as many as 50 million books for GBS, most of which would come from the collections of major research libraries, collections which are dense with the accumulated knowledge of the ages. It was thus no exaggeration to assert that approval of the settlement would have vastly expanded access to our cultural heritage.

Also beneficial was the proposed settlement's permission for Google to scan in-copyright books from research library collections and to provide its library partners with scans from the partners' collections that the libraries could use for preservation purposes as well as permitting patrons to engage in what the settlement called "non-consumptive research." Several leading academics wrote letters in support of the settlement, praising in effusive language, the incredible research opportunities and learning potential that non-consumptive research would enable. This is because scholars could conduct searches over the corpus of books to trace, for example, the influence of a particular thinker over time or the origins of words and phrases for linguistic analysis. Google itself would have been privileged by the settlement to engage in non-display (i.e., computational) uses of books in the GBS corpus for purposes such as improving its search technologies and automated translation tools.

And of course, the proposed settlement would have been socially beneficial in providing the opportunity for new income streams to authors and publishers because the proposed settlement would have given Google the right to commercialize out-of-print books in the corpus. Sixty-three per cent of the revenues from these commercializations would have been set aside for distribution to rights holders through a newly formed collecting society, the Book Rights Registry (BRR), which would have used some of the money collected from Google to look for rights holders and sign them

up for payouts due to them.

In March 2011, Judge Chin ruled that despite the many benefits that would flow from approval, the proposed settlement had to be rejected because its scope was too vast in comparison with the issue in litigation (i.e., is scanning books to index their contents copyright infringement or fair use?), it flipped the fundamental norm of copyright (ask permission first) on its head (by allowing Google to make use of in-copyright works unless rights holders showed up to say no), and it was not “fair, reasonable, and adequate” to all members of the class, as class action laws require.

In his decision rejecting the settlement, Judge Chin seemed to encourage the parties to reach a less ambitious settlement. While this may or may not occur, the settlement’s vision of enhanced access to the cultural heritage embodied in books from research library collections has whetted the appetite of many—this author included—to find a way to achieve the vision. If this cannot be accomplished through a class action settlement, how else might it happen?

The most obvious path forward would be through legislation. Maria Pallante, the newly appointed Register of Copyrights, and James Billington, the Librarian of Congress, have written to key Congressional leaders to indicate their willingness to undertake a study of legislative options in the aftermath of the GBS settlement disapproval. Having closely studied the settlement and assessed its possible benefits, I have developed a framework for a legislative proposal that would aim to achieve these objectives, entitled “Legislative Alternatives to the Google Book Settlement,” which is forthcoming in the Columbia Journal of Law & Arts and is available here [3].

In brief, the article recommends: 1) creating a privilege to scan in-copyright works for preservation purposes, to allow their contents to be indexed, and to allow non-display uses of the scans, including non-consumptive research uses, 2) allowing “orphan works” (works whose rights holders cannot be found after a reasonably diligent search) to be made available on an open access basis, 3) expanding the right of libraries and others to improve access for print-disabled persons, and 4) ensuring that reader privacy interests are respected (as CDT proposed in its submissions [4] to the court on the GBS settlement).

The article also suggests that serious consideration be given to adopting an extended collective licensing (ECL) regime for out-of-print, non-orphan books so that a collecting society could give libraries and other institutions a license to use all works in a corpus and not just to the rights holders who are already members of the collecting society. ECLs have been used with considerable success in Nordic countries to provide rights holders with compensation while at the same time allowing users the assurance that they can get a license to make a large number of works available even when transaction costs of clearing all rights would be excessive or possibly prohibitive.

Many, even if not all, of the social benefits that would have flowed from approval of the GBS settlement can be achieved in other ways. Some reforms can perhaps be done through private ordering (e.g., professors making their books available on an open access basis), some through fair use (e.g., scanning to index contents), and some through legislation. We should not let the failure of the GBS settlement stand in the way of finding new ways to make cultural heritage more widely available.
For updates, follow us on Twitter at @CenDemTech [5].

-
- Google Books settlement
- CDT Fellows Focus

Copyright © 2012 by Center for Democracy & Technology
The content of this website that originates with CDT can be freely copied and used as long as you make no substantive changes and clearly give us credit. Details.
Source URL:
https://www.cdt.org/blogs/overcoming-copyright-obstacles-post-google-book-settlement-world

Links:
[1] http://cdt.org/cdt-fellows-focus
[2] http://www.cdt.org/personnel/pamela-samuelson
[3] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126
[4] http://www.cdt.org/copyright/CDT-GoogleAmicusFinal.pdf
[5] https://twitter.com/#%21/CenDemTech