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I. INTRODUCTION

In the first article on this topic,[2] we discussed the position following the first draft settlement agreement in the Google Books dispute, presenting it in a broader European policy context. However, for those who don't recall the article, the background to this case is as follows. In the autumn of 2005 the Author's Guild and the Association of American Publishers brought a class action lawsuit against Google challenging the scanning in of in-copyright books. Under U.S. law, court approval is required for the settlement of a class action. The judge presiding over the case is required to determine whether any settlement reached is fair, reasonable, and adequate to the class on whose behalf it was negotiated.

The parties produced a first draft settlement agreement. However, this was amended due to the number of objections lodged, in particular by the U.S. Department of Justice. The fairness hearing in relation to this Google Books settlement agreement was held on February 18, 2010. Judge Chin, presiding, took into consideration strong opposition from the Department of Justice, governments of France and Germany, Google's most prominent competitors, public interest organizations, and hundreds of authors and publishers and turned it down. The amended settlement agreement was presented to Judge Chin; his judgment on this amended agreement was handed down in March 2011.

This article will first look at this Amended Settlement Agreement ("ASA), which was before Judge Chin for his consideration, and then Judge Chin's decision. It will look at potential changes to copyright law and, finally, it will look at the European Commission's current position on mass digitization.

II. THE AMENDED SETTLEMENT AGREEMENT

The ASA authorized Google to scan works, sell subscriptions to databases, and sell on-line access to individual books. It went far beyond the issues in the original pleadings, which related to searchable short snippets of copyright works.

The ASA required Google to obtain prior authorization from the copyright holder for in-print copyright works. However, it also gave Google the right to commercialize virtually every out-of-print book in the corpus unless individual copyright holders notified Google of their wish to opt-out.

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[2] Isabel Davies et al., *Online Distribution of Copyright Works: Google Books in a Broader European Policy Context*, CPI ANTITRUST CHRON. (Oct. 2009).

The ASA significantly reduced the scope of foreign works included on Google Books. Only foreign works registered with the United States Copyright Office and those published in Australia, Canada, and the United Kingdom (all common law countries with attractive fair use legislation) before January 5, 2009 would be included in the Google Books database. However, this scope would still, in practice, bring into the fold every significant book published in English and many French ones in the light of the inclusion of Canada.

To protect unregistered rights holders, it called for an "unclaimed works fiduciary" to represent their rights and interests and hold their revenues for ten years. At the end of this 10-year period it was suggested that any unclaimed money would go to literacy charities.

Another attractive feature of the ASA was a plan to develop an institutional subscription database ("ISD") of the out-of-print books. Google would have to provide free access to this database to public libraries and produce copies suitable for persons with disabilities. Further, Google would have to provide free access to students, researchers, and institutions of higher education.

The ASA also established a Books Right Registry ("BRR") to collect the revenues for the right holders to be distributed. Google would pay 63 percent of revenues made from the books to the BRR. Google would repay this percentage of revenue to authors whose works had already been digitized. The BRR is similar to the idea of an Extended Collective Licensing regime used in Norway which is discussed later in this article.

Because of these benefits, some authors and publishers supported the prospect of the ASA as out-of-print books would have generated new revenues for right holders. Others, however, did not.

III. JUDGE CHIN'S DECISION

Judge Chin was troubled by the number and nature of the objections received in relation to the ASA. These highlighted that not all authors have the same interests and, further, that there were numerous objections to the idea that the burden would be placed on authors to "opt-out" of the scheme rather than on Google to obtain permission ("opt-in").

The lawsuit had originally concerned the scanning of books and the display of snippets. However, according to Judge Chin, the ASA implemented "a forward looking business arrangement which grants Google rights to exploit entire books without the permission of the copyright owners." Judge Chin went on to state "the ASA would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyright works without permission, while releasing claims well beyond those presented in the case."

Copyright law currently provides copyright owners with the exclusive right to copy their work and make copies available to the public. This means that copyright owners currently have the right to ignore requests for permission to use the copyright work. Under the ASA, if copyright owners of out-of-print works ignored Google Books, they would lose out.

Judge Chin was concerned that the settlement would grant Google control over the digital commercialization of millions of books, including orphan books and other unclaimed works "and it would do so even though Google engaged in wholesale, blatant copying, without first obtaining copyright permissions." While its competitors went through the "painstaking" and "costly" process of obtaining permissions before scanning copyright books Google, by

comparison, could take a short cut by copying anything and everything regardless of copyright status."

Judge Chin went on to say:

> The notion that a court approved Settlement Agreement can release the copyright interests of individual rights owners who have not voluntarily consented to a transfer is troubling one….it is incongruous with the purpose of the copyright laws to place the onus on copyright owners to come forward to protect their rights when Google copies their works without first seeking their permission.

The ASA also included scanning orphan works. Orphan works are works where the copyright owner is unknown and not locatable. The challenge of dealing with orphan works is not a new topic before the U.S. Congress and other governments around the world. Possible legislation could be relatively straightforward, with requirements that the user make reasonable enquiries regarding copyright holders along with a reasonable royalty being paid to an author who requested it. However, the ASA would have undermined the authority of Congress to legislate in relation to orphan works. To this point, Judge Chin said that he felt that issues relating to how copyright laws should respond to new technologies in general, and orphan works in particular, were best left to Congress rather than dealt with "through an agreement among private, self interested parties."

Due to the number of objections to the ASA, the limited parties involved in the settlement, and current copyright law, it is not surprising that Judge Chin rejected the ASA in March 2011. He stated, "many of the concerns raised in the objections would be ameliorated if the ASA were converted from an opt-out settlement agreement to an opt-in settlement." He went on to say "there are likely to be many authors—including those whose works will not be scanned by Google until some years in the future—who will simply not know to come forward."

Judge Chin also raised two other issues. The first concerned privacy issues about information gained about subscribers. Regarding the second, Judge Chin pointed out that while Google argued that the ASA was limited to U.S. copyright, "it ignores the impact the ASA would have on foreign rights holders."

IV. THE NEXT STEP

Although copyright law prevented Google from obtaining court approval of the ASA, Google has already created a corpus of 15 million books that it is intending to grow. The case now proceeds to trial and it is a question of whether the Author's Guild has the resources and the stamina to resume full litigation against deep-pocketed Google. It will be a lengthy wait for a decision if the case proceeds to trial. Even if this case proceeds to trial, it is highly unlikely that a court would order destruction of the entire Google Books database, although it may limit the fair use to snippets; Judge Chin has said that the case is about fair use. Further, Google has shared its database with library partners that are not party to the litigation.

The wait for new legislation will also be lengthy. However, it is clear that this case has highlighted the urgent need to update copyright law worldwide. Digitization of works in America proceeds unregulated and worldwide governments must consider updating legislation to keep up with it.

As Maria Pallante, acting Register of Copyrights in the United States, said recently, Congress needs to address the issue of whether the digitisation of literary works should be of benefit to the public or become a profit-making endeavour:

> the first issue is really, is mass digitisation a national goal as congress feels legislation is warranted for, and if so, for what beneficiaries.

She went on to say

> it isn't that universal libraries aren't important but there's a difference between universal libraries and universal book stores.

There was to be a further hearing on June 1, but this was adjourned until July 19 to enable the parties to conduct further negotiations with a view to finding a compromise that would be acceptable to the court. Bearing in mind Judge Chin's views, this could be challenging, not least because of his indication that there should be an opt-in provision.

V. THE WAY FORWARD

There are three ways of moving forward. Changes could occur on a country-by-country basis, on a pan-European basis, or on an international basis.

A. Country-by-Country Basis

Countries may opt to create an online digital library for their own jurisdiction, introducing a similar regime to that used in Norway.

In 2009 the Norwegian National Library concluded an extended collective licensing ("ECL") regime agreement with Kopinor, a collecting society that represents a substantial number of authors in Norway. This licence allows Norway's National Library to provide access to its digital database on in-copyright works to residents of Norway. This includes out-of-print books. Members can read on-line but cannot print or download copies. The library pays a fixed fee per page to Kopinor, which is responsible for allocating revenues to rights holders.

From a U.S. point of view and also among other nations, this approach may be too socialist and be seen as a smacking of the nanny state. It has been reported that J.K. Rowling (author of the Harry Potter series) acted to stop her copyright works from being included in the Swedish ECL.

An ECL regime on a national, regional, or international basis could also consider: (i) lending out-of-print books by libraries subject to suitable restrictions; (ii) ensuring the level of privacy granted to readers preserves the anonymous nature of reading; (iii) forming a database of information in relation to orphan works; and (iv) forming an unclaimed works fiduciary which would represent the rights and interests of unregistered right holders for 10 years after which royalties gathered would be donated to literacy charities.

U.K. copyright law as it currently stands cannot facilitate mass digitization. Orphan works were omitted from the Digital Economy Act 2010. The government will need to consider whether it wishes to wait for European legislation on this matter or whether it is willing to take the lead. However, in light of the cross-border issues that will arise if it forges ahead on its own, it makes more sense to strive for a pan-European approach.

B. Pan-European Basis

On the European level, there has been movement towards a change. The European Commission released a report on January 10, 2011 regarding the EU's digital library project, EUROPEANA. It stated that:

> New information technologies have created unbelievable opportunities to make common heritage more accessible for all. Digitisation breathes a new life into material from the past and turns it into a formidable asset for the individual user and the important building block of the digital economy. We are of the opinion that the public sector has the primary responsibility for making cultural heritage accessible and preserving it for future generations. Digitising our cultural heritage is a gigantic task that requires large investments. We think the benefits are worth the effort.

Among other recommendations, the report suggested that a European legal instrument for orphan works needs to be adopted as soon as possible, and that a method for avoiding future orphan works must be created by some form of registration to fully exercise rights. It supported the idea of a collective licensing solution and suggested that this should be backed by legislation to digitize and bring out-of-distribution works online.

The report went on to note that private-public partnerships are desirable. However, "they must be transparent, non-exclusive and equitable for all partners and must result in cross-border access to the digitalised material for all."

One can see from this report that the European Commission agrees that legislation is required to update copyright law and propose the introduction of a similar regime to an ECL.

C. International Basis

In the event of a re-amended settlement agreement being approved, the United States could fall foul of the Berne Convention and WTO TRIPS treaties. However, these treaties do not reflect the needs of current technology whether terrestrially or extra-terrestrially. Indeed, the EC digitisation report recommended that the Berne Convention be adapted on this point in order to make it fit for the digital age.

A solution could be for WIPO to look towards creating a protocol to the Berne Convention to clarify the meaning of the Berne three-step test in relation to the fair use, fair dealing, or equivalent exceptions. Alternatively, other multinational provisions dealing with this and other issues would be worthy of consideration.

VI. CONCLUSION

The time has come to look afresh at copyright issues in particular, and IP issues in general, and agree on a structure to deal with these challenges on a holistic basis, perhaps by moving forward with multinational supplementary agreements.

It is not suggested that multinational co-operation will be easily achieved but, in our view, this process must begin without delay. Certainly Google has served notice that it continues its interest in developing its business in this area and doesn't intend to cease its activities. The British Library announced on June 20, 2011 that it has entered a partnership with Google to digitize 250,000 out-of-copyright books from the Library's collection with Google covering the digitization costs. This content will be available free through Google Books.