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Ian Forrester
White & Case LLP

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In the October 2009 issue of this publication,² I wrote an article entitled, *Google, the Benign Monopolist?* on the subject of the phenomenally ambitious Google Books project and the litigation which it aroused before the U.S. District Court in New York. The plan was that Google would scan millions of books and then make them available in hard copy or electronic form. Authors would have to opt out of the scheme if they did not like it, and rivals of Google would have to negotiate access to the database.

The article suggested that the project had admirable features. The abstract goal of creating easier access to millions of books is an honorable one, as is confirmed by the number of great libraries that like the idea. The whole world would have electronic access to nearly all the world's books. Such an immense collection of works would have another merit, immunity from fire, which famously destroyed several ancient libraries. But the venture would also be a commercial one with major commercial consequences, whose controversial characteristics were confirmed by the fact that it was being shaped by the outcome of a private litigation.

Was the scheme procedurally vulnerable since it contemplated creating, by means of the settlement of a private litigation, a new legal regime affecting all the world's authors and books? Indeed, many interested parties argued that there was a problem of the fairness of binding the world's authors of out-of-print books by an assumption that silence meant consent as to the outcome of an American litigation. So there would be a great leap forward in the accessing of knowledge, a truly vast achievement. But there would be a massive challenge to traditional copyright notions.

My first article noted:

By implying consent by the authors of books that are not commercially available, the Settlement violates the classic property rights of an author, or an author's estate, to publish or not to publish. Distributing unclaimed revenues to other right holders also seems startling. Morally, it excuses the accusation of theft but does not solve the problem of those who get nothing. Taking from the unknown to give to the known is not a comfortable regime for dealing with property rights.

District Judge Chin rejected the proposed settlement in 2009 and continued proceedings on a revised version, issuing his opinion on the Amended Settlement Agreement on March 22, 2011. 500 submissions to the court, a long fairness hearing, and a judicial rejection find Google "clearly disappointed,"³ and considering its options.

¹ Ian S. Forrester Q.C., LL.D. is Partner in the Brussels office of White & Case LLP.

² Ian Forrester, *Google, the Benign Monopolist?* 10(2) THE CPI ANTITRUST CHRONICLE (October, 2009), available at <https://www.competitionpolicyinternational.com/google-the-benign-monopolist>.

³ See Hilary Ware's statement, Managing Counsel, Google, regarding Judge Chin's ruling (March 22, 2011) at <http://books.google.com/googlebooks/agreement/> (last visit 9 June 2011).

Judge Chin rejected Google's proposal as "not fair, adequate and reasonable"⁴ for a straightforward reason: the Settlement, as the United States argued, seeks to implement a forward-looking business arrangement rather than a settlement of past conduct. The reasoning is summarized at the first page of the opinion:

While the digitization of books and the creation of a universal digital library would benefit many, the ASA [Amended Settlement Agreement] would simply go too far. It would permit this class action – which was brought against ... Google ... to challenge its scanning of books and display of "snippets" for on-line searching – to implement a forward-looking business arrangement that would grant Google significant rights to exploit entire books, without permission of the copyright owners. Indeed, the ASA would give Google a significant advantage over competitors, rewarding it for engaging in wholesale copying of copyrighted works without permission, while releasing claims well beyond those presented in the case.⁵

Now, the Settlement and its amended version would go beyond scanning. Google would be licensed to make wide, general, future uses of the works of those authors who did not opt out. Normally, enterprises seek permission to copy, which they may be granted or not be granted (*Magill* is a celebrated but rare example of the overturning on antitrust grounds of a refusal to authorize reproduction). By contrast, according to the judge:

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 copyrighted books, "Google by comparison took a shortcut by copying anything and everything regardless of copyright status ... Its business plan was: "So, sue me."⁶

The huge number of opponents, dissenters, and critics, as well as the opposition of the United States and eminent copyright experts, must have made the judicially negative outcome unsurprising. But Judge Chin's judgment is rather surprising in a number of ways:

- It has been awaited for more than a year but is only 48 double-spaced typed pages long, 13 of which serve as background. The actual discussion is just over 30 pages.
- The discussions of the adequacy of the class representation, copyright, antitrust, privacy, and international law play only a supporting role.
- Unlike many judgments that quote sophisticated arguments from briefs trying to reconcile bad facts or inconvenient law, Judge Chin's judgment does not have strings of citations (and only 22 footnotes).
- It quotes extensively from amicus briefs, the transcript of the hearing, and fretful letters to the Court from authors or heirs protesting about encroachment on their rights.
- The opinion relies not on the legal arguments of experts like the United States and Professor Pamela Samuelson, but on personally engaged people voicing their passions

⁴ Authors' Guild v Google, Inc., No. 05-CV-8136- DC (S.D.N.Y. Mar. 22, 2011), Opinion of Circuit Judge Chin, pages 1 and 45.

⁵ *Id.* pages 1-2.

⁶ *Id.* page 27 quoting Thomas Rubin, counsel for Microsoft, and Robert M. Kunststadt, a Settlement objector.

about the Google project. Judge Chin also notes that 6,800 authors have already opted out.

This is a “personal” judgment from a judge who seems to have carefully read all 500 filings. The number and vociferousness of the objectors to the Settlement must have had a considerable impact.⁷ For example, consider the concerns regarding the opt-out system proposed by the Settlement. They present the interesting question of whether the Settlement violates the Copyright Act, which prohibits involuntary transfer of copyright by “any governmental body or other official or organisation.”⁸ Judge Chin elects not to answer the question. Likewise, he elects not to decide whether “the Court” or “the Registry” of “the Unclaimed Works Fiduciary” qualify as an “organisation” under the Act. Instead he quotes from the letters from a number of objectors: a 79-year old nature writer who fears the vilification of her work through the internet, the granddaughter of an author from Texas who fears that her grandfather’s self-published memoir, *Dust and Snow*, risks being classified as an “orphan work,” and two literary agents whose indignation turns into a supplication:

We have pledged, in our contracts with clients, to sell or license their rights to **ethically and financially sound purchasers and licensees** ... The situation we find ourselves in now is one of dismay and powerlessness, with only the weak ability to “object” or opt out. We beseech you to give authors back their rights. Force Google to negotiate like any other publisher. And let us get back to work.⁹

Judge Chin agrees with the objectors and makes a statement of principle:

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 copied their works without first seeking their permission.¹⁰

There is also the question of fair and adequate representation. Judge Chin agrees that there might be antagonistic interests between the plaintiffs and certain class members. Academic authors would prefer orphan works to be treated on an open access basis rather than being controlled by a private entity. But some authors want royalties, not fame and the benefit of opening their arguments to millions of people.

Also, foreign authors felt misrepresented. 3,800 authors and 9,000 publishers from Germany (as well as authors and publishers from France, New Zealand, Austria, Israel, Belgium, Spain, Sweden, Switzerland) registered with the U.S. Copyright Office complained about the sweeping *de facto* compulsory license which assumes their consent to the digital exploitation of their books. Germany, in its memorandum to the Court, calls Google “a serial scanning infringer.” Foreign authors from India, teachers from Canada, and poets, playwrights, and novelists from Japan protested vociferously, and apparently eloquently.

Finally, says the Judge, rightholders who have not come forward to register are “deemed—by their silence—to have granted Google a license to use their copyright works.”¹¹ The Judge notes that Google would have little incentive to locate the owners of unclaimed works,

⁷ *Id.* page 19.

⁸ Copyright Act 17 U.S.C. paragraph 201(e).

⁹ Judge Chin’s Opinion, page 35, footnote 18 (emphasis added).

¹⁰ *Id.* page 35.

¹¹ *Id.* page 30.

as fewer opt-outs would mean more unclaimed works for Google to exploit and more revenues for the parties to split. One objector to the Settlement put it thus: “based on the shady practice of stealing by finding... Google is trying to legalise piracy.”¹²

There were also real antitrust concerns. Objectors such as the United States, Google’s competitors, non-profit public interest organizations, and some universities argued, “this sweeping default license will operate only in Google’s favour.”¹³ Judge Chin refers to Google’s upstream monopoly on new scannings and possible excessive downstream pricing. He repeatedly observes that Google asks for a *de facto* monopoly on the scanning of out-of-print books not through innovation and normal market forces but through a settlement procedure to conclude a litigation with a U.S. copyright entity. No competitor could be granted a similar license entitling it to do what Google wishes to do in respect of orphan books (unless legislation is enacted or a new lawsuit is brought which would result in a new settlement). No competitor could build such a comprehensive digital database as Google.

The opinion touches upon the entrenchment of Google’s dominance on the online search market. The reference is brief and might be overlooked. But it is there. Google’s competitors in the on-line search market would get access to Google’s scanned books only if they enter into agreements with Google. “The ability to deny competitors the ability to search orphan books would further entrench Google market power in the online search market.”¹⁴

Judge Chin elects not to go much further. Those who were expecting answers to hot questions such as “Is Google’s behavior fair use?”; “Does the Settlement violate antitrust law?”; or “Is the Settlement in compliance with international law?” may be disappointed. Judge Chin carefully notes the concerns but says, “I need not decide the precise questions of whether the ASA would in fact violate copyright law.”

In these issues, he defers to Congress: “The establishment of a mechanism for exploiting unclaimed books is a matter more suited for Congress than this Court.”¹⁵ Congress has the responsibility to adapt the copyright law in response to changes in technology. This is all the more appropriate since the Settlement raises international law concerns as to the appropriate representation of the rights of foreign authors. The Congress (like legislative bodies in Europe) has made “longstanding efforts” to enact legislation regarding orphan works. The Settlement of one litigation in one U.S. District Court should not be the vehicle to effect a permanent quasi-legislative change effective all over the world.

After the dust of the courthouse has settled, a large number of interested stakeholders will be wondering what comes next. One possibility would be an appeal, one would be a fresh settlement relying on Judge Chin’s hints, and one would be to resume the litigation probably without a large number of the smaller parties of modest means. The second possibility seems most likely. Judge Chin has suggested as possible improvements to follow “opt in” rather than “opt out,” try to contact more authors so as to reduce the immense number of deemed consents through silence, reinforce the privacy provisions, and try again. These improvements could put the out-of-print rightsholders and in-print rightsholders in the same situation, and respond to

¹² *Id.* page 27, footnote 14 (excerpt from William Ash’s letter to Court).

¹³ *Id.* page 38, footnote 20.

¹⁴ *Id.* page 37.

¹⁵ *Id.* page 22.

concerns expressed by foreign rightsholders. They would avoid touching the orphan works global problem through private litigation in New York.

The action might also shift to Congress, especially as to orphan works. Will Google lobby effectively enough to convince Congress? Google Books' public interest theory is a strong one: unprecedented online access to books, innovative new uses of information inside books, access for the visually impaired. But, as Judge Posner puts it, "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."¹⁶

The arithmetic and the sums of money are striking. Google has proposed to pay \$125 million to control digitally most of the world's books.¹⁷ A month ago, Google paid \$210 million to the French government to acquire a symbol of French heritage, the Second Empire building at 8 rue de Londres in Paris;¹⁸ and \$150 million to the financially suffering Irish government to acquire the tallest office building in Dublin. These investments are reportedly part of Google's campaign to cope with a surge of negative sentiments arising out of several aspects of how it does business. No doubt these investments in Europe's architectural heritage were carefully valued with the help of experts. The price of an office tower is not evidently a good basis for comparing the value of the creation of a universal digital library but, for lack of other parameters, it is one point of departure to consider whether the \$125 million price Google paid was a lot or a little. It would not be surprising if the amount at stake were to be increased, since the intellectual grandeur of the project is of immense potential monetary value.

When one day we look back at the antitrust and copyright history of this decade, we may see the Google Books case as a metaphor for the evolution of Google. From benign monopolist (from cottage industry to world leader in a dozen years) in 2009, it has become in 2011 a less lustrous entity. That shift is reflected in the multiple legal and political challenges Google currently faces at the EU and national levels (privacy, security concerns, search parameters, and other controversies).

Google continues to have supporters strongly advocating that the world would be better off if the Google Books project went through to fruition. The keepers of a number of the world's greatest libraries (the Universities of Oxford, Harvard, and Stanford) are strongly in favor. The evident public advantage in making huge amounts of knowledge available to all the world's citizens is heroic. But, as time passes, Google faces more and more articulate critics. The opinion of Judge Chin is a further manifestation of this proposition: while there are real public benefits at stake, there is an immense private benefit as well.

There is no doubt that the grand idea of scanning millions of books and making them available to the world's readers is spectacular. There is no doubt that public good can flow from it. However, the current settlement conferred a too immense private good, and annoyed too

¹⁶ RICHARD POSNER, *THEORIES OF ECONOMIC REGULATION*, (1974).

¹⁷ Google has already scanned more than 12 million books: 2 million copyright-free; 2 million in-print (with explicit permission by copyright owners); and 7 million out-of-print (permission by copyright owners is implied; many of them are orphan books). Half of the books are in languages other than English (more than 100 languages represented). Out of the \$125 million, \$45.5 million will go to class counsel for legal fees. The rest will compensate copyright owners as to books already scanned (\$45 million) and fund the creation of the new collecting society under the Settlement, the Books Rights Registry (\$34.5 million).

¹⁸ The old *hôtel de Vatry*, seat of the *Compagnie du chemin de fer de Paris à Orléans* from 1861 to 1938.

many ordinary people who had eloquent voices. Since the copying is far advanced, it seems unlikely that the project will be abandoned, so a more cautious, better balanced regime seems the most likely outcome. Again, there may be a broader message for Google's aspirations as to other activities—searches, maps, private addresses, and privacy generally. The message may be “Prune the exuberant aspirations and go more cautiously.”

The judgment is interesting, easy to read, rich in the voices of ordinary people, and very severe. But one must assume that the 12,000,000 copies are not going to be digitally deleted; therefore, we must also expect that a better-balanced regime will emerge to govern their exploitation.