

The Google Book non-Settlement and the Nordic ECL model

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It cannot have evaded the notice of anyone interested in copyright matters that Judge Chin at a New York federal district court recently has rejected the so-called Google Book Settlement (GBS). While holding that "the digitization of books and the creation of a universal digital library would benefit many", Judge Chin argued that the GBS "would simply go too far" as it would "permit the class action - which was brought against defendant Google Inc. 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." More specifically, the Judge held that the GBS "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."

Here I will not go into the details of neither the settlement nor the opinion by Judge Chin. Rather, I will focus on the Judge's opinion that the establishment of a mechanism for exploiting unclaimed books is a matter more suited for the legislature than Courts. Indeed, with reference to case law Judge Chin held that "the question of who should be entrusted with guardianship over orphan books, under what terms, and with what safeguards are matters more appropriately decided by Congress than through an agreement among private, self-interested parties."

Against this background, it is interesting to note that many of the features of the *general design* of the GBS have been part of the so-called *extended collective licensing* (ECL) model in the Nordic countries since the beginning of the 1960s. Contrary to the GBS, this model is based on legislation. It is also accepted at EU level, where it is held to be an arrangement concerning the management of rights rather than a limitation or exception, and the predominant view among legal scholars is that it is coherent with international copyright norms.

Referring only to its most characteristic, basic elements, a provision on ECL in the copyright acts of the Nordic countries establishes that the effects of a freely negotiated agreement on exploitations of works in a specific manner between a user of a work and a representative organization will *extend* to right holders who are not members of the organization (outsiders). Once an ECL agreement has been concluded, the user may use the works covered by the agreement and does not run the risk to get a claim, either legal or financial, from outsiders. Hence, a party that enters into an ECL agreement with a representative organization is provided full limitation on criminal liability and is assured that the organization will meet all financial claims from those affected by extension. To safeguard the interests of outsiders, they have a right to individual remuneration and in most cases a right to opt out of the agreement. For an organization to be eligible to enter into an ECL agreement it must be representative in its field, i.e. have to comprise a "substantial number of right holders" of a certain type of works which are used in the territory in question.

Currently, an ECL provision is under consideration by the Swedish legislature which would allow certain cultural institutions to reproduce copies of works in their own collections and communicate them to the public (via the Internet) - provided of course that the prerequisites of an ECL are fulfilled, including that a collective agreement has been reached with a representative organization. For clarification, it should be noted that such online communication must be limited to internet users on the Swedish territory.

The US and other countries that are interested in mass-digitization projects similar to the one carried out by Google, and who want to have legal support for such endeavors, should take a closer look at the Nordic ECL model. Indeed, the ECL model is currently *considered* by e.g. the European Commission as a possible solution to stimulate the digitization and online availability of the collections held by cultural institutions.