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The Google Book Settlement: Canadian Perspectives

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A Canadian analysis of the Google Book Settlement (GBS) must be placed in the context of a cultural policy, which has always taken a protectionist stance largely motivated by the perceived danger of cultural incursions from south of the 49th parallel. While several years of a minority Conservative government have signalled a move to a more free market approach to the regulations governing cultural industries, sensitivities are still present and quickly manifested if threats to cultural sovereignty appear. Amazon’s announced intention to open a Canadian based warehouse to service Amazon.ca was front page news in our national newspaper in February 2010, with industry representatives denouncing the threat this would pose to Canadian booksellers. The virtual existence of Amazon.ca supplying its products (Canadian and foreign) through a subsidiary of Canada Post was approved by the government several years ago, on the basis that there were no employees in Canada and, therefore, it fell outside the regulations designed to protect Canadian distribution and retail. This counter-intuitive perception that the creation of Canadian infrastructure and employment by a foreign owned company already fully serving Canadian consumers was a threat to Canadian interests is indicative of the confusing outcomes which can arise from “brick and mortar” regulatory regimes applied to virtual enterprises. The ongoing debate over Amazon.ca indicates that Canadian cultural protectionism is alive and well.

Given this environment, it was especially surprising that Canadians were largely absent from the initial debate on the Google Book Settlement (GBS). Unlike governments in France and Germany, the Canadian government took no position on the GBS before the U.S. Court or in the media. English Canadian publishers largely signed on to the Book Rights Registry and took no formal position prior to the September 2009 Court deadline for submissions. Their motivating factor appeared to be that if there was money to be made, they needed to be part of the initiative. In keeping with their European counterparts and in contrast to their Anglophone counterparts, ANEL (Association Nationale des Editeurs de Livres), urged their members not to sign on to the Registry but appear not to have made a submission to the Court. As far as I can ascertain, there were only three Canadian submissions by the September deadline:

- A strongly worded objection from the Canadian Standards Association, as a publisher owning international copyrights including U.S. publications. CSA described the GBS as “anticompetitive, arguably violates antitrust laws, and improperly uses the class action mechanism...to force a perpetual business deal upon class members for the future use of copyrighted works in ways that go well beyond the facts that gave rise to this lawsuit in the first place.”
- The Canadian Urban Libraries Council (CULC) offered “general support in principle” for the GBS, arguing that without it “the probability of a subscription-based service with this vast body of work being available outside the United States is very unlikely.”
- The Writers’ Union of Canada (WUC) Statement of Objections indicated support for the GBS establishment of the Book Rights Registry, while expressing a number of concerns over “expropriating the copyrights of foreign rights holders” if their works were published only outside the U.S. without authorization for U.S. distribution. Other concerns raised by the WUC included:
  - The settlement should not permit future digitization by Google without voluntary sign up with the Book Rights Registry.
  - Google should not be permitted to license and profit from orphan works in the absence of U.S. Congress legislation on the matter.
  - Libraries and non-profit higher educational institutions should be required to pay a licensing fee to provide public access to the database, and digital copies should not be used by them to replace titles that are commercially available. The WUC Chair was quoted as saying on the free access to the database through public libraries, “That really sticks in our craw because we think it could have copyright implications in Canada.”
  - Authors of foreign works should be represented on the Books Rights Registry.
  - Rights holders should have the choice of opting into new uses not covered by the GBS.
  - Google should not be given preferential treatment in the negotiation of other licensing agreements by the Book Rights Registry.

Canadian stakeholder engagement with the GBS increased significantly following the filing of the Amended Google Book Settlement (AGBS) in November 2009. The AGBS limited the scope of access to digitized works (but not their actual digitization) to works published in the U.S., UK, Australia, and Canada, countries described as having common legal heritage and similar book industry practices. Paul Atken, Executive Director of the Authors Guild, one of the main plaintiffs in the case against Google, stated that this narrowing of coverage in the AGBS meant “Ninety-five percent of foreign language works are out,” meaning that “the lion’s share of the potential unclaimed works are now out of the Settlement.” What does make Canada unique in this grouping is its active French language publishing sector. While reliable Canadian publishing statistics are elusive, it is reasonable to assume that 25% to 33% of Canadian publishing is French language. It is interesting to speculate if the anomaly of full database access to these “foreign” language titles might generate additional revenue relative to European-published French language titles. The extent of this “advantage” is, of course, contingent upon the percentage of Quebec publishers that needed ANEL’s urging to remove titles from the Book Rights Registry.

The two major national English language Canadian publisher associations, The Association of Canadian Publishers (membership comprises 133 Canadian owned and controlled publishers) and the Canadian Publishers’ Council (18 publishers including foreign-owned trade and education publishers and legal publishers), both issued general letters of support for the AGBS shortly after its release. The Canadian Publishers Council specifically noted its satisfaction with the change to the definition of “commercially available,” which reads in the AGBS (new text underlined):

‘Commercially Available’ means, with respect to a Book, that the Rightsholder of such Book, or such Rightsholder’s designated agent, is at the time in question, offering the Book (other than as derived from a Library Scan) for sale new from sellers anywhere in the world, through one or more then-customary channels of trade to purchasers within the United States, Canada, the United Kingdom, or Australia.

Publisher pleasure with this amendment is understandable, as the distinction between “in print” and “out of print” is significant in the AGBS, with Google restricted for in print titles from displaying more than text snippets and publishers controlling the right to sell full text. In this age of Internet bookselling, the definition change means effectively that any book available anywhere in the world is deemed to be in print worldwide and Google has restricted rights on what it can do with the book.

As Canadian publishers quickly fell into line in support of the AGBS, the mobilization of writers and educators in opposition to the deal started to coalesce.

An online petition from writers opposed to the AGBS circulated, and by early January 2010 had 250 signatories. The WUC submission to the U.S. Court in 2009 was described by a spokesperson for dissident writers as failing to

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take an official position and trying “to work it from the inside.” The writers under the name “Canadian Writers Against Google Settlement” filed an objection to the GBS to the U.S. Court on January 28th asking that Canadian copyright holders be removed from the agreement. Several new arguments (from Canadians at least) against the settlement were introduced:

- As well as violating the Berne Convention (an argument made forcibly by European interveners), the agreement would be in violation of U.S. obligations under NAFTA
- Canadian authors’ moral rights would be violated under the agreement
- Competition and privacy concerns should be addressed
- Canadian provisions for addressing orphan works should be respected
- Canada’s bi-lingual and bi-juridical heritage and tradition set it apart from the other countries included in the AGBS

As was the case with the WUC, the Union des Écrivains et des Écrivaines Québécois, the primary Quebec writers organization, did not advise members on a specific position on the AGBS.

The Canadian Association of University Teachers (CAUT), representing over 65,000 teachers, librarians, and other academic staff, also intervened with the U.S. Court on the AGBS in late January. CAUT echoed a number of the objections raised by other Canadian groups, including that the AGBS is in conflict with international copyright and trade agreements, ignores Canadian legislation on moral rights and orphan works, is in conflict with the separate Quebec legal and commercial regulatory regimes, and includes minimal privacy protections. CAUT also introduced the objection that the interests of its members are at odds with those of the AGBS plaintiffs in that “academic authors generally place a higher premium on access than is reflected in the (AGBS).”

As we await the next stage of the ongoing GBS saga, from a Canadian perspective it is difficult to imagine that it could be implemented as written without it leading to transformative change in Canada’s regulatory, publishing, and library environments. Whether the transformation is catastrophic or liberating or a little of both remains to be seen and will certainly be in the eyes of the beholder. As a librarian I tend to “fetishize” access (in the memorable phrase of European critic Roland Reuss*) and am inclined to agree with CULC in its assertion that implementation of the GBS is a necessary first step in providing universal access to our print heritage, while providing reasonable protections for writers and content providers. I worry that “universal access” for a number of years will be limited to the United States, and that there has not been enough consideration of the research imbalance this will create, especially if institutional subscriptions are constrained in any number of ways for institutions outside the U.S.. Setting aside the implications for academic research, the image of a Canadian having to travel to a U.S. public library to access a digital text of a Canadian title is both troubling and offensive. The impression left in a June 2009 meeting between Google representatives and Canadian educators and librarians that GBS implementation was at least ten years away in Canada does not offer much hope in this regard.

The only thing that is certain is that this process will not get any easier as it proceeds. I do believe, however, that the imperatives of the emerging digital reality will make a resolution to the multifaceted tensions surrounding the GBS both necessary and desirable for all concerned. An outcome that only addresses English language content must be seen as a partial and interim solution.

Endnotes
2. Ibid., p 5.
3. Letter from Jeff Barber, CULC Chair, to Judge Chin of the U.S. District Court for the Southern District of New York, August 31, 2009.

The Google Book Settlement: An International Library View

by Stuart Hamilton (Senior Policy Advisor, International Federation of Library Associations (IFLA), 2509 CH, The Hague, Netherlands)

Ever since Google began digitizing millions of books in 2002, the Google Book project has fascinated the international library community. The tantalizing possibility of universal access to a massive number of books from American and European libraries, with further expansion to institutions elsewhere in the world — this is the stuff of librarians’ dreams. Even as the years have gone on, and more books have been digitized, at the same time louder voices are heard against the Google initiative. The idea of universal access seems to have faded somewhat from librarians’ minds, even if the possibilities Google Book offers remain attractive and seemingly within reach.

The International Federation of Library Associations and Institutions (IFLA) is the leading international body representing the interests of library and information services and their users. Founded in 1927, IFLA has 1600 member associations and institutions in approximately 150 countries around the world. In its 83-year history, IFLA has authored and published many books, and therefore has a great interest in the resolution of the Google Book question. Furthermore, some IFLA members are partners in the digitization programme itself, and as such are keen to see the success of the project and increase access to their collections.

Paul Whitney joined the Vancouver Public Library as City Librarian in June 2003. He has served in national, provincial, and local leadership positions, including President of the Canadian Library Association and the British Columbia Library Association. He currently Chairs the following groups: Library and Archives Canada Council on Access to Information for Print-Disabled Canadians and the Canadian Urban Library Council Copyright Committee. Whitney serves on the International Federation of Library Associations (IFLA) Governing Board and is the Board liaison to the IFLA Copyright and Other Legal Matters Committee.

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