

米国における著作権関連訴訟文書に係る法的論点整理及び分析等

調査報告書 概要

(英語版)

**Summary of the research report “Analysis of Legal Issues, etc. on the U.S.
Copyright Litigation Documents” dated March 1, 2010 (the “Report”)**

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骨董通り法律事務所

Kotto Dori Law Office

1. *Subject Matter of the Research Report*

The purpose of this Report is analyze: (i) the particulars of, and issues related to, the proposed settlement agreement (the “PSA”) between the plaintiffs (including the Authors Guild and Association of American Publishers, Inc.) and Google, Inc. (“Google”) in the course of the copyright infringement litigation filed with U.S. federal district court (the “Litigation”) regarding the online search and distribution service named “Google Book Search” (currently “Google Books”); and (ii) the current trends of online distribution and digital archive of books and magazines and issues to be solved for the future development thereof.

2. *The PSA as a U.S. Class Action Settlement*

The Litigation is a class action lawsuit under the United States federal rules of civil procedure, which is a type of lawsuit in which certain category of people having common interests (i.e., “class”) are represented by one or more class members and/or lawyers (as plaintiffs or defendants) and all members of the class will be subject to the legal effect caused by the outcome (such as judgment or settlement).

In order for the PSA to become effective, it should be finally approved by the court (such approval is pending as of March 1, 2010). If the PSA becomes effective, all the members of the class certified by the court (i.e., the rightholders in any books covered by the PSA), except those who timely opted out of the class action, would be bound by the settlement terms of the PSA. On the other hand, if the court determines not to approve the PSA for the reason that the settlement terms or the statutory notice to class members are not “fair, reasonable and adequate” as required by the Federal rules of civil procedure, the Litigation could be resolved not by settlement but by a judgment.

3. *Characteristics and Issues regarding the PSA*

One of the most important characteristics of the PSA is that it grants Google the right to online distribution (i.e., online page display) of books which are not “commercially available (i.e., offered for sale new through one or more then-customary channels of trade into purchasers within the United States., Canada, the United Kingdom or Australia)” without requiring prior specific consent of copyright holders (the “Opt-Out Mechanism”). So-called “orphan works (i.e., in-copyright works regarding which the copyright holder may not be found in spite of reasonable searching effort by the prospective licensee)” is highly likely to fall into the category

of non-“commercially available” and therefore to become subject to the Opt-Out Mechanism.

The Opt-Out Mechanism has the virtue of promoting the accessibility and facilitating the use of books (chiefly orphan works), and could contribute to the cultural and academic development in that sense.

On the other hand, such mechanism could conflict with copyright laws because it would “reverse” the copyright law principle that the copyright holder’s prior specific consent is required for certain exploitation of in-copyright works (Issue (1)). In other words, the PSA could narrow the scope of control over such exploitation of works (orphan works and non-U.S. works in particular) by the rightholders so as to discourage new creation of authorship.

Also, the PSA could cause certain violation of U.S. antitrust laws by giving Google excessive advantage against fair competition as a result of creating the Opt-Out Mechanism (which is more advantageous for prospective licensees than copyright law) for Google only (Issue (2)).

Further, the PSA could give rise to the question whether it is “fair, reasonable and adequate” as required for the court’s final approval, because there may be many class members (i.e., those who would be bound by the PSA as a class action settlement), such as the copyright holders of orphan works and non-U.S. works in particular, who are not adequately represented in the course of the Litigation or not sufficiently informed of the settlement terms and proceedings by the statutory notice (Issue (3)).

The PSA was originally reached on October 28, 2008, and amended as of November 13, 2009 in response to objections and suggestions on various issues such as (1) through (3) above (including those made in the amicus brief submitted to the court by the U.S. government). Although such amendment solved some of these issues, it is argued by the U.S. government, etc. that neither of the Issue (1) through (3) above is fully solved by the amendment.

4. The Particulars and Legal Effect of Amendment to the PSA

The most outstanding point of the amendment to the PSA is that the scope of “Books” is limited so that the PSA should generally apply only to such books as published in either of the United States, Canada, the United Kingdom and Australia.

Originally, the PSA was criticized by Japanese rightholders associations, etc. for the reason that the PSA, being applicable to books published in any country other than those four countries, gave rise to the concern that such books (being classified as non-“commercially available”) could be distributed online without prior consent of the rightholders. However, such concern was considerably diminished by the change of scope of “Books” as described above, so that the potential legal effect of the PSA to Japanese rightholders was diminished as well.

Nevertheless, the PSA is, as amended, still applicable to certain Japanese authors and

publishers because it covers books registered with U.S. Copyright Office as of January 5, 2009 and translations published in U.S., Canada, U.K. or Australia.

The books out of the scope of the PSA could be subject to the current “Google Books” service, which means digital scanning (reproduction) and snippet display (online distribution) without obtaining rightholder’s permission. It should depend upon the applicability of “fair use” provisions (Section 107 of the U.S. Copyright Law) whether such reproduction and/or distribution made in the United States is lawful. Although thumbnail display of images and “cache link” related to Google’s web search service was found to be “fair use” by some U.S. court decisions, the conclusion on “Google Books” should be difficult to predict because the manner of use in book search is different from web search.

Google provides certain information on the options (granting online distribution license by joining the Partnership Program, requesting removal of digital copy, etc.) for the rightholders who fell out of the scope of the PSA as a result of the amendment thereof, on Google’s website (<http://books.google.com/support/partner/bin/answer.py?answer=166297>). For Japanese authors and publishers interested in such scanning and snippet display, it could be helpful to check the updated information on such website.

5. Impact of PSA in terms of Online Distribution and Digital Archive of Books and Magazines

The PSA should be worthy of analysis not only in terms of its legal effect but also in terms of its impact on the future prospect of development of online distribution and digital archive of books and magazines worldwide.

In recent years, in light of hardware progress led by the development of digital book reading devices of U.S. origin such as “Kindle” by Amazon, “Reader” by Sony, “iPad” by Apple, etc., the market for online distribution of books and magazines is expected to greatly expand. Although there could be pros and cons for the PSA, it may be said that the PSA has presented certain approach for solution on clearance of rights for books, which would be an issue to be solved for online book distribution in a large scale.

In contrast to the trends in the United States initiated by private business sectors, in EU countries, it seems that digitization of books and magazines is initiated as cultural archive projects by public sectors such as e-library project named “Europeana.” In such projects, as well as in U.S. business, one of most important issues appear to be those on rights and contracts (such as the manner to deal with a large number of orphan works, difficulty in balancing of interests among authors, publishers, etc. particularly with respect to out-of-print books). Japan could learn from such project to some extent, although it has some issues to solve (such as high cost of rights clearance).

In Japan, although online book distribution has a long history, there should be still a long way to establish a business model (including systems for rights clearance and contracts). For such development, it should be necessary to discuss on various measures including renovation of author-publisher contracts, development of rights-clearing society and copyrights information database, legislation for further exploitation of orphan works

6. *Concluding Statements*

The PSA, having such characteristics as creating the Opt-Out Mechanism for Google regarding non-“commercially available,” caused a great deal of impact worldwide. As a result, we would need to seriously consider a question whether there is any other idea better than such mechanism to solve the issues related to copyright clearance (for orphan works in particular). In such sense, it should be advisable not only to analyze the PSA itself but also to seek various measures (including those at industry level or at government level) to find a way to solve the issues on rights and contracts regarding online distribution and digital archive of books and magazines.