Google Book Search and the Future of Books in Cyberspace

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INTRODUCTION

One of the most significant developments in the history of books, as well perhaps in the history of copyright, is the massive digitization project that Google, Inc. has undertaken in partnership with more than forty major research libraries and thirty thousand publishers.[1] Google has already scanned and digitized the contents of more than ten million books.[2] Approximately two million are books that are both in-print and in-copyright, the publishers of which may have agreed to participate in the Google Book Search (GBS) Partner Program.[3] Two million others are books that Google believes to be in the public domain.[4] At least six million are books that are in-copyright, but out-of-print.[5] Google has not indicated the upper bounds of the GBS corpus of books, but expectations are that it will grow much larger.[6]

Google currently allows users of its search engine to download the full texts of individual public domain books.[7] It also provides a few short snippets of the texts of in-copyright books responsive to user queries.[8] But unless the books' rights holders have

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[1] *See, e.g., Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 1-3 (2009) ["*Hearing"*] (Testimony of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.) ["Drummond Testimony"] (discussing the Google Book Search (GBS) initiative). Others, however, predict that a globally available Kindle "could mark as big a shift for reading as the printing press and the codex." See Stephen Marche, *The Book that Contains All Books*, WALL. ST. J., Oct. 17-18, 2009, at W9.

[2] Drummond Testimony, *supra* note 1, at 2. Only a few weeks later, at the Oct. 9, 2009, D is for Digitize Conference at New York Law School, Dan Clancy, Chief Engineer of the GBS project, announced that the GBS corpus had grown to 12 million books. This does not, however, mean that there are twelve million unique books in the GBS corpus. Google has sometimes scanned more than one copy of particular books.

[3] The Google Partner Program enables copyright owners of books to contract with Google about inclusion of their books in the GBS corpus and displays that Google can (or cannot) make of these books. *See* Google Books, Information for Authors and Publishers, *available at* http://www.google.com/googlebooks/publishers.html. *See also* Settlement Agreement § 1.62, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (Oct. 28, 2008), *available at* http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf ["Settlement Agreement"] (defining the Partner Program). Relatively little is publicly known about the Google Partner Program and its terms, as Google requires its partners to sign non-disclosure agreements about the terms.

[4] Drummond Testimony, *supra* note 1, at 3.

[5] *Id*.

[6] *See, e.g.*, Letter from Paul Courant to Judge Denny Chin, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 4, 2009), *available at* http://thepublicindex.org/docs/letters/Courant.pdf ["Courant Letter"] (estimating that Google will scan 50 million unique books for GBS).

[7] Public domain books scanned by Google are in pdf form and bear a Google watermark. Google has licensed the GBS sub-corpus of public domain books to Sony so that these books can be made available for the Sony e-book reader. See Brief for Sony Electronics Inc. as Amici Curiae Supporting the Settlement Agreement, Authors Guild Inc. v. Google Inc., No. 1:05 CV 8136 (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/sony.pdf. While Google may intend to continue to make all public domain books freely downloadable, there is nothing, so far as I can tell, that would prevent Google from deciding to withdraw these books from display uses or to charge for them in the future.

[8] If the settlement is approved, snippets will no longer be available for in-print books unless the rights holder has specifically agreed to allow this display use. *See* Settlement Agreement, *supra* note 3, § 3.2(b)

enrolled in the Google Partner Program and agreed to allow more extensive access to the books' contents, the public can only get access to snippets from most books at this time.

The Authors Guild and five publishers charged Google with copyright infringement for scanning in-copyright books in 2005.[9] A settlement of this lawsuit was announced in October 2008, and is currently awaiting judicial review.[10]

Access to books in the GBS corpus will be dramatically affected if the judge in the *Authors Guild v. Google* case decides to approve the proposed settlement agreement. The biggest change will be far broader access to out-of-print books.[11] Open Internet searches will no longer yield only snippets of such books, but now up to 20 percent of their contents. Public libraries and nonprofit higher education institutions will be eligible for some free public access terminals, although most are expected to acquire institutional subscriptions for full access to out-of-print books (unless their rights holders have directed Google not to display the contents of these books).[12]

The GBS initiative has certainly heightened public awareness about the social desirability of creating a digital corpus of millions of books from major research libraries.[13] But it has also proven to be quite controversial. Harvard Librarian Robert Darnton has aptly observed that a project as ambitious as Google Book Search is "bound to elicit reactions of two kinds...on the one hand, utopian enthusiasm, on the other, jeremiads about the dangers of concentrating power to control access to information."[14] This Article will consider the future of books in cyberspace with a particular focus on how this future may be affected by the approval or disapproval of a settlement of the GBS litigation.

Part I discusses impediments to mass digitization projects, such as GBS, and how Google overcame them. It explains the litigation that challenged Google's mass digitization project, the proposed settlement agreement, and some reasons why the settlement has become controversial. Part II contrasts some glowingly positive predictions about the future of books if the GBS deal is approved with predictions of far more negative futures for books that some critics foresee if the GBS settlement is approved. Part III considers what may happen to GBS and the future of books in cyberspace if the settlement is not approved. It recommends that major research libraries collaborate in the creation of a digital library of books from their collections as an alternative to GBS, regardless of whether the proposed settlement is approved. This digital library could greatly expand access to books, while avoiding certain risks to the public interest that the GBS settlement poses.

(classification of a Commercially Available book as "No Display"); § 2.3(d)(i) (the initial determination of Commercially Available will be used to classify books as "In-Print" or "Out of Print"); § 3.4(allowing only Non-Display uses for No Display Books).

[9] See infra notes 33-34 and accompanying text.

[10] See infra notes 36-38 and accompanying text.

[11] See infra notes 40-41 and accompanying text.

[12] See infra notes 42-51 and accompanying text.

[13] *See, e.g.*, Letter from members of the Stanford University Computer Science Department to Judge Denny Chin, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136, (S.D.N.Y. Sept. 3, 2009), *available at* http://thepublicindex.org/docs/letters/stanford_cs.pdf ["Stanford Letter"]; Michael Masnick, *Focusing In on the Value: Google Books Provides an Amazing Resource*, TECHDIRT, Oct. 2, 2009, http://www.techdirt.com/articles/20091002/0331316405.shtml.

[14] ROBERT DARNTON, THE CASE FOR BOOKS 15 (2009).

I. MASS DIGITIZATION OF BOOKS AND THE CONTROVERSIES GENERATED BY GBS

Librarians and academic researchers recognize that it is highly desirable to digitize the codified and generally well-curated knowledge embodied in the tens of millions of books in the collections of major research libraries for purposes of making a database of these books that is searchable and widely accessible to the public.[15] Although some book digitization projects have been undertaken,[16] there have been at least three significant impediments to mass digitization projects.

One impediment is cost. High quality book scans cost approximately $30 a book, which means that a large-scale project like the twenty million book goal of the GBS project would cost about $600 million.[17] This may not be a lot of money for a commercial entity with resources such as substantial as Google's,[18] but the cost of digitization is a major inhibitor of large-scale projects for university libraries and nonprofit organizations such as the Internet Archive.

A second impediment is access to millions of books.[19] The richest sources of books for mass digitization projects are the libraries of major research institutions, such as the University of Michigan, Stanford University, and University of California.[20] The collections of these book-rich institutions overlap far less than one might expect.[21] It would thus be desirable for a mass digitization project to include books from multiple research libraries. Books from these collections are dense with knowledge that could be invaluable if made part of one large corpus of books. It is, however, disruptive for

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[15] *See, e.g.*, Courant Letter, *supra* note 6, at 1-2.

[16] *See, e.g.*, Brief for Internet Archive as Amicus Curiae in Opposition to the Settlement Agreement at 3-4, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 8, 2009) (discussing the Internet Archive's collection of over one million books); Brief for Questia Media, Inc. as Amici Curiae in Opposition to the Settlement Agreement at 3, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 9, 2009) (noting Questia, Inc.'s archive of "74,000 books, 181,000 journal articles, 213,000 magazine articles, and 2.1 million newspaper articles").

[17] This estimate of per-book scans derives from a conversation I had with Brewster Kahle, founder of the Internet Archive, in New York, NY, on Sept. 17, 2009. It does not include the costs of labor required to remove books from library shelves, make records about books being shipped, deliver them to a mass digitization facility, and restack books on library shelves upon return. These costs may also be substantial. Concerning the 20 million book aspiration for GBS, *see, e.g.*, KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 258 (2009) (indicating that Google's goal for GBS is 20 million books).

[18] Even Microsoft, a firm with financial resources to engage in mass-digitization, decided not to proceed with a digitization project because of high costs. *See* Satya Nadella, *Book Search Winding Down*, Microsoft Bing Community, May 23, 2008, *available at* http://www.bing.com/community/blogs/search/archive/2008/05/23/book-search-winding-down.aspx (economic reasons for Microsoft's shutting down its digitization project after scanning of 750,000 books and 80 million journal articles).

[19] *See, e.g.*, Brian Lavoie, et al., *Anatomy of Aggregate Collections*, D-LIB MAG., Sept. 2005, at 3-4, available at http://www.dlib.org/dlib/september05/lavoie/09lavoie.html (estimating that there are 32 million unique books in libraries of the world, 18 million of which are in the collections of the five libraries with which Google initially partnered in the GBS project, for an average collection of 3.6 million books each).

[20] *See, e.g.*, Courant Letter, *supra* note 6, at 1 (estimating that Michigan's partnership with Google in GBS will enable Michigan to preserve 8 million books).

[21] Lavoie, et al., *supra* note 19, at 5 (only 40% of the books in the collections of the five libraries with which Google commenced GBS were held in more than one of the five institution's libraries).

libraries to make books available to be scanned, and libraries have legitimate concerns that books could be damaged in the digitization process.[22]

A third, and most daunting, of the impediments is copyright.[23] A substantial majority of the books in collections of major research libraries are in-copyright and likely to remain so for several decades.[24] Many of these books should be in the public domain., as they were published before 1978, an era in which copyrights lasted twenty-eight years, although they were renewable for another twenty-eight years if authors registered for a new term with the U.S. Copyright Office (which most rights holders failed to do).[25] Had copyright terms not been repeatedly extended by Congress,[26] all books published before 1953 would now be in the public domain, as would most of the books published before 1978 insofar as their rights holders did not bother to renew the copyright. Because of copyright term extensions, books first published in 1960 are, however, unlikely to be out of copyright until 2055.[27] However regrettable and ill-advised these copyright term extensions may have been,[28] they are a reality with which librarians and other would-be digitizers of books must contend when contemplating mass digitization projects.

Google had the vision, technology, and financial resources to undertake a mass digitization effort in 2004. It also had a plan for wooing libraries to make their books available for GBS corpus building,[29] and a fair use defense for scanning books to index their contents that it decided was strong enough to overcome the copyright constraint.[30]

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[22] Some earlier preservation projects resulted in damage and destruction of materials. See, e.g., DARNTON, *supra* note 14, at 112-17.

[23] *Id*. at 36. Jonathan Band has estimated the average transaction costs of seeking book rights clearances for a multi-million book digitization project to be about $1000, and this does not include the license fee that the rights holder would charge for inclusion of his/her work in the corpus. See Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 27 JOHN MARSHALL REV. INTELL. PROP. L. 227, 229 (2009).

[24] See Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-copyright Print Books in Library Collections*, D-LIB MAG., Nov.-Dec. 2009, available at http://www.dlib.org/november09/lavoie/11lavoie.html (estimating that about 2/3 of the books in major research library collections are still in copyright).

[25] 17 U.S.C. § 24 (superseded 1978). The Copyright Act of 1976, which became effective in 1978, 17 U.S.C. § 101, et seq., eliminated the renewal period and extended the terms of new copyrights to life of the author plus fifty years, which made it more difficult to predict, just by looking at a copy of the work, when the copyright had expired. This same act extended the terms of existing copyrights in pre-1978 works to approximate the new copyright term. The 1976 Act also lightened burdens on copyright owners to give notice of their copyright claims and to register their works; in 1989, these burdens were almost completely eliminated. The implications for the public domain of the U.S. decision to drop formalities requirements, such as notice and renewals of copyrights, are explored in Christopher Springman, *Reform(aliz)ing Copyright Law*, 57 STAN. L. REV. 485 (2004).

[26] *See* Eldred v. Ashcroft, 537 U.S. 186, 194-95 (2003) (recounting the history of copyright term extensions).

[27] 17 U.S.C. § 304 (2006).

[28] *See, e.g.*, Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002) (arguing that the 1998 term extension was irrational and should be ruled unconstitutional).

[29] This includes a willingness on Google's part to indemnify library partners for any copyright liability they might incur for contributing to the Google digitization project. See University of Michigan Cooperative Agreement § 10.1 (June 15, 2005), available at http://www.lib.umich.edu/files/services/mdp/um-google-cooperative-agreement.pdf ["Michigan Agreement"]. The liability risk is higher for private universities, such as Stanford, than for public universities, such as University of Michigan, because of Eleventh Amendment case law suggesting that state universities cannot be held liable in damages for copyright

The Google scanning project initially met with mixed reactions. Some commentators welcomed it and championed Google's fair use defense.[31] Some author and publisher groups, however, were highly critical of Google's scanning of in-copyright books.[32]

The Authors Guild responded to Google's book scanning project in September 2005 by bringing a class action lawsuit to challenge the scanning as copyright infringement.[33] A month later, five major publishers, all of whom, interestingly enough, were members of the Google partner program, brought a similar lawsuit against Google.[34]

In the spring of 2006,[35] the publisher plaintiffs sat down with Google and representatives of the Authors Guild to explore how the parties might achieve a

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infringement. *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000)(University of Houston has 11th Amendment immunity from damage liability for copyright infringement).

[30] *See, e.g.*, Eric Schmidt, *Books of Revelation*, WALL ST. J., Oct. 18, 2005, at A18, *available at* http://online.wsj.com/article/SB112958982689471238.html ("We have the utmost respect for the intellectual and creative effort that lies behind every grant of copyright. Copyright law, however, is all about which uses require permission and which don't; and we believe . . . that the use we make of books we scan through the Library Project is consistent with the Copyright Act, . . . without [the need for] copyright-holder permission."). Google did not at that time publicly discuss its plans for making what are now called "non-display uses" of books in the corpus. See infra notes xx and accompanying text. And neither lawsuit mentioned non-display uses of GBS books as possible bases for infringement. However, these uses were probably a strong driving force for undertaking the GBS project, as they will allow Google to do many useful things, such as refine its search technologies and automated translation tools. See generally Jeffrey Toobin, *Google's Moon Shot*, NEW YORKER, Feb. 5, 2007 (discussing the development of the GBS project).

[31] *See, e.g.*, Jack Balkin. *Search Me Please*, BALKINIZATION, Sept. 28, 2005, *available at* http://balkin.blogspot.com/2005/09/search-me-please.html. In February 2006, I hosted a workshop of about 15 copyright professors to discuss Google's fair use defense in the *Authors Guild* case. The general consensus at that meeting was that this fair use defense was likely to succeed. Scholarly commentary has generally been supportive of Google's fair use defense. *See, e.g.*, Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors or Napster for Books?*, 61 U. MIAMI L. REV. 601 (2006) (arguing that scanning books to index them is fair use). *See also* Band, *supra* note 23, at 237-60 (discussing the merits of Google's fair use defense in the *Authors Guild* case); Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual* (Working paper Series, Aug. 2009) at 11-25, *available at* http://ssrn.com/abstract=1437812 (comparing the proposed GBS settlement to fair use outcome); Frank Pasquale, *Copyright in an Era of Information Overload*, 60 VAND. L. REV. 135 (2007) (discussing the need for broad fair use for search engines to help people find information).

[32] *See, e.g.*, Patricia Schroeder, *Google Cannot Rewrite U.S. Copyright Laws*, WALL ST. J., Oct. 25, 2005. Schroeder's position is consistent with a recent decision by a French court, which held Google liable for copyright infringement arising from its scanning of books owned by French rights holders. *See, e.g.*, Matthew Saltmarsh, *Google Loses in French Copyright Case*, N.Y. TIMES, Dec. 19, 2009, *available at* http://www.nytimes.com/2009/12/19/technology/companies/19google.html.

[33] *See* Class Action Complaint, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005).

[34] *See* Complaint, McGraw Hill Co. v. Google, Inc., Case No. 05 CV 8881 (S.D.N.Y. Oct. 19, 2005); Toobin, *supra* note 30, at [3] (publisher plaintiffs were in Google's partner program when the lawsuit was filed).

[35] Although it has been pending for more than four years, the *Authors Guild* case is in relatively early stages as a litigation. *See, e.g.*, Objection of Scott E. Gant to Proposed Settlement and to Certification of the Proposed Settlement Class and Sub-Classes at 3, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC), available at http://www.publicindex.org/docs/objections/gant.pdf. (pointing out how little discovery and motion practice have been done in the case). At the Oct. 7, 2009, status conference, Michael Boni, lawyer for the author subclass, stated that no depositions have been taken in the case. Transcript of Status Conference, Oct. 7, 2009 at 9, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC), available at http://thepublicindex.org/docs/case_order/Status%20Conference%20Transcript.pdf. During the two and a

settlement of the lawsuits. Negotiations continued for more than two years. Google brought its library partners into some of these negotiations in part because the litigants envisioned a settlement under which Google would provide institutional subscriptions to libraries, and the settlement agreement needed to include some provisions for this, including a price setting mechanism.[36]

In late October 2008, Google announced it had reached a $125 million agreement to settle the lawsuits.[37] The proposed settlement agreement provided for the consolidation of the two lawsuits into one class action, whose plaintiffs now consisted of an Author Subclass and a Publisher Subclass to represent all persons or entities having a U.S. copyright interest in one or more books as of Jan. 5, 2009.[38] In light of U.S. treaty commitments, this settlement would have given Google a license to virtually every in-copyright book in the world.[39]

This GBS settlement, if approved, would have vastly increased availability of out-of-print books. The deal would authorize Google to make up to twenty per cent of the contents of out-of-print books available in response to search queries.[40] In addition, the entire texts of out-of-print books would, by default, become accessible through consumer purchases, institutional subscriptions, and public library access terminals (unless the rights holder of particular out-of-print books specifically requests that the contents not be displayed).[41]

Two weeks after the GBS settlement was announced, the judge then presiding over the *Authors Guild* case provisionally approved the proposed settlement and provisionally certified the class for purposes of notifying class members about the settlement and allowing them to opt out, object, or otherwise comment on the terms of

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half years before the GBS settlement was announced, Google knew that it could scan books with impunity because it had already reached a settlement agreement with these plaintiffs.

[36] *See* Settlement Agreement, *supra* note 3, Arts. IV, VII, & VIII.

[37] Press Release, Google, Inc., Authors, Publishers, and Google Reach Landmark Settlement (Oct. 28, 2008), *available at* http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html. Only $45 million has been set aside as payouts to rights holders whose books Google has already scanned, $60 for each book, $15 for each insert, and $5 for each partial insert. The lawyers for the author and publisher subclasses will get a total of $45.5 million if the settlement is approved. The rest of the settlement funds are being used to create the new collecting society, the Book Rights Registry, which will be created upon approval of the settlement, although $12 million has been spent on administrative matters, such as notifying members of the class about the settlement. See Amended Settlement Agreement, § 2.1 (describing benefits of the settlement to the class), Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf ["Amended GBS Agreement"]. It is not surprising that the litigants would have wanted to settle the GBS lawsuits. *See, e.g.*, Toobin, *supra* note 30, at [5] (predicting that the GBS lawsuits would settle and indicating that publishers wanted to make a deal). One factor that enhanced Google's interest in a settlement was its potential exposure for statutory damage awards which has been estimated at $3.6 trillion. *See, e.g.*, Band, *supra* note 23, at 229. The proposed settlement was, however, surprising because of its sweeping scope. *Id*., at 260.

[38] *See* Settlement Agreement, *supra* note 3, §§ 1.14 & 1.120, Attach. H, ¶ 7.

[39] Members of international copyright treaties agree to recognize copyrights in their countries of all works of foreign nationals whose countries are members of that treaty. *See, e.g.*, SAM RICKETSON & JANE C. GINSBURG, BERNE CONVENTION AND BEYOND: INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS AGREEMENTS FROM 1886 TO THE PRESENT § 6.89 (2d Ed. 2006). The license would be broader for out-of-print than in-print books, but Google would be able to make non-display uses of all books in the corpus.

[40] *See* Settlement Agreement, supra note 3, §§ 3.2, 3.3.

[41] *Id.*, §§ 1.1, 1.48, 3.2(b).

the settlement.[42] The initial schedule called for opt-outs, objections, and comments to be filed with the court by May 5, 2009, and a fairness hearing on June 11, 2009.[43] In late April Judge Denny Chin extended the comment and opt-out period to September 4, 2009 and reset the fairness hearing to October 7, 2009.[44]

Approximately four hundred documents commenting on the proposed GBS settlement were filed with the court in early September 2009, the overwhelming majority of which were critical of the settlement.[45] The most important submission was a mid-September U.S. Department of Justice ("DOJ") filing of a Statement of Interest that recommended against approval of the proposed settlement.[46] DOJ perceived several antitrust problems with the settlement.[47] DOJ was also troubled by interclass conflicts adequacy of notice, and other problems with the settlement as a matter of class action law.[48]

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[42] Order, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136, Nov. 14, 2008, *available at* http://thepublicindex.org/docs/motions/approval/order_granting_preliminary_approval.pdf.

[43] Order, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC), April 28, 2009, *available at* http://thepublicindex.org/docs/motions/approval/order_allowing_extension.pdf.

[44] *Id*.

[45] *See, e.g.*, Brandon Butler, *The Google Books Settlement: Who Is Filing and What Are They Saying?* (Ass'n Res. Libr.) Sept. 28, 2009, at 3, available at http://www.arl.org/bm~doc/googlefilingcharts.pdf. Butler characterizes the objections as falling into one of three categories: that the GBS settlement would be harmful to competition, to rights holders, or to users (e.g., inadequate privacy protections). *Id*. Many submissions raised concern about the monopoly that the settlement would give Google over "orphan works," that is, books whose rights holders cannot readily be located. See, e.g., Brief Amicus Curiae of Consumer Watchdog in Opposition to the Settlement at 11-14, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/cw.pdf; Brief Amicus Curiae of Public Knowledge in Opposition to the Settlement at 5-10, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/pk.pdf. The "orphan work" issue is discussed *infra* note 74 and accompanying text, as well as in Part II-B-6.

[46] Statement of Interest by the U.S. Dept. of Justice Regarding the Proposed Settlement at 27, Authors Guild, Inc. v. Google, Inc., Case No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 18, 2009), *available at* http://thepublicindex.org/docs/letters/usa.pdf ["DOJ Statement"]. DOJ did not reach firm conclusions about the antitrust or other legal issues addressed in this Statement, but it did indicate its preliminary analysis gave rise to serious enough concerns that DOJ recommended against the settlement. *Id.* at 2. Commentators have differing views on the antitrust implications of the GBS settlement. University of Chicago Law Professor Randal Picker has raised antitrust concerns about it in two articles. *See, e.g*, Randal C. Picker, *Assessing Competitive Issues in the Amended Google Book Search Settlement*, Nov. 16, 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507172; Randal C. Picker, *The Google Book Search Settlement: A New Orphan Works Monopoly?*, J. COMPET. L. & ECON. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387582&rec=1&srcabs=1404247. Harvard Law School Professor Einer Elhauge, however, argues that the GBS settlement should pass antitrust scrutiny because it increases output and does not raise entry barriers for other firms. Einer Elhauge, *Why the Google Book Settlement is Pro-competitive*, J. LEGAL ANALYSIS (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028.

[47] DOJ raised concerns about various pricing provisions of the settlement that might run afoul of the per se rule against price fixing. DOJ Statement, supra note 46, at 17-22. It also expressed concern about the potential foreclosure of competition that might result if Google got a license from the settlement class to commercialize all out-of-print books that no other firm could get. *Id.* at 23-25.

[48] DOJ raised concerns, for example, about provisions that would divert funds owed to orphan book rights holders to payouts to registered rights holders that created a conflict of interest between registered and unregistered rights holders. *Id*. at 8-9. DOJ also raised concerns about whether class members had

Shortly after DOJ recommended against approval of the settlement, lawyers for the Author and Publisher Subclasses asked Judge Chin to postpone the fairness hearing in order to give the parties time to negotiate new terms that would respond to the DOJ's and other concerns.[49] The lawyers filed an amended settlement agreement with the court on November 13.[50] Judge Denny Chin granted the motion for preliminary approval of the amended settlement and set the date for a hearing about whether to approve the deal for February 18, 2010.[51]

The most significant changes in the amended GBS settlement agreement pertain to the composition of the settling class and to control over disposition of funds from books whose rights holders do not come forward to claim funds derived from Google's commercialization of their books. Foreign rights holders are now excluded from the settling class, except owners of books published in the UK, Canada, and Australia.[52] The amended agreement calls for appointment of a fiduciary to represent the interests of owners of rights in unclaimed books and control over revenues owed to these rights holders.[53] The settling parties also made several changes to GBS pricing provisions in response to DOJ concerns.[54] Because DOJ also objected to open-ended provisions that allowing Google to adopt unspecified new revenue models,[55] the amended settlement specifies three new revenue models through which Google may commercialize out-of-print books in the future.[56]

II. THE FUTURE OF BOOKS IF THE GBS SETTLEMENT IS APPROVED

A. THE OPTIMISTIC PREDICTIONS

Google's General Counsel, David Drummond, painted a glowingly optimistic picture of the future of public access to books and to the knowledge embodied in them in his September 2009 testimony to Congress about the GBS settlement.[57] He began by asserting that approval of the settlement would allow young students in rural areas or inner cities to go to public libraries and have access to millions of books at the free public access terminal Google promises to provide to these libraries.[58] Google has also promised

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received adequate notice of the settlement. *Id*. at 12-13. Concerns about the fairness of the settlement to foreign rights holders were also expressed by DOJ. *Id*. at 15-16.

[49] Order, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. Sept. 24, 2009), available at http://thepublicindex.org/docs/case_order/20090924.pdf.

[50] *See, e.g.*, Amended GBS Agreement, *supra* note 37.

[51] Order, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (DC) (S.D.N.Y. Nov. 19, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/order_granting_prelim_approval.pdf.

[52] Amended GBS Agreement, *supra* note 37, at §§ 1.13 (definition of "amended settlement class"), 1.19 (definition of "book").

[53] *Id*. ,§ 6.2.

[54] *Id*., § 4.2(b) (algorithmic pricing of books for consumer purchases to simulate prices of books in competitive market); 4.5(b)(Google can discount prices).

[55] Settlement Agreement, *supra* note 3, § 4.7 (allowing Google and the Book Rights Registry to agree on new revenue models).

[56] *Id*., § 4.7. The new revenue models include print on demand, file download, and consumer subscription.

[57] Drummond Testimony, *supra* note 1, at 1.

[58] *Id. See also* Presentation of Lateef Mtima, Session on P is for Public (emphasizing the benefits of GBS for enhanced public access to books for disadvantaged communities), at the D Is for Digitize Conference, Oct. 9, 2009, *available at* http://thepublicindex.org/documents/video-library. *But see* Settlement

that GBS will enable access for print-disabled persons.[59] Approval of the settlement would, Drummond predicted, "create an educational, cultural, and commercial platform to expand access to millions of books for anyone in the United States, enriching our country's cultural heritage and intellectual strength in the global economy."[60]

Drummond also asserts that the GBS settlement would be a boon to authors because their out-of-print books would be able to attract new readers.[61] GBS may breathe new commercial life into these works in at least three ways. First, Google will serve ads to users whose queries yield GBS results, and authors or other rights holders will share in the fruits of the ad revenues.[62] Second, Google will sell institutional subscriptions to universities and other entities.[63] Third, Google anticipates "revolutioniz[ing] the way some people read books" by providing "an open cloud-based platform where users buy and store digital books in online personal libraries accessible from any Internet-connected device."[64] Revenues from consumer purchases, institutional subscriptions, and ads will be split, 37 percent to Google and 63 percent to the Book Rights Registry (BRR) whose principal task is to sign up rights holders so it can pay them their share of the monies received from Google.[65]

Drummond noted that Google is "partnering with bookstores, publishers, and device manufactures to develop an open platform," so that "readers can find and purchase digital books from any bookstore and read them on any device, including laptops, mobile phones, and e-readers from multiple vendors."[66] This would overcome the dissatisfaction that some consumers feel about only being able to read their e-books only on a Kindle, Nook, or other proprietary device.

Another settlement benefit, according to Drummond, would be an equalization of higher education institutions.[67] GBS public access terminals and institutional subscriptions will enable small, medium, and even large size but resource-challenged colleges and universities to, in effect, expand their collections to include millions of

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Agreement, *supra* note 3, § 4.8(a)(iii) ("The Registry and Google may agree that Google may make available the Public Access Service to one or more Public Libraries . . . either for free *or for an annual fee*, in addition to the Public Access Services provided under Section 4.8(a)(i).") (emphasis added). Neither public nor private school libraries will get GBS public access terminals. Users of Internet-enabled computers at these schools can, however, see up to 20% of the contents of out-of-print books whose rights holders have not turned off preview uses.

[59] Drummond Testimony, *supra* note 1, at 1. Google plans to enable vision-impaired persons, for example, to read GBS books in Braille or have access to audio tape versions. *See also Hearing*, *supra* note 1 (testimony of Marc Maurer, President, National Federation of the Blind).

[60] Drummond Testimony, *supra* note 1, at 1. Although Drummond emphasized the benefits of the settlement for authors, some objectors believe that publishers will obtain more benefits from the settlement than authors will. *See, e.g.* Objection of Bloom, et al. to Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/objections/bloom.pdf.

[61] Drummond Testimony, *supra* note 1, at 1.

[62] Settlement Agreement, *supra* note 3, §§ 3.14, 4.4

[63] *Id.* at § 4.1

[64] Drummond Testimony, *supra* note 1, at 2. A fourth, although less touted, source of revenue envisioned in the settlement is a fee that libraries will be charged for each page patrons print out from GBS books at public access terminals. Settlement Agreement, *supra* note 3, § 4.8(a)(ii).

[65] *Id.* at § 6.1 (c)-(d).

[66] Drummond Testimony, *supra* note 1, at 3.

[67] *Id.* at 4.

books from major research university collections. This would put students and faculty from these institutions on a more even par with the students and faculty of schools such as Stanford and Michigan. According to Paul Aiken of the Authors Guild, "[t]he settlement would turn every library into a world-class research facility."[68]

A further benefit of the GBS settlement, in the view of the Authors Guild, is the creation of a new collecting society, the BRR, through which authors and publishers can be paid for uses of their books not only by Google, but also by licenses granted to other firms.[69] To attract rights holders to sign up with BRR, Google plans to make $45 million (and possibly more) available so that BRR can pay early registrants $60 for each book in the GBS corpus in which they hold a copyright interest.[70] BRR will likely prioritize its search for rights holders by searching first for those whose books are generating the most revenues.[71]

In his testimony to Congress, Drummond expressed optimism that the GBS settlement would help to solve the "orphan works" problem for books.[72] In-copyright books are sometimes described as "orphans" if their rights holders are difficult or impossible to find. One of the unfortunate consequences of copyright term extensions in recent decades is that many works are now in-copyright for decades beyond the life of the author; the older the work is, the more difficult it generally is to track down the appropriate rights holder to get permission to use the work. It would be socially desirable to make orphan works more widely available for educational, research, and other purposes; there seems little reason to restrict uses of in-copyright works if there is no rights holder that is available for getting a rights clearance. To address the orphan works problem, the U.S. Copyright Office has proposed legislation to allow unauthorized uses of orphan works as long as efforts were made to track down rights holders; orphan works legislation remains on the Congressional agenda.[73]

Drummond has predicted that relatively few—under 20 percent—of the books in the GBS corpus will ultimately turn out to be orphans.[74] The basis for his optimism is that BRR is charged with tracking down rights holders and signing them up for the benefits that will come with participation in the GBS initiative.[75] Once rights holders realize their

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[68] *Hearing*, *supra* note 1, at 4 (Statement of Paul Aiken, Executive Director of the Authors Guild).

[69] *See* Settlement Agreement, *supra* note 3, at § 2.4 (recognizing the right of copyright owners to license others to commercialize their books through the BRR or otherwise). It should be noted, however, that the settlement does not directly confer on BRR the right to license any books.

[70] Those who register with BRR before March 31, 2011, are eligible for this payout. Authors of Inserts and Partial Inserts (e.g., of forewords, epilogues, essays in edited books) are entitled to $15 and $5 if they register with BRR for an initial payment for scanning of their works. Settlement Agreement, *supra* note 3, at § 5.1.

[71] Conversation with Jan Constantine, Authors Guild lawyer, New York City, Aug. 5, 2009.

[72] Drummond Testimony, *supra* note 1, at 6-7.

[73] See, e.g., U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), *available at* http://www.copyright.gov/orphan/orphan-report.pdf (proposing legislation to foster greater reuse of orphan works). There are a number of reasons why books might be orphans: the publisher might, for instance, have gone out of business; the author might have died, and his heirs might not realize that grandpa owned rights in his books; or the author or other rights holder might have moved to India to join an ashram. See, e.g., Band, *supra* note 23, at 230.

[74] Drummond Testimony, *supra* note 1, at 6. Others have much higher estimates of the percentage of orphan and other unclaimed books in the GBS corpus. *See, e.g.*, Band, *supra* note 23, at 294 (estimating that 75% of books will remain unclaimed).

[75] Settlement Agreement, *supra* note 3, at § 6.1(c).

books are generating income, Drummond expects they will come forward to participate in the revenue-sharing program GBS envisions.[76] He denied that Google would have a monopoly over orphan books, for any firm could do what Google did.[77] Drummond reaffirmed Google's strong support for orphan works legislation.[78] Such legislation could allow others to digitize orphan books. Drummond believes that Google's competitors will be able to get a license from the BRR to commercialize all of the valuable out-of-print books, except the orphaned ones.[79] In the absence of the settlement, moreover, no one has a license to make orphan books available, so the Google deal should be welcomed for opening up a new market that otherwise wouldn't exist.[80]

Drummond's Congressional testimony did not mention two other significant benefits—one accruing to Google and the other accruing to nonprofit researchers—that would attend approval of a GBS settlement agreement. Google has a right under the settlement to make "nondisplay" uses of books in the corpus.[81] These nondisplay uses of books in the corpus will allow Google to refine its search technologies, develop improved translation tools, and create other new services that will make GBS a more useful and valuable resource.[82] Google also plans to make access to the GBS corpus available at two university host sites, which can then make the corpus available to nonprofit researchers to engage in "nonconsumptive" research on it.[83]

The availability of a corpus of millions of digitized books is not only, and possibly not mainly, of value to scholars because it would enable access obscure volumes on arcane subjects (e.g., medieval watermills or Lithuanian tapestries), but rather because a digitized and searchable corpus of books would allow scholars to learn a great deal through computational analysis of the contents of books in the corpus.[84] This would make it possible, for instance, to trace the spread of the influence of a particular thinker by

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[76] Drummond Testimony, *supra* note 1, at 6-7.

[77] *Id.* at 5. There is reason to doubt this, for Google's settlement of the *Authors Guild* lawsuit puts at risk the next person's fair use defense, even for scanning to index books, because Google's willingness to settle the lawsuit may be viewed as a concession that it needed a license to engage in this scanning. Far riskier would be scanning for the purpose of developing a competing database of books to GBS. See Pamela Samuelson, *Google Books is Not a Library*, HUFF. POST, Oct. 13, 2009, available at http://www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html.

[78] Drummond Testimony, *supra* note 1, at 6. Drummond also suggested that many orphan books will turn out to be commercially insignificant, so even if Google is the only firm to have a license to them, the insignificance of these orphans would not give Google a competitive advantage over others. *Id.*

[79] *Id.* at 7.

[80] *See, e.g.*, Elhauge, *supra* note 46, at 51-52.

[81] Amended GBS Agreement, *supra* note 37, §§ 3.3(a), 3.4(a). Non-display uses are defined as "uses that do not display Expression from Digital Copies of Books or Inserts to the public." *Id.*, § 1.94.

[82] *See, e.g.* Objection of Yahoo! Inc. to Settlement Agreement at 25, Authors Guild, Inc. v. Google, Inc., No. 1:05 CV 8136 (DC) (S.D.N.Y. Sept. 8, 2009), available at http://www.publicindex.org/docs/objections/yahoo.pdf (pointing out the need for larger quanta of data to improve search technologies, for "the very worst [search] algorithm at 10 million words is better than the very best algorithm at 1 million words").

[83] Amended GBS Agreement, *supra* note 37, §§ 1.93. Non-consumptive research is defined as "research in which computational analysis is performed on one or more books," which includes image analysis or text extraction, textual analysis or information extraction, linguistic analysis, and indexing and search. Terms under which non-consumptive research can be performed are set forth, *id.* § 7.2(d).

[84] *See, e.g.*, Letter from Gregory Crane to Judge Chin in Support of the Settlement Agreement at 3, Authors Guild, Inc. v. Google, Inc., No. 1:05 CV 8136 (DC) (S.D.N.Y. Aug. 8, 2009), available at http://www.publicindex.org/docs/crane.pdf ["Crane Letter"].

running searches across many books that might mention him. Linguists could discover the origins of words, concepts, and principles, or learn new things about usage patterns over time.[85] Before GBS, only the deepest of scholars with prodigious memories of their decades of experiences with books could appreciate the deep intertextuality of books. With GBS, this intertextuality could become accessible to all. A digital corpus such as GBS thus opens up opportunities to explore knowledge embodied in books in ways that today can only be imagined.[86]

Several Stanford computer scientists, who wrote to Judge Chin in support of the GBS settlement, waxed even more eloquent about GBS, predicting that it would bring society to the verge of two major orders-of-magnitude changes in access to knowledge.[87] First, information that once was available from research libraries in hours, weeks, or months—or possibly not at all unless one could get to the Library of Congress—would become available through GBS to end users in minutes, if not seconds.[88] This would be a breakthrough not only in speed of access, but also in the breadth and location of access, for any one could read these books from any Internet-connected place.[89] These supporters of GBS further predict a fundamental change in the quality of understanding and insight by a new generation of students, which would represent another order-of-magnitude change resulting from GBS.[90]

Although patrons of institutional GBS subscriptions will generally not be able to get access to in-print books, lively competition can be expected among multiple sellers of these books which should ensure that in-print books will also be broadly accessible, whether in traditional print book form, in e-book form, or through print-on-demand services. For the foreseeable future, libraries will continue to purchase individual copies of in-print books that can then be lent to patrons.[91]

If the GBS institutional subscription base expands dramatically and network effects kick in, publishers of in-print books may decide that it would be beneficial to allow more display uses of them in the GBS corpus. GBS could thus become an essential resource for anyone interested in acquiring the knowledge that is embodied in books.[92] To facilitate this, Google is integrating GBS with other information resources, such as its

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[85] *See* Letter from Michael Heller to Judge Chin at 6 (advances in linguistic analysis possible through non-consumptive research on the GBS corpus), Authors Guild, Inc. v. Google, Inc., No. 1:05 CV 8136 (DC) (S.D.N.Y. Aug. 8, 2009), available at http://thepublicindex.org/docs/letters/Stanford%20Libraries.pdf.

[86] With GBS, Crane says, "[w]e are witnessing the emergence of a radically new, but deeply traditional form of intellectual activity, as emerging technologies allow us to more fully realize our most basic goals of advancing intellectual life." Crane Letter, supra note 84, at 3.

[87] Stanford Letter, *supra* note 13, at 2.

[88] *Id.*

[89] *Id.* This eloquent statement may be true for university researchers whose institutions subscribe to GBS, but only those users who are physically present at public libraries will have access to GBS terminals. *See* Settlement Agreement, *supra* note 3, § 4.8(a).

[90] Stanford Letter, *supra* note 13, at 2.

[91] Public libraries are now being charged more for e-books than individual customers are, even though they typically pay the same price for hard-back books as individual consumers would. *See.e.g.*,Motoko Rich, *Libraries and Readers Wade Into Digital Lending*, N.Y. TIMES, Oct. 14, 2009, at A1, *available at*, http://www.nytimes.com/2009/10/15/books/15libraries.html. Lending of e-books is discussed infra notes xx and accompanying texts.

[92] This is, in fact, what some of Google's competitors worry about. By the time Congress does pass orphan works legislation to allow those entities to compete with Google, Google's position may be so dominant that another entity will be unable to establish itself. *See* Brief for Internet Archive, *supra* note 16, at 22.

new browser, email, and social networking tools. With this suite of resources, Google will be a few steps closer to achieving the founders' aspiration to "organize all of the world's information."[93]

B. MORE PESSIMISTIC PREDICTIONS FOR THE FUTURE OF BOOKS IN CYBERSPACE

Although Google and other proponents of the GBS settlement have been uniformly upbeat in public about the future of books in cyberspace if the GBS settlement agreement is approved, many commentators are quite critical of the settlement and pessimistic about its implications for the future of books. Among the pessimists are some publishers, librarians, academic authors and researchers, professional writers, and those with concerns that audacious class action settlements, such as GBS, are fundamentally corrosive of democratic processes.

Most of the pessimistic assessments of GBS and the future of books can be found in the briefs and letters filed with the court objecting, opposing, or expressing concerns about the GBS settlement. Yet, even some publishers who support the GBS settlement are profoundly worried about the future of books in cyberspace, with or without the settlement. Although most of this section will discuss views of those who have been critical of the settlement, it may be instructive to consider first the rather ominous situation in which traditional book publishers presently find themselves.

1. Publisher Nightmares

Book publishing was a $40.3 billion business in 2008.[94] This is substantial, of course, but as Michael Healy, the incoming Executive Director of the BRR, has pointed out, the book business in the U.S. is about the same size as the razor blade industry.[95] Revenues from sales of print books went up slightly in 2008 as compared with 2007, but unit sales went down.[96] The industry thus only did somewhat better than the year before because it raised prices. E-book revenues constituted only $53.5 million of the 2008 book industry revenues, although this segment is growing.[97] There was, however, a 13 percent decline in sales of hard-cover books in 2008 and a further 15.5 percent decline in the first half of 2009.[98] There was also negative growth in 2008 in sales of adult and juvenile trade books, as well as in sales of religious books.[99] The trends for print books are not promising.

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[93] Sergey Brin, , *A Library to Last Forever*, N.Y. TIMES, Oct. 8, 2009, at A31, *available at*, http://www.nytimes.com/2009/10/09/opinion/09brin.html.

[94] See, e.g., Michael Healy, Book Industry Study Group, *Books and e-Books: Some Industry Numbers*, for the D is for Digitize Conference, New York Law School, Oct. 9, 2009, at 3-4. Healy reports there were 130,477 active publishers in 2008, that approximately 275,000 new titles were published that year, and that there are approximately 6 million books that are commercially available in the U.S. *Id.* at 2.

[95] Remarks of Michael Healy, I is for Industry session, D is for Digitize conference, New York Law School, Oct. 9, 2009, video *available at* http://thepublicindex.org/documents/video-library.

[96] Healy, *supra* note 95, at 7.

[97] *Id*. at 16.

[98] *See, e.g.*, Randall Stross, *Will Books Be Napsterized?*, N.Y. Times, Oct. 4, 2009, at B4, available at http://www.nytimes.com/2009/10/04/business/04digi.html. The recession of 2008-09 may have more explanatory power for this decline than copyright infringement.

[99] Healy, *supra* note 95, at 5.

The most frightening scenario of immediate concern to major trade publishers is the "Napsterization" of commercially valuable books.[100] Although new e-books, such as Dan Brown's *The Lost Symbol*, are available from Amazon.com for $9.99, it is also possible to obtain such books for free through file storage sites, such as Rapid-Share and Megaupload.[101] The New York Times recently reported that 166 illegal copies of Brown's new book are available on eleven different websites.[102] Expensive textbooks for college courses are, moreover, being shared via peer-to-peer file-sharing networks.[103]

Napsterization is a phenomenon that mainly affects in-print books,[104] so the GBS settlement may not have much direct impact on this problematic future for digital books. Yet, because GBS will allow consumers to get lawful access to millions of books, it may alleviate somewhat the risk that users will go to file storage sites or engage in peer-to-peer file-sharing when they want access to books.

Although GBS will bring them new revenues, publishers worry that GBS could be "hacked" and all of the books therein, including the in-print books which are not available for display uses could be "liberated" by the hackers. The GBS settlement agreement contains an extensive set of provisions specifying very strict security requirements for Google and host sites of the GBS corpus to avert this potential disaster.[105]

Another troublesome aspect of the future of books in cyberspace from the standpoint of publishers is that consumers aren't willing to pay premium prices for digital books. [106] The same book—*The Lost Symbol*, for instance—whose hard-back list price is

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[100] Stross, *supra* note 99, at B1.

[101] *Id*. at B4. The presence of unauthorized copies of newly released titles on Internet sites or through peer-to-peer file-sharing technologies is not, however, a new phenomenon. See DAVID A. BELL, THE BOOKLESS FUTURE 213 (2005) ("The *New York Times* estimated recently that as many as 25,000 titles can be downloaded [for free], including all the *Harry Potter* novels and *The Da Vinci Code*-but sales of the print versions have not been hurt enough to make the publishing industry worry. Most book editors ... are not even aware of the files' existence."), *available at* http://www.press.umich.edu/pdf/9780472031955-ch19.pdf.

[102] Stross, *supra* note 99, at B4. *See also* Mike Harvey, *Pirates Find Easy New Pickings in Open Waters of E-book Publishing* THE TIMES, Nov. 21, 2009, *available at* http://technology.timesonline.co.uk/tol/news/tech_and_web/article6925926.ece (reporting that *The Lost Symbol* had been downloaded by illegal filesharers over 100,000 times within the first few days of its release)

[103] *Expensive Books Inspire P2P Textbook Downloads*, SLASHDOT, July 1, 2008, *available at* http://news.slashdot.org/news/08/07/01/1838205.shtml. Several online sites provide information to amateurs about how they could make their own book scanners. *See, e.g.*, The Book Liberator Project, available at http://www.bookliberator.com/doku.php; The Do-it-yourself Book Scanner Project, available at http://diybookscanner.org/. *See also* Remarks of Daniel Reetz, founder of diybookscanner.org, Session on C is for Culture, at the D is for Digitize Conference at New York Law School, on Oct. 9, 2009, *available at* http://thepublicindex.org/documents/video-library.

[104] Only a small percentage of in-print books are actually "Napsterized." Stross, *supra* note 99, at B4.

[105] Amended GBS Agreement, *supra* note 37, § 8. There may be good reason to be worried about this, as evidenced by the existence of applications to circumvent Google's security preventing users from downloading full copies of books that are already available. *See* Bonnie Shucha, *Google Book Downloader*, WISBLAWG, Sept. 10, 2009, http://www.law.wisc.edu/blogs/wisblawg/2009/09/google_book_downloader.html.

[106] Consumers are also less willing to pay higher prices for digital books because most e-books come with technical restrictions and are not freely shareable with friends or resalable in the same way that print books are. See Memorandum of Amicus Curiae Open Book Alliance as Amicus Curiae in Opposition to the Proposed Settlement Between the Authors Guild, Inc., Association of American Publishers, Inc., et al. and

$29.95 is available for the Kindle for $9.99. While the lower digital price is understandable in part because digital publishers do not have to pay printing, binding, and distribution costs, there is a sense within the traditional book publishing industry that prices of digital books need to be higher if their industry is to thrive, or possibly even to survive.[107] Lower digital prices have also put pressure on the prices of hard-cover books.[108] A price war broke out in 2009 between Amazon.com and Wal-Mart that will lower prices even more—to $8.99—for best-selling books.[109] This is not good news for book publishers.

The new economics of digital publishing may help to explain why the five trade publishers who initially sued Google for infringement may have come to perceive the lawsuit as presenting an unusual opportunity to reshape the marketplace for books in cyberspace and generate new revenues through a "the magic trick" of a class action settlement.[110] The lion's share of these new revenues will go to book rights holders who, more often than not, are likely to be publishers.[111]

Google will set prices for institutional subscriptions to out-of-print books in the corpus in consultation with the BRR.[112] Google plans to set prices for consumer purchases of books in the cloud through an algorithm designed to optimize the market returns for each book, although rights holders remain free to set their own prices for each book.[113]

The pricing provisions of the GBS deal are an important part of the benefit that the publisher-negotiators hope to get from the GBS deal. However, the DOJ raised serious questions about provisions in the first iteration of the GBS settlement agreement.

Google Inc., at 4-5, No. 05 CV 8136-DC), (S.D.N.Y. Sept. 4, 2009) ["OBA Memo"], available at http://www.publicindex.org/docs/letters/open_book_alliance.pdf.

[107] *Id*.

[108] The list price for a hardback copy of Dan Brown's new book is $29.95, but this book is also available from Amazon.com for $16.47. Consumers can also buy used copies of this book through Amazon.com from $11.65. See Amazon.com: The Lost Symbol (9780385504255): Dan Brown: Books, http://www.amazon.com/Lost-Symbol-Dan-Brown/dp/0385504255 (last visited Nov. 10, 2009).

[109] *See, e.g.*, Geoffrey Fowler & Miguel Bustillo, *Wal-Mart, Amazon Gear Up for Holiday Battle*, WALL ST. J., Oct. 19, 2009, at B3, available at http://www.wsj.com/article/SB10001424052748703816204574481272902910430.html.

[110] Paul Courant, Librarian of the University of Michigan, characterized the class action settlement as a "magic trick" during the Keynote Conversation at the D is for Digitize Conference at New York Law School, Oct. 9, 2009. *See* Pamela Samuelson, *The Google Book Settlement: Real Magic or a Trick?*, Econ. Voice, Nov. 2009, available at http://people.ischool.berkeley.edu/~pam/EconomistVoiceNov2009.pdf.

[111] Publishers often get contractual assignments of copyright in books they have published which they are likely to register either through the Google Partner Program or with the BRR. There is, however, case law suggesting that authors, not publishers, have retained the right to authorize the commercialization of electronic versions of their books. See Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490 (2d Cir. 2002) (treating authors as having retained rights to authorize the making and selling of e-books). Some publishers, however, insist that the copyright assignments they got from authors give them the rights to control e-book publications. See, e.g., Motoko Rich, *Legal Battles Over E-Book Rights to Older Books*, N.Y. TIMES, Dec. 13, 2009, *available at* http://www.nytimes.com/2009/12/13/business/media/13ebooks.html. One of the most important aspects of the GBS settlement is Appendix A, which sets forth a revenue-sharing arrangement between authors and publishers as to BRR-registered books. *See* Sag, *supra* note 31, at 46-56 (discussing the Author-Publisher Procedures of the proposed GBS settlement).

[112] Amended GBS Agreement, *supra* note 37, §§ 4.1(vi)-(viii), 4.2.

[113] *Id*. at §§ 4.2(b), 4.2(c)(ii).

The algorithmic pricing regime proposed by Google, for instance, looked to DOJ like an illegal price-fixing agreement.[114] The amended settlement made some adjustments to the pricing algorithm and now provides that Google's goal is to simulate the price of the book in a competitive market.[115] It remains to be seen whether DOJ will find the amended pricing provisions to be acceptable.

Just when publishers thought the GBS deal was going to breathe new commercial life into their backlists, the DOJ has let them know the deal may be challenged for violating the antitrust laws (e.g., conspiring to fix prices and monopolize markets for digital books). This could put them through years of costly litigation defending the GBS deal.

While DOJ would likely seek a resolution that did not include sending the negotiating publishers to jail, it could conceivably stop the deal altogether or force the publishers and Google to make such dramatic changes to the GBS deal that it no longer seemed as desirable to publishers as the first version was. If, for example, the DOJ insisted that rights holders of unclaimed books (i.e., orphan books) should be excluded from the settlement class because they cannot be given adequate notice of the settlement, the GBS deal would be far less attractive to Google and the publishers.[116] Insistence on limiting the scope of the settlement to payouts for scanning books to make indexes and providing snippets would likewise change the deal so substantially that the parties might no longer want to pursue it.[117]

The GBS settlement could, of course, be disapproved for other reasons. The judge might, for instance, not be persuaded that the GBS settlement satisfies Rule 23,[118] which sets forth the legal requirements for settling class action lawsuits. Disapproval could happen because the proposed settlement class has too diverse a set of interests to be certified, notice to class members was inadequate, the named plaintiffs did not fairly and adequately represent the interests of the class as a whole, or the settlement is too broad in scope and too future oriented to be approved.[119] Some publishers whose interests diverge substantially from those of the major trade publishers who negotiated the GBS deal have, for example, objected to the deal as unfair to them.[120] Support for the settlement among publishers is, in general, more mixed than Judge Chin might infer from the relative paucity of U.S. publisher objections to the settlement.[121]

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[114] DOJ Statement, supra note 46, at 21-22.

[115] Amended GBS Agreement, supra note 37, §§ 4.2(b)(2), 4.2(c)(2).

[116] The Internet Archive argued that orphan book rights holders should be excluded from the settlement class. See Brief of Internet Archive, supra note 16, at 2 ("It is impossible to know if the ostensible class representatives are typical of the entire class because it is impossible to know what orphan rights holders would want or would perceive to be in their interests.").

[117] See DOJ Statement, *supra* note 46, at 7 (suggesting that a settlement involving indexing and snippets could conceivably satisfy class action requirements).

[118] Federal Rules of Procedure, Rule 23.

[119] *See, e.g.*, Objection of Scott Gant, *supra* note 35 (raising numerous Rule 23 objections to the GBS settlement).

[120] *See, e.g.*, Letter of American Law Institute, et al., to Judge Denny Chin, Authors Guild v. Google, Inc., Case No. 05 CV 8136 (DC), Sept. 1, 2009, available at http://thepublicindex.org/docs/letters/ali.pdf; Letter of ProQuest, LLC to Judge Denny Chin, Authors Guild v. Google, Inc., Case No. 05 CV 8136 (DC), Sept. 4, 2009, *available at* http://thepublicindex.org/docs/objections/proquest.pdf.

[121] Publishers Weekly conducted a survey of its readership in mid-July 2009 and found that just over half supported the settlement. *See* Andrew Richard Albanese, *Unsettled: The PW Survey on the Google Book Settlement* at 1, Publishers Weekly, Aug. 24, 2009.

Disapproval of the settlement could well bring about another publisher nightmare. McGraw-Hill and its fellow plaintiffs cannot relish the prospect of either renewing litigation against Google over whether scanning books for purposes of indexing their contents is infringement, or dropping the litigation altogether because it would be too expensive to carry on, too uncertain in outcome, and too demoralizing because of widespread public support for Google, in general, and for GBS, in particular.

Most publishers today are probably too busy coping with the challenges of the present to reflect very deeply on the future of their role in the book industry in the digital era. This future may be far dimmer than many realize.[122] In the past, publishers have offered many important services. They selected manuscripts that could be targeted to audiences that the publishers knew how to reach; they provided authors with advances to help them complete the books; they provided editing, typesetting, book cover design, printing, and advertising services.[123] They also arranged for shipping books to distribution outlets for book tours, for book reviews, and for other promotional materials for their books. Because of their control over most of the value chain, publishers, wholesalers and retail outlets have generally enjoyed much larger shares of the revenues that books have generated than their authors have. But things are changing rapidly. Publishers are both providing fewer services to authors and performing others (e.g., online promotion of books) less well than in the print era.

In the digital era, authors are in a better position than in the past to grow their own audiences, cultivate reputations that attract readers, and provide their works to readers through alternative distribution channels, such as the Kindle or GBS. Authors are already being asked to perform the bulk of the copy-editing, formatting, and other tasks of book preparation. Services, such as customer book ratings on Amazon.com, are helping to sell books that depend less on publisher intermediation. Authors may well think they deserve a better royalty stream than they have traditionally gotten from trade publishers.[124]

With the rise of Kindle, GBS and other new digital service providers,[125] authors may find it attractive to cut out the traditional middle-man.[126] The title of Ken Auletta's new book on Google is apt. Traditional book publishers have been *Googled*; for them, this may be *The End of the World as We Know It*.[127] Traditional book publishing firms, such as McGraw Hill, will not necessarily disappear, but they may be on life-support from the revenues to they receive from Google for books they make available through

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[122] At least one respondent to the Publisher Weekly survey opined that the GBS deal "will destroy the book industry." *Id*. at 1.

[123] *See, e.g.*, Eugene Volokh, *The Future of Books Related to the Law?*, 62 Mich. L. Rev. [18] (forthcoming 2010)(listing traditional functions of publishers, and pointing to the diminishing value from publishers).

[124] *See, e.g.*, Edward Hasbrouck, *Google Books and Writers' Rights: The Proposed Settlement of the Google Books Lawsuit*, Aug. 20, 2009, at 5 (book authors have typically gotten a 5-15% royalty from sales of print books, but a much larger share of revenues from licensing subsidiary rights, most often 50%, which should include licensing of e-book rights). *See also* Objection to Proposed Class Action Settlement On Behalf of Author's Rights Class Member Ian Franckenstein, Aug. 13, 2009, at 5, *available at* http://thepublicindex.org/docs/objections/franckenstein.pdf (noting that some e-publishers are paying rights holders 80% of e-sales).

[125] *See, e.g.*, Smashwords is an online publisher of independent books, https://www.smashwords.com.

[126] *See, e.g.*,Brad Stone & Motoko Rich, *Top Author Shifts E-Book Rights to Amazon.com*, N. Y. TIMES, Dec. 15, 2009, *available at* http://www.nytimes.com/2009/12/15/technology/companies/15amazon.html.

[127] AULETTA, *supra* note 17.

GBS.[128] This is not a future scenario for books in cyberspace that traditional book publishers can possibly be looking forward to.

2. Library and Academic Researcher Nightmares

Although library associations and academic authors and researchers unquestionably welcome the far greater access to books that would come about if and when the GBS settlement is approved, many have expressed serious concerns about the risks that approval of the settlement will, over time, lead to price gouging for institutional subscriptions.[129] This would limit the ability of libraries to acquire new materials, especially from independent publishers, and to serve well their core constituencies.

Two main factors underlie the concerns about price gouging. One is that there are no meaningful constraints on price hikes in the proposed GBS settlement.[130] The GBS settlement agreement sets forth four criteria for the pricing of institutional subscriptions: the number of books available, the quality of the scans, features offered as part of the subscription, and prices of similar products and services available from third parties.[131] The more books Google scans and the more features it adds to the subscription database, the more justification it will have to raise prices.[132] There are, moreover, no comparable

[128] It is conceivable that these revenues will enable firms like McGraw Hill to become bankers to authors, that is, entities that lend authors money to enable them to finish their books.

[129] *See, e.g,* Library Association Comments on the Proposed Settlement, Authors Guild v. Google, Inc., Case No. 05 CV 8136 (DC), Sept. 9, 2009, *available at* http://thepublicindex.org/docs/letters/ALA%20complete.pdf; Letter from members of the University of California Academic Council to J. Michael McMahon, Office of the Clerk, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Aug. 14, 2009), *available at* http://thepublicindex.org/docs/letters/ucfaculty.pdf ["UC Academic Council Letter"].

[130] My letter to Judge Chin objecting to the GBS settlement on behalf of sixty five academic authors and researchers suggested several ways that prices for institutional subscriptions might be constrained. See Letter of Pamela Samuelson to Judge Denny Chin on behalf of academic authors at 3-4, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 3, 2009), *available at* http://thepublicindex.org/docs/letters/samuelson.pdf. Proponents of the GBS settlement regard the "dual objective" of the agreement as a constraint on price-gouging. See Settlement Agreement, *supra* note 3, § 4.1(a)(i) (setting forth the dual objectives of the settlement in respect of institutional subscriptions as , first, realization of market returns for books being licensed through GBS, and second, the realization of broad public access to books in the GBS corpus). My letter argues that this is too vague to be a meaningful constraint on price-gouging. Samuelson Letter, *supra*, at 4.

[131] Id. at 4.1 (a)(ii). The agreement contemplates pricing bands for different kinds of institutions, *id*. sec. 4.1(a)(iv). The core institutional subscription database (ISD)for licensing to higher educational institutions will consist of all books eligible for such subscriptions (that is, all out-of-print books whose rights holders have not opted to exclude their books from the ISD, plus any in-print books whose rights holders have opted in to the ISD). *Id*., § 4.1(a)(v). The expectations of those who negotiated the settlement is that approximately 95% of the books in the ISD will be out-of-print books. Conversation with Jan Constantine, Aug. 5, 2009, New York City. Google also expects to develop some discipline-specific subsets of books in the GBS corpus that might be licensed to corporations, governments, and the like. Settlement Agreement, *supra* note 3, § 4.1(a)(v).

[132] Google's license from the settlement class allows it to scan many books for GBS that may be wholly lacking in scholarly or research significance (e.g., say, Harlequin romance novels). Google may also scan duplicates of books already in the corpus. The settlement agreement seems to contemplate that price hikes for institutional subscriptions can be based on the sheer number of books in the corpus. Prices for GBS institutional subscriptions may thus go up based on the number of books as well as the number of services available. Many such services may be developed by non-profit researchers who engaged in non-

products or services to the GBS institutional subscriptions,[133] so this too will not serve as a check on price hikes.

A second is that Google will have a de facto exclusive license to commercialize all out-of-print books through the class action settlement; no one else can realistically expect to obtain a comparably broad license to make out-of-print books available in the current legal environment (e.g., in the absence of orphan works legislation that would allow others to scan such books).[134] This means that no other firm besides Google will be able to offer institutional subscriptions of comparable breadth to be competitive with the GBS subscriptions.[135] The de facto monopoly that the settlement would confer on Google is the source of its power to charge supracompetitive prices for institutional subscriptions. The DOJ has expressed concern about the GBS settlement because of the potential foreclosure of competition arising from this de facto exclusive license to Google.[136]

Although institutional subscriptions may be priced quite modest initially to attract customers,[137] academic authors are concerned that "ten, twenty, thirty or more years from now, when institutions have become ever more dependent on GBS subscriptions and have consequently shed books from their physical collections, and indeed when electronic publishing begins to supplant traditional methods of publication for some texts, the temptation to raise prices to excessive levels will be very high."[138] Another reason to fear substantial price hikes is that Google cannot set institutional subscription prices unilaterally. It must do so in consultation with the BRR,[139] whose mission is to represent rights holders who will almost certainly press for higher prices.

Ironically, the very future that may seem like nirvana to publishers—new opportunities to obtain monopoly rents from out-of-print books through revenue-maximizing pricing in collaboration with Google—may be a nightmare scenario for libraries and academic researchers.[140] The risks of price gouging for institutional

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consumptive research using the GBS corpus. These researchers are forbidden from commercializing these services without Google's and BRR's permission. See Amended GBS Agreement, *supra* note 37, § 7.2(d). Yet, Google may well be able to include these services in the GBS institutional subscription corpus, which would justify charging higher prices.

[133] Samuelson Letter, *supra* note 131, at 3, n.6. The GBS settlement agreement contemplates that prices for individual out-of-print books in the cloud will be between $1.99 and $29.99. See Settlement Agreement, *supra* note 3, at § 4.2 (c)(i). Given this, it would be logical for institutional subscription prices for access to the GBS database of these same books to be quite dear, even with a discount for bundling.

[134] The GBS settlement agreement states that it is non-exclusive. Amended GBS Agreement, *supra* note 37, at § 2.4. However, no one else can get a comparably broad license to out-of-print books. DOJ urged the settling parties to find a way to grant a similar license to third parties. DOJ Statement, *supra* note 46, at 25-26. Orphan works legislation is another way a comparable license could potentially be obtained.

[135] *See, e.g.*, James Grimmelmann, *The Google Book Search Settlement: Ends, Means, and the Future of Books* at 10-11, April 2009, *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1024&context=james_grimmelmann; Pamela Samuelson, *Why is the Antitrust Division Investigating the Google Book Search Settlement?*, HUFF. POST, Aug. 19, 2009, *available at* http://www.huffingtonpost.com/pamela-samuelson/why-is-the-antitrust-divi_b_258997.html.

[136] DOJ Statement of Interest, *supra* note 46, at 17.

[137] Settlement Agreement, *supra* note 3, at § 4.1(a)(vi) ("The initial Pricing Strategy will also include a discount from the List Prices that will be offered for a limited time to subscribers. This discount…is designed to encourage potential customers to subscribe.").

[138] Samuelson Letter, *supra* note 131, at 4.

[139] Amended GBS Agreement, *supra* note 37, § 4.1(a)(4).

[140] *See, e.g.*, UC Academic Council Letter, supra note 130.

subscriptions are of particular urgency to university and other major research libraries because they have experienced outrageously large price hikes in the pricing and bundling of journals and other scholarly periodicals, especially those provided by for-profit publishers.[141] Some university libraries now pay more than $4 million a year to license access to scholarly journals for their research communities.[142] They have reason to fear that institutional subscriptions to millions of books in the GBS corpus will, in time, prove even more expensive.

Another reason that librarians are fearful about GBS subscriptions is that book-rich institutions may succumb to the temptation to give away or sell off ("deaccession" is the term of art for this practice) copies of physical books from their collections after years of becoming comfortable with GBS subscriptions. Physical books may no longer seem to be needed. If GBS subscriptions work as well as some hope, books may only be taking up valuable real estate on college campuses and gathering dust.

As understandable as book deaccession might be, it would put libraries at the mercy of Google in the pricing of institutional subscriptions, for they would no longer have the institutional resources to enable patrons to shift back to reliance on local book collections and those of institutions with which they have interlibrary loan arrangements.[143]

Deaccession would also make it impossible for these institutions to scan their collections to create an alternative corpus to GBS. Without books to scan, institutions would be stuck with whatever prices Google and BRR had agreed to charge for GBS institutional subscriptions.

Those who downplay the risk of price gouging suggest that Google's focus on advertising revenues will avert this problem.[144] This theory posits that Google will have incentives to keep prices of subscriptions low so that ever larger numbers of people can see the ads, which would presumably enhance ad revenues. Yet, those who negotiated the GBS deal on behalf of authors and publishers do not expect that GBS will generate

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[141] *See, e.g.,* Aaron S. Edlin & Daniel L. Rubinfeld, *Exclusive or Efficient Pricing? The Big Deal Bundling of Academic Journals*, 72 ANTITRUST L. J. 119 (2004), *available at* http://ssrn.com/abstract=610103l (noting, for example, that between 1984 and 2002, science journal prices increased almost 600%); Mark J. McCabe, *A Portfolio Model of Journal Pricing: Print v. Digital* 7 (June 2003) (unpublished manuscript), *available at* http://mccabe.people.si.umich.edu/PD.pdf .

[142] Brief of American Library Association, et al. to Settlement Agreement at 9, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. May 12, 2009).

[143] Once researchers get used to having access to digital books, they may, moreover, be unwilling to switch back to print books. Habit, convenience, and market ecology may make this regression quite unlikely.

[144] *See, e.g.*, Elhauge, *supra* note 46, at 44, 50. *See also* Paul N. Courant, *What's at Stake in the Google Book Search Settlement?*, ECON. VOICE, Oct. 2009, available at http://www.bepress.com/ev/vol6/iss9/art7/. Yet, Courant, who is the head librarian of the University of Michigan, was apparently concerned enough about the risk of price gouging that he negotiated for an arbitration procedure to be established in an agreement between the University of Michigan and Google that allows challenges of excessive institutional subscription prices. See Michigan Agreement, *supra* note 29, Att. A, sec. 3. Prof. Elhauge argues that the arbitration procedure will serve as a meaningful check on excessive pricing. Elhauge, supra note 46, at 49. My letter to Judge Chin takes issue with this argument. See Samuelson *Letter*, supra note 131, at 5 ("The procedure set forth for the pricing review is truly byzantine, even Kafkaesque, and is fraught with complications and limitations. Even leaving aside the complexity and opacity of the proposed arbitration procedure, the fundamental problem is that the Settlement Agreement has inadequate criteria for meaningful limitations on price hikes. Because of this, we believe it is highly unlikely that the arbitration procedure contemplated in the Michigan side agreement will prove to be more than a symbolic gesture.").

substantial ad revenues; in their view, "the big money" is going to come from institutional subscriptions.[145] Additionally, Google's senior management has actively been trying to expand the firm's revenue models;[146] institutional subscriptions would seem a promising source of such revenues. It is, moreover, far from clear that contents of out-of-print scholarly books will be promising materials for serving ads to readers.[147]

Google spokesmen have also sometimes suggested that if institutional subscription prices become too high for some to bear, those who want access to particular books can always buy those books through the GBS consumer purchase model or get access to preview uses that GBS will provide for open Internet searches.[148] This may be a feasible solution for some individual patrons, but purchases of books in the cloud are not a realistic alternative at an institutional level to a subscription that would enable patrons to access millions of books; nor will access up to 20 percent of GBS book contents suffice for scholarly work. College and university libraries will likely need an institutional subscription to GBS to be competitive with other institutions.

The vision that GBS will be an equalizer among higher education institutions may be inspiring,[149] but the reality may be quite different. Small, rural, and resource-challenged colleges from states such as Indiana, West Virginia, or Mississippi will not be eligible for as favorable a deal on institutional subscriptions to GBS as resource-rich University of Michigan, which will get its subscription for free for twenty-five years.[150] Michigan was able to get this deal because it provided Google with millions of books for GBS scanning and because it was an early enthusiastic supporter of GBS.

Colleges and universities with much smaller book collections (most of which Google may already have scanned from research libraries) that became Google library partners much later than Michigan will have less to offer Google to qualify for deep discounts. If Michigan and other book-rich, early GBS library partners are getting free or heavily discounted prices for their subscriptions to GBS, book-poor and late-to-partner institutions will likely pay a premium for their subscriptions to GBS. Ironically enough, small and resource-poor schools would likely end up subsidizing resource-rich schools like Michigan, turning Drummond's promise of equalization on its head.

That does not mean that small and resource-challenged institutions will have no access to GBS. Nonprofit institutions of higher education, as well as public libraries, will

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[145] Telephone conversation with Michael Boni, lead lawyer for the Author Subclass, Aug. 12, 2009; telephone conversation with John Sargent, a publisher-negotiator for Macmillan, Aug. 11, 2009.

[146] Auletta, *supra* note 11, at xx.

[147] Books on the history of Paris or Berlin may be promising materials for serving ads about hotels or restaurants in those cities. However, many scholarly books from major research libraries may be too arcane or esoteric in subject matter to generate ad revenues. Targeted advertising in higher education settings may be viewed as unwelcome distractions from reading and research experiences.

[148] Dan Clancy, Google's chief spokesman for the GBS project, made this assertion at a meeting with UC Berkeley faculty members and librarians on June 22, 2009. Proponents of the settlement also argue that the free library access terminal will be a check on excessive pricing. Elhauge, *supra* note 46, at 50-51. However, demand for free terminal access is unlikely to suffice to fulfill demand for access to GBS either at higher education institutions or at public libraries. Besides, print-out fees from these public access terminals are an alternative way in which price gouging could occur.

[149] See supra note 68 and accompanying text.

[150] See, e.g., Jonathan Band, *A Guide for the Perplexed, Part II: The Amended Google-Michigan Agreement* at 5-6, June 12, 2009, *available at* http://wo.ala.org/gbs/wp-content/uploads/2009/06/google-michigan-amended.pdf.

be eligible for one or a small number of public access terminals through which the GBS institutional subscription database can be accessed.[151]

Access to dedicated GBS public access terminals will be free; however, users of the public access terminals at higher education and public libraries will be charged a fee for every page of every GBS book that patrons print out, and this fee will go to BRR.[152] At an August 28, 2009, conference about the Google Book Search settlement, Dan Clancy, Google's chief spokesman for GBS, said that the settling parties' expectation was that providing public access terminals would fuel demand for purchases of institutional subscriptions.[153] Buy-one-get-one-free is a tried-and-true marketing strategy; Google is planning to use a variant (get one free first, and then buy the same thing to fulfill patron demand) to induce these libraries to purchase institutional subscriptions.[154]

Another way that price gouging might come about is if Google decides to sell the GBS institutional subscription database business to another firm. It might do this for one of several reasons; it might, for example, decide to shift its corporate priorities in a different direction or possibly become bored with GBS after the engineering challenges it poses are surmounted. Institutional subscriptions would seem to require investments in cultural stewardship and particularized customer support, which have thus far not been Google's strong suit.[155]

The settlement agreement gives Google the unqualified right to sell the corpus to anyone without getting consent from BRR or anyone else.[156] Google would presumably sell the institutional subscription part of GBS to the highest bidder (or risk a shareholder lawsuit challenging it with neglecting responsibilities to its shareholders). One reason a firm might bid on this asset is to maximize revenues, which could mean raising the prices of institutional subscriptions.

Beyond price gouging, libraries and academic authors are and should be nervous about the possibility that GBS institutional licenses and public access to GBS contents

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[151] Higher education institutions will be eligible for one public access terminal per so many enrolled students, depending on which kind of institution it is. See Amended GBS Agreement, *supra* note 37, at § 4.8(a)(i)(1), (2). Public libraries will be eligible for one public access terminal per public library. *Id.*, § 4.8(i)(3). The amended agreement provides BRR with authority to approve more than one such terminal per public library. *Id.* Libraries must request these terminals from Google.

[152] Settlement Agreement, supra note 3, § 4.8 (a)(ii). *See infra* notes xx and accompanying text for a discussion of the fair use implications of this provision.

[153] Remarks of Dan Clancy, Google Books Settlement and the Future of Information Access Conference, UC Berkeley, Aug. 28, 2009, video available at http://www.ischool.berkeley.edu/newsandevents/events/20090828googlebooksconference.

[154] Public and private K-12 schools and their libraries are expected to be interested in institutional subscriptions as well, although perhaps to a subset of the GBS corpus. There will be no free public access terminals at these schools, although Internet-connected computers would be able to provide access to preview uses of GBS books. Rights holders in these books can restrict the scope of preview uses to less than 20% of the book and restrict access to specific parts. Settlement Agreement, *supra* note 3, at § 4.3.

[155] *See, e.g.*, Kevin Poulsen, *Google's Abandoned Library of 700 Million Titles*, WIRED, Oct. 7, 2009, available at http://www.wired.com/epicenter/2009/10/usenet/ ("[A] few geeks with long memories remember the last time Google assembled a giant library that promised to rescue orphaned content for future generations. And the tattered remnants of that online archive are a cautionary tale in what happens when Google simply loses interest.") *See also* Remarks of Paul Duguid, Session on C is for Culture, D is for Digitize Conference, New York Law School, Oct. 9, 2009, video available at (suggesting that Google has not proven itself to be a good cultural steward as to GBS thus far because of pervasive metadata problems with the corpus), video *available at* http://thepublicindex.org/documents/video-library.

[156] Settlement Agreement, *supra* note 3, § 17.30.

could cease to be available. There are several ways in which this could occur. First, the October 28 settlement agreement makes reference to a termination agreement, which the settling parties are intending to keep secret, even from the court. [157] The negotiating parties have thus acknowledged the possibility that GBS could be discontinued.

Second, technological glitches could cause GBS to go down, either temporarily or permanently. Temporary outages have happened several times with Google's Gmail servers, causing considerable disruption.[158] Similar outages can be expected for GBS, which would be highly disruptive to core activities of research communities. Hackers or electronic terrorists may, moreover, consider GBS to be a challenging target for attacks.

Third, Google could also decide to stop providing institutional subscriptions, even without terminating the agreement as a whole. While the Registry and Google's library partners are entitled under the agreement to seek an alternate provider of institutional subscriptions who would have the same obligations to BRR as Google had,[159] they might not be able to find another vendor willing to provide those services. There is no backup plan if no third party comes forward. It would be desirable for participating libraries to band together and pool their library digital copies to restore their ability to facilitate access to books from the GBS corpus. The settlement agreement does not, however, specifically provide for this. Shutting down GBS might cause Google to breach its contractual obligations to its library partners, but it has limited this liability through liquidated damages clauses.[160]

A fourth way in which GBS could cease to be available is if the *Authors Guild v. Google* litigation goes forward, and Google ultimately loses the lawsuit. Many librarians have invested hundreds of hours of work in negotiating deals with Google, arranging for books to be sent off for scanning, and then reintegrating the books into the library upon their return. If the GBS deal is not approved, not only will all the time, money, and energy spent on cooperating with Google be wasted, but libraries, particularly private institutions, have reason to worry that if litigation over GBS resumes, they could be at risk of being held liable for contributory copyright infringement for materially aiding Google by providing the books scanned for the GBS corpus. Although Google has promised to indemnify them for liability to third parties, the risks of litigation weigh heavily on libraries, especially those affiliated with private universities.[161]

The database of publicly accessible GBS books could also substantially shrink in size and scope as a result of decisions by rights holder to exclude out-of-print books from display uses, to insist that Google not scan their out-of-print books, or to demand removal of books already scanned. Many publishers and some author groups have reportedly asked Google not to scan their books for the GBS corpus or to exclude their books from

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[157] *Id*., art. XVI. The amended settlement agreement no longer makes any reference to the termination agreement.

[158] *See, e.g*., Ryan Singel, *Gmail Down, Again—Update*, WIRED, Sept. 1, 2009, available at http://www.wired.com/epicenter/2009/09/gmail-down-again/.

[159] Settlement Agreement, *supra* note 3, at § 7.2 (e)(ii).

[160] *See, e.g*., Amended Michigan Agreement, term 32 (limiting Google's liability to Michigan to $3 million).

[161] *See, e.g.*, Andrew Richard Albanese, *Deal or No Deal: What if the Google Settlement Fails?*, PUBLISHERS WEEKLY, May 25, 2009, http://www.publishersweekly.com/article/CA6660295.html ("Should this deal fail, libraries could face legal exposure for their own digital library initiatives, and possibly for their contributory role in Google's book-scanning efforts."). See supra note 29 (discussing the Eleventh Amendment immunity that public universities would likely have from damage awards in a copyright case).

display uses; others have opted out of the GBS settlement.[162] The more numerous are the requests to exclude, the less likely it is that the public benefit that Google and proponents of GBS have promised will materialize. The corpus of books eligible for GBS institutional subscriptions and public access has already shrunk by about half because the amended GBS settlement no longer includes non-Anglophone foreign books scanned from major research library collections.[163] Some librarians mourn this loss. [164]

Poor quality scans and metadata may also limit significantly the utility of the GBS for research communities. Linguist Geoff Nunberg has characterized GBS, in its current form, as a "disaster for scholars" because of pervasive errors in metadata (which are basic data about the books, such as the name of the book, the name of the author, the year and place of publication).[165] GBS, for instance, yields 182 citations to Charles Dickens, for instance, to books GBS says were published years before he was born.[166] A search for references to Internet before 1950 yields 527 GBS hits.[167] Walt Whitman's "Leaves of Grass" is "variously classified [in GBS] as Poetry, Juvenile Nonfiction, Fiction, Literary Criticism, Biography & Autobiography, and, mystifyingly, Counterfeits and Counterfeiting."[168] This problem arises because Google has been using BISAC codes to classify GBS books by type; publishers developed BISAC codes to instruct bookstores about which section of the store should house their books.[169]

One reason Google may be using BISAC codes to classify books is to aid it in determining what kinds of ads to serve to users of those books (e.g., airline promotions against books classified as travel). While Google expects to serve ads for open Internet searches that yield GBS book results, it is also contemplating serving ads to users of books in the institutional subscription database to which college and university libraries will be subscribing. This worries some academic researchers who consider ads to be serious distractions from the scholarly enterprise, for they pose the risk of transforming research libraries into shopping malls.[170]

3. Professional Author Nightmares

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[162] *See, e.g.*, Motoko Rich, *William Morris Advises Clients to Say No to Google Book Settlement*, N.Y. Times, Aug. 7, 2009, *available at* http://mediadecoder.blogs.nytimes.com/2009/08/07/william-morris-advises-clients-to-say-no-to-google-settlement/. The DOJ Statement of Interest indicates that the parties believed that the largest publishers would opt out of the GBS settlement and negotiate separate deals with Google. DOJ Statement, *supra* note 46, at 10.

[163] *See, e.g.*, Brian Lavoie, et al., *supra* note 19, at 8 (estimating that half of the books in major research libraries are foreign-language books).

[164] *See, e.g.*, Kenneth Crews, *GBS 2.0: The New Google Book (Proposed) Settlement*, Columbia University Libraries, Copyright Advisory Office, Nov. 17, 2009, *available at* http://copyright.columbia.edu/copyright/2009/11/17/gbs-20-the-new-google-books-proposed-settlement/ ("Because the settlement is now tightly limited [by the exclusion of foreign books], so will be the ISD [Institutional Subscription Database]. The big and (probably) expensive database is no longer so exciting").

[165] Geoffrey Nunberg, *Google's Book Search: A Disaster for Scholars*, CHRON. HIGHER EDUC., Aug. 31, 2009.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] See Pamela Samuelson, *Google Books Is Not a Library*, HUFF. POST, Oct. 13, 2009, *available a*t http://www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html.

Academic authors are likely to continue to write scholarly books, regardless of what happens with GBS, as copyright incentives are not the main motivations for their creative output. However, professional writers have distinctly mixed feelings about GBS. Some are pleased at the prospect that their books, even if out-of-print for decades, may once again attract readers as well as generate some revenues. Authors Guild spokesmen have heralded the settlement as a tremendous benefit for authors.[171] Yet, other professional writers fear the consequences of their loss of control over uses Google will make of their books. An author who has written a critique of stereotypes of women as sex objects may, for example, be quite unhappy if Google runs ads next to her text that promote the sale of sex toys or breast enhancement surgery.[172]

Some professional authors are upset about the low amounts—$60 per book, $15 per insert—that the settlement will provide to rights holders whose books have already been scanned.[173] Insofar as Google keeps prices of GBS institutional subscriptions low, as some commentators predict, some authors worry that they will not be adequately compensated for Google's commercial uses of their books.[174] One set of objectors to the settlement assert that rights holders should be paid for non-display uses made of their books in the GBS corpus, particularly for the sale of AdWords from which Google derives substantial revenues.[175] They also complained about the unfairness of the $500 cap on payments to rights holders of inserts (e.g., short stories or essays in an edited volume).[176] The amended settlement agreement also seems to deprive U.S. authors of inserts, such as book chapters, from any compensation for Google's commercialization of their works unless the insert was separately registered with the U.S. Copyright Office.[177]

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[171] *See, e.g.*, *Hearing*, *supra* note 1, at 5 (testimony of Paul Aiken)

[172] Nunberg, *supra* note 168 ("The 2003 edition of Susan Bordo's *Unbearable Weight: Feminism, Western Culture, and the Body* (misdated 1899) is assigned to Health & Fitness—not a labeling you could imagine coming from its publisher, the University of California Press, but one a classifier might come up with on the basis of the title, like the Religion tag that Google assigns to a 2001 biography of Mae West that's subtitled An *Icon in Black and White* or the Health & Fitness label on a 1962 number of the medievalist journal *Speculum"*). *See also* Objections of Arlo Guthrie, et al., to Proposed Class Action Settlement Agreement, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136, (S.D.N.Y. Sept. 2, 2009) at 21, *available at* http://thepublicindex.org/docs/objections/guthrie.pdf (expressing concern that advertising next to GBS books may be offensive to authors and damaging to their reputations).

[173] See, e.g., Bloom Objection, *supra* note 61, at 11. The settlement payments contrast sharply with the $750 per infringed work minimum statutory damage that could be awarded if the matter went to trial. 17 U.S.C. § 504(c).

[174] *See, e.g.*, Gant Objection, *supra* note 35, at 28-29 (complaining about the inadequacy of GBS settlement compensation). Others complained about the burdensomeness of claiming works and rampant errors in the Google Books database. *See, e.g.*, Objections of Harrasowitz, et al., Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136, (S.D.N.Y. Aug. 31, 2009) at 19-20, *available at* http://thepublicindex.org/docs/objections/harrassowitz.pdf.

[175] Guthrie Objection, *supra* note 175, at 19.

[176] *Id*. at 12.

[177] *See* Kenneth Crews, *Google Books: "Dude, Where're My Inserts?,"* Columbia University Library, Copyright Advisory Office, Dec. 17, 2009, *available at* http://copyright.columbia.edu/copyright/2009/12/17/google-books-dude-wherere-my-inserts/ (explaining why it was plausible for insert authors to believe their inserts were in the settlement as long as the books in which their works appeared were registered and how the amended agreement limited the insert author subclass).

Some also worry that BRR will spend most of the revenues it gets from Google on its own operations, leaving precious little for paying authors for commercial uses of their works.[178] Some have expressed concern about the deal that the Authors Guild cut with publishers over revenue splits for books published before 1987.[179] A good argument can be made that authors who assigned their copyrights to publishers before that year only assigned rights to print publications of their works, not to e-books.[180] Yet, the GBS settlement agreement would give publishers 35 percent of the revenues generated from pre-1987 books.[181] Some authors mourn the loss also of access to federal courts for disputes over books in the GBS corpus,[182] for the settlement agreement provides for compulsory arbitration of all GBS-related disputes.[183]

4. Nightmares for Readers

Although members of the reading public will benefit from the greater access to books that approval of the GBS settlement would bring, there are some reasons to be concerned about the settlement's implications for readers. These include inadequate guarantees of privacy protections, potential erosion of fair use and first sale rights, some likelihood that books purchased through GBS will be priced at excessive levels, and risks of censorship because the settlement authorizes Google to exclude books from GBS for editorial reasons

The proposed GBS settlement calls for extensive monitoring of uses of individual books, yet it says almost nothing about user privacy.[184] One group of authors, including Michael Chabon, Lawrence Ferlinghetti, and Jonathem Lethem, objected to the GBS settlement because they feared that "the lack of privacy protections in the current settlement will deter readers" which would "harm their expressive and financial interests in sustaining and building a readership that browses, reviews, and purchases their works,"[185] owing to the sensitive and controversial nature of their works.[186]

Although Google has announced that its general privacy policy will apply to GBS,[187] that policy currently allows Google to "track a reader's past and present online

[178] *See, e.g.*, Lynn Chu, *Google's Book Settlement Is a Ripoff for Authors*, WALL ST. J., Mar. 28, 2009, *available at* http://online.wsj.com/article/SB123819841868261921.html.
[179] *See, e.g.*, Bloom Objection, supra note 61, at 26.
[180] *See* Random House, Inc. v. Rosetta Books L.L.C., 283 F.3d 490 (2d Cir. 2002) (authors had the right to authorize e-book versions of their works because contracts to publish books only covered print books). *But see* Rich, *supra* note 112 (reporting that publishers contest that authors own e-book rights).
[181] Settlement Agreement, *supra* note 3, App. A, § 6.2(c)(i).
[182] *See, e.g.*, Bloom Objection, *supra* note 61, at 9.
[183] Settlement Agreement, *supra* note 3, art. 9.
[184] *See, e.g.*, UC Academic Council Letter, supra note 130, at 5-6 (expressing concerns about lack of privacy guarantees); Brief Amicus Curiae of the Center for Democracy and Technology in Support of Approval of the Settlement and Protection of User Privacy, Authors Guild Inc. v. Google Inc., No. 1:05-CV-8136 (S.D.N.Y. Sept. 4, 2009), *available at* http://thepublicindex.org/docs/letters/cdt_amicus.pdf.
[185] Privacy Authors and Publishers' Objection to Proposed Settlement at 1, Authors Guild Inc. v. Google Inc., No. 1:05-CV-8136 (S.D.N.Y. Sept. 4, 2009), *available at* http://thepublicindex.org/objections/privacy_authors.pdf. They expressed concern that the audience for their works "will be severely diminished if people must wonder and worry if information about their reading habits,
[186] *Id*. at 3-4 (explaining the sensitive or controversial nature of the objecting authors' books).
[187] *See* Google Privacy Policy, http://www.google.com/googlebooks/privacy.html.

actions and locations through some unstated combination of cookies, IP addresses, referrer logs, and numerous distinguishing characteristics of a reader's hardware and software."[188] Tracking this data in respect of GBS would allow Google to know "what books are searched for, which are browsed (even if not purchased), what pages are viewed of both browsed and purchased books, and how much time is spent on each page."[189] Google can aggregate that information with other information it has collected about users of other Google products or services.[190] Google can use this information for purposes for which it has no user consent; it can also provide sensitive reader information to government agents and third parties with interest in this sensitive data without a court order.[191] This may have a chilling effect on the willingness of users to read controversial materials,[192] and consequently, may diminish the ability of authors of controversial books to earn money from them.

Fair use rights of readers may also diminish if the GBS settlement is approved.[193] The settlement calls for readers to pay a fee for every page they print out from books accessed via a GBS public access terminal.[194] Photocopying the same pages from a book taken off a library bookshelf would almost certainly be fair use.[195] The GBS per-page-print fee would thus override reader fair use rights. While this erosion of fair use is troubling in its own right, it may be additionally troubling insofar as publishers treat it as a "precedent" for charging libraries per-page-copying fees more generally. Publishers have been trying to control private study copying for several decades.[196] The GBS settlement may give them new ammunition for achieving this objective.

First sale rights may also erode as a result of the GBS settlement.[197] Although Google characterizes its plan to commercialize individual e-books as a "consumer purchase" model,[198] this description is somewhat misleading. Purchasers of print books have many first-sale-related freedoms with respect to their books that purchasers of GBS e-books will not have. The former can lend their books to friends; the latter cannot. The former can resell their books or give them away; GBS e-book purchasers can do neither.

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[188] Privacy Author Objection, *supra* note 188, at 8.
[189] *Id*.
[190] *Id*.
[191] *Id.* at 13.
[192] *Id*.
[193] 17 U.S.C. § 107. Four factors are typically used to decide whether an unauthorized reproduction of some or all of a copyrighted work is fair and hence non-infringing: the purpose of the challenged use, the nature of the copyrighted work, the amount and substantiality of the taking, and the harm the taking would cause to the markets for the work. My letter to Judge Chin on behalf of academic authors expresses concern on this point. Samuelson Letter, *supra* note 129, at 7.
[194] Settlement Agreement, *supra* note 3, at § 4.8(a)(ii). Google will collect this fee from the libraries and share these revenues with the BRR. *Id*.
[195] *See generally* Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2580-87 (2009).
[196] *See, e.g.*, Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1974)(ruling that photocopying of scientific articles by libraries for researchers was fair use); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994) (ruling that photocopying of technical articles for research purposes at for-profit firm was unfair use)
[197] Copyright owners are entitled to control the first sale of their works to the public, but the purchaser of a copy of the work is generally free to lend, rent, sell, or otherwise transfer ownership of their copy of the work. 17 U.S.C. § 109(a). See Samuelson, *supra* note 111, at 3 (raising the erosion of first sale rights concern).
[198] Settlement Agreement, *supra* note 3, at § 4.2.

Purchasers of print books can freely annotate their books and share their annotations with friends or colleagues, unlike purchasers of GBS e-books. GBS e-book purchasers cannot, in fact, even take possession of their books.[199] The money they pay to Google will only give them the right to access the books "in the cloud," that is, on Google servers. The more apt description of the relationship between readers and GBS e-books they pay for is a single-user access license model.

Avid readers will, of course, have a number of choices when purchasing in-print books. Those who want to possess their books can buy hard copies or acquire e-books for their Kindles; those that want to share their books with friends can buy hard copies or e-books for Nooks. However, those who want e-books of out-of-print works may only get them through the GBS consumer purchase model.[200]

Purchasers of GBS e-books also run the risk of paying prices substantially above what would prevail in a competitive market. Although proponents of the GBS settlement sometimes characterize out-of-print books as an insignificant part of the book market or having little value,[201] the proposed settlement agreement contemplates that Google will use an algorithm to set prices for out-of-print books ranging from $1.99 to $29.99.[202] The agreement sets forth fixed percentages of books that will be assigned to each of twelve pricing bins (e.g., 5% of the books will be sold for $1.99 and another 5% at $29.99).[203] The average price at which Google intends to sell these e-books to consumers is, however, $8.65.

Given that in-print e-books are currently selling for $9.99 (and sometimes less), this average price is higher than one might expect for out-of-print books. It remains to be seen whether the DOJ will object to the pricing bins and percentages as a form of illegal price-fixing. Although Google apparently considers its proposed consumer purchase model to be superior to other e-book systems because GBS books would be readable on multiple devices,[204] it is unclear that this justifies pricing so close to in-print e-book

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[199] Purchasers of GBS e-books can, however, digitally copy and paste up to 4 pages and print up to 20 pages at a time from their e-books. *Id*. at § 4.2(a). The pages will be watermarked and encrypted session information would enable Google to determine what and who was copying or printing material from the books. *Id*.

[200] The GBS settlement agreement does, however, contemplate that Google and the BRR might agree in the future to make out-of-print books available through pdf downloads or print-on-demand services. *Id*. at § 4.7.

[201] *See, e.g*., Drummond Testimony, *supra* note 1, at 1, 6-7.

[202] Settlement Agreement, *supra* note 3, at § 4.2(c)(i)(1). The agreement states that the goal of Google's algorithmic pricing system is to approximate prices for books in a competitive market and to maximize revenues for each book. *Id.* at § 4.2(c)(i)(2). It is difficult to square the goal of approximating market pricing with a fixed percentage of books in each of the twelve pricing bins, and with twelve fixed bins, some of which are $10 apart. James Grimmelmann has questioned the consistency of the goal of competitive pricing and fixed price bins. See James Grimmelmann , *GBS: A Question of Pricing Bins*, Dec. 16, 2009, *available at* Laboratorium.net. The settlement agreement does contemplate adjustment of the pricing algorithm over time, as data about book sales becomes available.

[203] Settlement Agreement, *supra* note 3, at § 4.2(c)(ii). The DOJ raised concerns about the algorithmic pricing provisions of the GBS settlement in its September 2009 submission to Judge Chin, suggesting that it would facilitate collusive pricing. DOJ Statement, *supra* note 46, at 21. The parties have made some changes to the algorithmic pricing provisions to respond to this concern. See Amended GBS Agreement, *supra* note 37, at § 4.2(c)(i), (c)(2). However, the bins and percentages per bin remain unchanged.

[204] Drummond Testimony, *supra* note 1, at 2. Publisher John Sargent and Author-Subclass lawyer Michael Boni who participated in negotiations that produced the GBS settlement agreement have expressed

prices, especially given some disadvantages of the GBS consumer purchase model (e.g., its dependence on Internet access and server availability).

The risk of censorship as to GBS books is an additional concern.[205] The most immediate source of this risk comes from rights holders who can ask for their books to be removed from the GBS corpus or not to be scanned at all.[206] GBS searches cannot be conducted on removed books, even for purposes of letting a prospective reader know at which library the removed book can be found. Google is not planning to make the list of removed books available for public inspection.[207]

Google also has the right to exclude from GBS any book it chooses on either editorial or non-editorial grounds.[208] Google could, for example, decide to omit from GBS books on controversial subjects under pressure from conservative groups or foreign governments.[209] If Google decides to exclude a book from GBS for editorial reasons, it must notify BRR about its decision; BRR is authorized to seek a third party provider through which to offer the book.[210] BRR is not, however, obliged to do so. There is also no guarantee an alternate provider would step forward. Google has the further power under the settlement agreement to exclude up to 15 per cent of eligible books from the institutional subscription database, consumer purchases, and preview uses.[211] It need not say which books were left out.

Even if most readers today have confidence that Google would not engage in censorship, they should recognize that Google has bowed to foreign pressure before and the firm might sell GBS to another firm in the future.[212] That purchaser may be less interested in wide-ranging freedom of expression values than Google and less reluctant to use the censorship powers that the settlement agreement confers on Google.

5. Competition, Innovation, and Cultural Ecology Risks

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skepticism about how viable the consumer purchase market for out-of-print books would be. Telephone conversation with Michael Boni, Aug. 12, 2009, with John Sargent, Aug. 11, 2009.

[205] See, e.g, Ryan Singel, *Libraries Warn of Censorship, Privacy Cost in Google's Digital Library*, WIRED, May 5, 2009, available at http://www.wired.com/epicenter/2009/05/libraries-warn-of-censorship-privacy-cost-in-googles-digital-library/; Fred von Lohmann, *Google Book Settlement 2.0: Evaluating Censorship*, Dec. 3, 2009, available at http://www.eff.org/deeplinks/2009/11/google-books-settlement-2-0-evaluating-censorship.

[206] Settlement Agreement, *supra* note 3, at § 3.5 (a). Von Lohmann, supra note 208 (pointing out that authors, publishers, and other rights holders have sometimes sought to suppress protected works).

[207] *Id*.

[208] Settlement Agreement, *supra* note 3, at § 3.7(e).

[209] Jonathan Band has predicted that Google, like public libraries all over the U.S., will likely "find itself under pressure from state and local governments or interest groups to censor books that discuss topics such as alternative lifestyles or evolution." Band, *supra* note 23, at 312. This is especially likely because children will have access to GBS books at public libraries as well as in their homes. Unfortunately, "if Google bends to political pressure to remove a book, it will suppress access to the book throughout the entire country." *Id*. Band also pointed to examples of China, Thailand, and Turkey putting pressure on Google to censor controversial materials. *Id*.

[210] Settlement Agreement, *supra* note 3, at § 3.7(e)(i). Google can also alter the texts of books in GBS if it has authorization to do so from the rights holder. *Id*. at § 3.10(c)(1). This raises the specter of revisionist histories akin to those that George Orwell imagined in 1984. Von Lohmann, *supra* note 208.

[211] Settlement Agreement, *supra* note 3, at § 7.2(e).

[212] *Id*. at § 17.30.

Approval of the GBS settlement will have important implications for competition and innovation in markets beyond the institutional subscription and consumer purchase markets discussed above.[213] Several companies believe that approval of the GBS settlement would give Google an unfair competitive advantage over rivals in existing markets and would stifle competition and innovation in other markets. Concerns have also been expressed about the impacts of the settlement on the cultural ecology of the information economy.

Yahoo! has opposed the GBS settlement because of the "tremendous advantage" it would unfairly give Google "in its core market: Google Search."[214] Engineers who develop and refine search algorithms are constantly striving to develop techniques to improve the speed and quality of search results. One strategy for improving search quality involves increasing the quantity of data the search engine can process. As Peter Norvig, a Google engineer, has observed, "the very worst [search] algorithm at 10 million words is better than the very best algorithm at 1 million words;" he has also suggested that "rather than arguing about which [algorithm] is better or trying to discover a better one, why not just go out and gather more data?"[215] The GBS database is just that: a vast resource of additional data that Google can use to refine its search technologies and further entrench its market dominance in the search market. Yahoo! regards Google's data advantage from GBS to be unfair because Google would be obtaining its de facto exclusive license to GBS books through a misuse of the class action procedure.[216]

The proposed settlement explicitly gives Google a license to make a wide range of "non-display" uses of books in the GBS corpus, a term which includes, but is not restricted to, development and refinement of search technologies.[217] Google expects to develop a host of new products and services from its non-display uses of GBS books,[218] including automated translation tools. The GBS corpus contains many books that have been translated from its native language into one or more other languages; by comparing the texts of the English and French versions of the same books, for instance, Google can improve its ability to translate texts in these languages. No other profit-making firm will

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[213] George Dyson reported in his blog, *The Edge*, that he was told by his host for a 2005 talk at Google: "'We are not scanning all those books to be read by people…We are scanning them to be read by an AI [artificial intelligence]," quoted in Guthrie Objection, *supra* note 175, Exhibit K to Declaration of Andrew DeVore.

[214] Yahoo! Objection, *supra* note 83, at 25.

[215] *Id* (quoting Peter Norvig). *See also* Bill Schilit, *Navigating the Network of Knowledge: Mining Quotations from Massive Scale Digital Libraries of Books*, PARC Forum, Sept. 4, 2008, video available at http://www.parc.com/event/671/navigating-the-network-of-knowledge.html (discussing some results of Google's nondisplay research on the GBS book database).

[216] Yahoo! Objection, *supra* note 83, at 25. The tremendous advantage that GBS will give Google in search is partly of concern because the long-term prospects for competition in search are, in the view of some, not all that positive. See, e.g., Frank Pasquale, *Seven Reasons to Doubt Competition in the General Serarch Market*, March 18, 3009, http://madisonian.net/2009/03/18/seven-reasons-to-doubt-competition-in-the-general-search-engine-market/.

[217] Amended GBS Agreement, *supra* note 37, at §§ 1.91, 3.3(a), 3.4(a).

[218] One commentator has suggested that non-display uses of books in the GBS corpus "will end up being far more important than anything else in the agreement. Imagine the kinds of things that data mining all the world's books might let Google's engineers build." Fred von Lohmann, *The Google Book Search Settlement: A Reader's Guide*, Oct. 31, 2008, *available at* http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide.

have access to GBS or a comparable database of books to make non-display uses that would enable them to make competing translation tools.

Although the settlement agreement would allow "qualified users" to engage in non-consumptive research on the GBS research corpus at university host sites,[219] this term is defined so that only non-profit researchers are eligible to engage in this activity.[220] Qualified users can publish results of their work; they can also develop non-commercial services (e.g., an index of books focused on certain geographical references) derived from their non-consumptive research. However, they are forbidden from developing commercial services with data derived from GBS without the express permission from Google and the Registry.[221] Qualified users are also prohibited from using data extracted from GBS books to provide services that would compete with Google or the books' rights holders.[222]

The most creative of the non-consumptive researchers may well have opportunities to financially benefit from their innovations by going to work for Google, but the settlement will preclude them from becoming next-generation entrepreneurs capable of developing radically new information services arising from their non-consumptive uses of the GBS corpus.

It would be logical for Google to incorporate information services developed by non-consumptive research into Google products or services.[223] Insofar as this occurs, the non-consumptive research provisions of the GBS deal may be valuable to Google by allowing it to reap the commercial value of the research and development efforts of leading university researchers.

Google will likely integrate GBS with other Google products and services, such as its new Wave technology. Wave has been described as "a real-time communication and collaboration platform that incorporates several types of web technologies," such as email, instant messaging, wikis, document sharing, social networking, and other services.[224] Integration of GBS into this platform could make Google's platform much more "sticky" with users. This could make it difficult for other firms to compete effectively with Google and raise entry barriers insofar as other firms would have to offer comparable array of integrated products and services.

In this and other respects, GBS may contribute to what some deem an unfortunate trend in the Web ecosystem. One prominent technology pundit recently observed that "efforts by Google, Microsoft, Amazon, Apple, and other tech vendors—as well as publishers like Rupert Murdoch's Dow Jones—to create closed communities around their products and services are jeopardizing the freedom, and the spirit, of the Web. 'It's no

[219] Settlement Agreement, *supra* note 3, at § 7.2 (d)(xi). Nonconsumptive research uses of the GBS corpus are discussed *supra* notes 83-90 and accompanying text.
[220] Amended GBS Agreement, *supra* note 37, at §§ 1.123 (defining "qualified user), 7.2(d)(2)(xi)(only qualified users can engage in non-consumptive research).
[221] *Id*. at § 7.2(d)(2)(viii).
[222] *Id*. at § 7.2(d)(2)(ix).
[223] The inclusion of non-consumptive research services into GBS institutional subscriptions could justify increasing the prices of these subscriptions. *See supra* notes 131-32 and accompanying text.
[224] See, e.g., Andres Ferrate, *An Introduction to Google Wave—Google Wave: Up and Running*, Oreilly.com (2009), *available at* http://oreilly.com/web-development/excerpts/9780596806002/google-wave-intro.html.

longer about the Internet as a platform,' said [Tim] O'Reilly. 'It's Google as a platform, it's Amazon as a platform, it's Microsoft as a platform,'"[225]

The architectures of the Internet and the World Wide Web have thus far been an open ecosystem that has been highly generative of a wide range of unanticipated innovations from diverse sources.[226] Google is one of thousands of companies who have built applications and features on top of these open architectures; its initial success has depended on the openness of these environments. Yet, Google's commitment seems now to be moving toward the walled garden model, and GBS seems to be a component of this new strategy. [227] While this may be rankling in its own right, it rankles also because of the taint of unfairness through which Google is getting its advantage with GBS through an unprecedented use of the class action settlement process. A more open and competitive ecosystem for digital books is possible, but it may not be achieved if the GBS settlement is approved.

6. Abuse of Class Action Risks

Several firms oppose the GBS settlement on the ground that it represents an improper use of the class action procedure to achieve what is quintessentially a legislative restructuring copyright owner rights and remedies.[228] Microsoft made this point vividly:

> Following closed-door negotiations that excluded millions of copyright owners and the very public that copyright serves, Google and the plaintiffs seek to arrogate public policymaking to themselves, bypass Congress and the free market, and force a sweeping "joint venture"—built on copyrights owned by a largely absent class—via this Court's order. The proposed settlement would usurp the role that Article I, Sec. 8 of the Constitution vests in Congress alone.[229]

Amazon.com argues that courts are ill-equipped "to balance and make adjustments necessary to accommodate the many public interests at stake when a new technology emerges that offers both the promise of public benefit and the danger of abuse of both

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[225] *See, e.g.*, Paul McDougall, *Web 2.0 Expo: O'Reilly Warns of Web War*, INFO. WEEK, Nov. 17, 2009, available at http://www.informationweek.com/news/internet/web2.0/showArticle.jhtml?articleID=221800396. (reporting that a prominent technology pundit,

[226] *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW WE CAN STOP IT (2008).

[227] *See, e.g.*, Lawrence Lessig, *Google Book Search Settlement: Static Good, Dynamic Bad*, Harvard Law School, July 30, 2009, video *available at* http://www.youtube.com/watch?v=Svytkew5qPI.

[228] *See, e.g.*, Objection of Amazon.com, Inc. to Proposed Settlement at 1-14, Authors Guild Inc. v. Google Inc., No. 1:05-CV-8136 (S.D.N.Y. Sept. 1, 2009), *available at* http://thepublicindex.org/docs/letters/amazon.pdf; Internet Archive Brief, supra note 16, at 11-21; Objections of Microsoft Corp. to Proposed Settlement and Proposed Certification of Class and Sub-classes at 1-5, Authors Guild Inc. v. Google Inc., No. 1:05-CV-8136 (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/objections/microsoft.pdf.

[229] *Id*. at 3. Only Congress has "the constitutional authority and institutional capacity" to reorder copyright owner rights, *id*., at 7, quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

copyright holders and consumers" as part of a fairness hearing on a class action settlement.[230]

Congress is the proper branch of government to change copyright entitlements to address new technology issues, which it has often done, sometimes as to issues that first arose in class action litigations.[231] Because Congress has been actively considering legislation to make orphan works more widely available—a key objective of the GBS settlement—Amazon.com asserts that the proposed GBS settlement should be disapproved because it "tilts the playing field by liberating Google (and Google alone)" from constraints in the orphan works legislation that Congress is most likely to enact.[232] Yet, some proponents of the GBS deal insist that the orphan works problem can *only* be solved through a class action settlement.[233]

Diversity of interests among class members, the impossibility of discerning the interests of orphan work rights holders or of notifying them of the settlement's terms, inter-class conflicts, and the atypicality of the class representatives are among the specific reasons to doubt whether the GBS class could or should be certified.[234] Questions also exist about whether this settlement should be approved given the stark contrast between the narrow issue in litigation in the *Authors Guild* case—whether scanning books in order to make short excerpts available in response to search queries is copyright infringement—and the expansive and complex business arrangement that approval of the settlement would establish.[235] The settlement would, moreover, release Google from acts of infringement in which it has not yet engaged (e.g., selling institutional subscriptions to out-of-print books) which are different in kind from the infringement claim being settled.[236]

Approval of the GBS settlement could also create a dangerous precedent that would encourage class action lawyers to address important public policy questions by bringing lawsuits that begin with a legitimate dispute over a specific issue, but are later enlarged to transform the structure of affected industries and their markets. Imagine, for example, that A&M Records brought a class action lawsuit against Napster for inducing copyright infringement of sound recordings of music, and then negotiated a settlement

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[230] Amazon Objection, *supra* note 231, at 2.
[231] *Id*. at 9-12; Microsoft Objections, *supra* note 231, at 8.
[232] Amazon.com Objection, *supra* note 231, at 14-15.
[233] See, e.g., Ashby Jones, *The Google Books Settlement: A Lawsuit Ripe for Congress?*, WALL ST. J., Nov. 17, 2009, *available at* http://blogs.wsj.com/law/2009/11/17/the-google-books-settlement-a-lawsuit-ripe-for-congress/ (quoting Paul Aiken of the Authors Guild: "You can't solve this problem without something like a class action,,,,We weren't going to sit around and wait for a legislative solution.")
[234] *See, e.g.*, Internet Archive Brief, *supra* note 16, at 1-2, 11, 15-16. Microsoft pointed out that each of the publisher subclass representatives had negotiated separate deals with Google for making their books available through GBS and "they all reportedly plan to exclude their books from the settlement terms that most class members who lack the plaintiff publishers' knowledge, relationships, and sophistication will have to live with in perpetuity," which called into question the adequacy of their representation of the subclass interests. Microsoft Objection, *supra* note 231, at 18.
[235] *Id*. at 22 (using a class action settlement to launch a joint venture would abridge substantive rights in violation of the Rules Enabling Act, 28 U.S.C. sec. 2072).
[236] Amazon.com Objection, *supra* note 231, at 35-38. *See, e.g.*,Unisuper Ltd. v. News Corp., 898 A.2d 344, 347 (Del. Ch. 2006) ("A settlement can release claims that were not specifically asserted in an action, but it can only release claims that are based on 'the same identical factual predicate' or the 'same set of operative facts' as the underlying action. Thus, it follows that a release is overly broad if it releases claims based on a set of operative facts that will occur in the future.")

with Napster that would make the latter the exclusive distributor of digital music, with authorization to use an algorithm to set prices at which Napster would sell the songs and determine revenue splits. Approval of such a settlement would have, among other things, precluded Apple from introducing iTunes.

Approval of the settlement may also enable Google to have a substantial and arguably unfair advantage in negotiating with owners of rights in copyrighted materials other than books.[237] Google could start scanning these works and claim to be interested only in making snippets available; when challenged by rights holders, Google could say to them: "We could obviously litigate whether our scanning is copyright infringement, and you could bring a class action lawsuit to challenge this, but why don't we make a deal instead and save ourselves a lot of litigation costs and anguish?"

Use of a class action settlement to restructure markets and to reallocate intellectual property rights, particularly when it would give one firm a de facto monopoly to commercialize millions of books, is arguably corrosive of fundamental tenets of our democratic society.[238]

C. SUMMING UP

Proponents of the GBS settlement have painted a very rosy picture about the many positive things that would happen if the GBS settlement was approved by the federal courts. It is unquestionably true that the public would have more access to books than ever before, and rights holders would have new opportunities to make money from Google's commercialization of their books. Google's non-display uses of books in the GBS corpus, as well as the non-consumptive research that university scholars and other non-profit users would be able to undertake if the settlement is approved, would advance knowledge and lead to development of new technologies, such as automated translation tools, that will facilitate further advances. The GBS goal of expanding access to books for print-disabled persons is laudable as well. There is, moreover, a pragmatic argument that can be made in favor of the settlement, for it would "cut the Gordian knot" of very high transaction costs that would inhibit clearing rights necessary to digitize millions of out-of-print books and make them available for institutional subscriptions and consumer purchases.[239]

Notwithstanding the benefits, there are both substantive and procedural reasons to question whether the GBS settlement will fulfill the lofty goals its proponents have articulated, especially over the long run. Proponents of the settlement have sometimes exaggerated its benefits and ignored or been dismissive of legitimate issues raised by

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[237] Google's founders want to organize all of the world's information. Brin, *supra* note 94. Not all of such information can be found in books, so it is logical to wonder which copyright industry will be Google's next target for its scanning projects. One logical possibility are the texts of academic journals, which have much the same character as books. However, there are probably more revenues to be made if Google scans sound recordings so that it can offer a music service to its sticky user base.

[238] *See, e.g.*, Amazon.com Objection, *supra* note 231, at 7, 14-15 (it is for Congress, not the courts, to revise copyright law to respond to new technology issues).

[239] *See, e.g.*, Letter of American Library Association, et al. to William F. Cavanagh, Deputy Ass't Attorney General of the U.S. Antitrust Division at 1, Dec. 15, 2009, *available at* http://www.wo.ala.org/districtdispatch/wp-content/uploads/2009/12/AntitrustdivASA-FINAL1.pdf ["ALA Letter"].

critics of the settlement.[240] There is more substantive merit in these criticisms than GBS proponents have acknowledged. Of particular concern are risks of excessive pricing, the lack of a backup plan if Google decides to discontinue GBS, and inadequate privacy protections. It is, of course, too early to know whether any of the "nightmares" that some envision will come to pass over time. However, there are presently too few checks and balances in the settlement agreement to protect the public's strong interests in this corpus of books. Also of concern are the possible diminishment of competition in the book market, the broad restructuring of rights and remedies available to copyright owners, and the audacious effort to use class action procedures to accomplish a quintessentially legislative objective. These concerns cannot be dismissed simply because some of them have been articulated by Google's rivals, Amazon.com, Microsoft, and Yahoo!

GBS is, in short, a mixed bag. Some have called for measures to limit the risks posed to the public and other interests. Library associations, for instance, have urged the judge presiding over the fairness hearing to retain jurisdiction over the case and closely supervise compliance with the settlement agreement provisions to guard against abuses, particularly as to excessive pricing.[241] Others have called for the court to order Google to grant a compulsory license to the GBS corpus so that other firms could make use of it.[242] It is, however, far from clear that federal courts can or should approve of the deal on antitrust or class action grounds. The next section considers what might happen to the future of books in cyberspace if the GBS settlement is not approved, and why it would be desirable to create an alternative research corpus of books that could serve as competition for GBS as well as preserving our cultural heritage better than Google is likely to do.

III. OTHER POSSIBLE FUTURES FOR BOOKS IN CYBERSPACE

Regardless of whether the GBS settlement is or is not approved, several things are clear: First, the market for digital books is growing, and its trajectory is strong.[243] Amazon.com's Kindle, the Sony e-book reader, and Barnes & Noble's Nook are fueling the market for digital books.[244] These information appliances offer some useful features

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[240] When testifying before Congress, Authors Guild Executive Director Paul Aiken, for example, gave the committee the impression that approval of the GBS settlement would make "at least 10 million" books available to the public. Aiken Statement, *supra* note 69, at 4. This is an exaggeration. Aiken was also very dismissive of criticisms of the settlement. *Id*. at 6-9. And he failed to mention the print-out fee that libraries will be charged for uses from public access terminals.

[241] ALA Letter, supra note 242, at 2.

[242] OBA Brief, supra note 107, at 26-31.

[243] AAP reports that e-book sales reached $15.9 million in September 2009, a 170.7% increase over the previous September, and 176.1% YTD increase. *See* Press Release, Association of American Publishers, Book Publishing Sales Post Gains in September (Nov. 17, 2009) *available at* http://www.publishers.org/main/PressCenter/Archicves/2009_November/BookPublishingSalesPostGainsinSeptember.htm. *See also* International Digital Publishing Forum, *Wholesale eBook Sales Statistics*, http://www.idpf.org/doc_library/industrystats.htm (last visited Nov. 26, 2009) (reporting a 235% increase for the third quarter of 2009).

[244] *See, e.g.*, David Pogue, *Novel Now, But Not for Long*, N.Y. TIMES, Nov. 25, 2009, *available at* http://www.nytimes.com/2009/11/26/technology/personaltech/26pogue.html (noting that with the eReader market heating up, "e-books are evolving at a screaming pace"); Adam Rose, *Kindle Killers? The Boom in New E-Readers*, TIME, Oct. 11, 2009, *available at* http://www.time.com/time/business/article/0,8599,1929387,00.html (discussing the booming eReader and eBook market).

unavailable in print books (e.g., search functionality) and they make books much more readily transportable than print books.[245] These technologies will continue to improve, and competition among the platforms is yielding benefits to the public.[246]

Second, the economics of digital publishing now make it commercially viable to make sell books that have been out of print for some time because the web can "match geographically dispersed buyers to a product of their choice efficiently, in contrast to the old distribution model based on storefronts."[247] Individual out-of-print books may not be all that valuable in isolation, but there is a growing recognition that bundles of them might be quite valuable.[248]

Third, digitization of books has made it possible to serve ads that can be targeted either to the individual user or to the book.[249] This could create a lucrative new revenue stream for rights holders as well as for intermediaries, such as Amazon.com or Google, that stand between the publisher and book readers. Targeted ads may be a particularly useful model for books stored "in the cloud" (e.g., stored on servers), for new ads can be generated every time the reader accesses the book.[250]

Fourth, digitized versions of public domain books are now widely available not only from Google, but also from other sources, such as the Internet Archive.[251] Fifth, libraries and other nonprofit educational institutions are likely to digitize more works in their collections that they have reason to believe are or are likely to be in the public domain or to be orphans. Sixth, amateurs will digitize too, sometimes for their own personal uses, sometimes to share with friends, and sometimes to share with lots of people, as through peer-to-peer file-sharing.[252] The darknet is alive for books, as for other types of content.[253]

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[245] *See, e.g.*, Steven Levy, *The Future of Reading*, NEWSWEEK, Nov. 26, 2007, *available at* http://www.newsweek.com/id/70983.

[246] The Barnes & Noble Nook, for example, allows readers some ability to "lend" their books to others. *See* Jeffrey A. Trachtenberg & Geoffrey A. Fowler, *B&N Reader Out Tuesday*, WALL ST. J., Oct. 20, 2009, *available at* http://online.wsj.com/article/SB10001424052748703816204574483790552304348.html.

[247] OBA Memo *supra* note 107, at 4. Google, for instance, will have to make relatively few sales of out-of-print books to recoup its costs of scanning and storing them on its servers as part of the GBS corpus. At an average sales price of $6, with the BRR/Google revenue split, one commentator has estimated that Google would need to sell only 41 copies to recoup its investment in digital publishing, whereas print publishers require orders of magnitude more sales to make physical books available. *See, e.g.*, Kent Fitch, *Google Book Settlement Doesn't Address the Hard Problem*, LONG TERM MEMORY, Feb. 28, 2009, http://ltmem.blogspot.com/2009/02/google-book-settlement-doesnt-address.html. Even if Google's costs may be somewhat higher than this commentator suggests, the main point that digital publishing changes the economics of publishing certainly stands.

[248] OBA Memo, *supra* note 107, at 4-5.

[249] See, e.g., Randal C. Picker, *The Mediated Book*, U. Chic. Law & Economics, Olin Working Paper No. 463 (May 5, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399613.

[250] Advertising is one of the three revenue models that the GBS settlement anticipates will be implemented in GBS. Amended GBS Agreement, *supra* note 37, § 4.4.

[251] *See* Internet Archive, http://www.archive.org/details/texts (last visited Nov. 10, 2009). *See generally* List of Digital Library Projects, Wikipedia, http://en.wikipedia.org/wiki/List_of_digital_library_projects (last visited Nov. 13, 2009) (providing links to dozens and dozens of book digitization projects).

[252] See supra note 103 concerning the availability of amateur book scanning technology information.

[253] See Harvey, supra note 101.

There is, moreover, a growing recognition that a digital corpus of millions of searchable books from major research libraries is both desirable and achievable.[254] GBS has whetted the public's, as well as the scholarly communities', appetites for this kind of information resource.[255] Although approval of the GBS settlement will bring about greater access to books sooner, I believe it is inevitable that a digital corpus of books from major research libraries will be developed and made widely available to research communities and to the public.

A. WHAT WOULD HAPPEN TO GBS IF THE SETTLEMENT IS REJECTED?

Disapproval of the GBS settlement is unlikely to cause Google to stop scanning in-copyright books from the major research libraries with which it has contracted, and growing the GBS corpus accordingly.[256] The company has made too much of an investment in the project to drop it, even if the settlement is not approved. If the settlement is rejected, Google will likely continue to provide snippets of texts from GBS in-copyright books as well as links to places from which it is possible to acquire the books and to provide free downloadable copies of public domain books. Google would also likely continue to make nondisplay uses of books in the corpus to improve its search technologies, for which it would have a plausible fair use defense.[257]

Google will almost certainly continue to work with publishers of in-print books to make these books available under terms mutually acceptable to Google and the publishers under its partner program.[258] Now that authors and publishers of out-of-print books are more aware of the GBS project and familiar with its terms, more of them may wish to sign up to make digital versions of their books available through the partner program. Presumably this would mean that more out-of-print books would become available through GBS on a voluntary basis. Those rights holders who do not want to participate in a GBS initiative can ask for their books to be removed from the corpus, just as they could if the settlement was approved, and presumably Google will honor those requests.[259]

GBS has fueled interest in institutional subscriptions to a corpus of digitized books. Many authors and publishers of out-of-print books may well want to take part in a

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[254] *See, e.g.*, GARY HALL, DIGITIZE THIS BOOK, THE POLITICS OF NEW MEDIA, OR WHY WE NEED OPEN ACCESS NOW 4-5 (2008).

[255] *See e.g.*, Janet M. Baker et al., *Research Developments and Directions in Speech Recognition and Understanding, Part 1*, IEEE SIGNAL PROCESSING MAGAZINE, at 79 (May 2009) (discussing how the digitization of libraries could advance the "state of the art in the automation of world language speech understanding and proficiency").

[256] An interesting article that compares the GBS settlement to the likely litigation outcomes is Sag, *supra* note 31.

[257] Non-display uses of the GBS corpus would likely result in advancing knowledge and/or in the creation of new non-infringing works of authorship, such as new tools to aid in the translation of texts from one language to another. They would be "transformative" in the sense that courts have endorsed in recent years. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 469 (1994). Non-display uses, by definition, do not display any expression from works whose texts might be analyzed. Non-display uses are unlikely to bring about any harm or potential harm to the market for the underlying works.

[258] Google has announced its intent to launch an e-books service, Google Editions, in the first half of 2010, through which it would make available half a million or so books. See, e.g., Jacqui Cheng, *Google Editions Aims to Bring eBooks to All Devices*, ARS TECHNICA, Oct. 15, 2009, available at http://arstechnica.com/media/news/2009/10/google-editions-aims-to-bring-e-books-to-all-devices.ars.

[259] Amended GBS Agreement, *supra* note 37, at § 3.5.

subscription service. Google may well offer such a service, but others might be willing to do the same if the settlement is not approved.[260]

Google has announced that it plans to work with Creative Commons so that rights holders of books with open access preferences can be accommodated.[261] Google is also willing to work with rights holders of out-of-print books who want to dedicate their books to the public domain.[262] These initiatives should ensure that more books will be available to the public, both through GBS and through other sites and services that foster open access. Disapproval of the settlement would give Google incentives to partner with libraries and other organizations to develop websites through which it would be possible to share information about which books published between 1923 and 1964 are actually in the public domain for failure to renew copyrights and which books are really orphans. [263]

Disapproval of the GBS deal would likely precipitate renewed interest in orphan works legislation.[264] Google would certainly have stronger incentives to support such legislation if the GBS settlement was rejected than if it was approved. It might also be more likely to support free uses of true orphan works instead of paid uses of such books, with funds escrowed for some years, as the Authors Guild and AAP seem to prefer.[265] Congress is the more appropriate venue than the courts for addressing how to rescue orphan works or under what conditions mass digitization of books should take place. A societal benefit of Congressional action would be that Google would no longer be the only firm that could make orphan books available.

As for the *Authors Guild v. Google* litigation, there are at least three options. One is that the Guild and AAP could decide to drop their lawsuits against Google because of the expense, the time it would take, and considerable uncertainty about the outcome. The uncertainty exists not only as to Google's fair use defense, but also to the certifiability of the class.[266] Dozens of objections filed with the court in connection with the proposed

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[260] No matter what happens, Google will have a five year lead-time advantage over any other book digitization project, as well as a set of contractual arrangements in place with libraries and publishers that will be difficult for other digitizers to match. Second-comers will also have the challenge of figuring out exactly which books are orphans, a problem that Google has sought to surmount through the settlement terms that give it a broad license to commercialize all out-of-print books.

[261] *See, e.g.*, Xian Ke, *Bringing the Power of Creative Commons to Google Books*, available at booksearch.blogspot.com/2009/08/bringing-power-of-creative-commons-to.html. *See also* Amended Settlement Agreement, *supra* note 29, § 4.2(a)(i); Eric Steuer, *Google Books Adds Creative Commons License Options*, CREATIVE COMMONS, Aug. 13 ,2009,

[262] FAQ #58, FAQs - Google Book Settlement, http://www.googlebooksettlement.com/help/bin/answer.py?answer=118704&hl=en#q43f (last visited Nov. 26, 2009). *See also*, UC Libraries, *More on the Google Book Settlement*, at 3, August 11, 2009, *available at* http://osc.universityofcalifornia.edu/google/gbs_UC_libraries_doc.pdf.

[263] *Id.* (explaining the desirability of such information sharing).

[264] Orphan Works Act of 2008, H.R. 5889, 110 Cong. (2008); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). Changes to these bills would need to be made to allow mass digitization akin to GBS.

[265] The Amended Settlement reflects an expectation that the Unclaimed Works Fiduciary might eventually license orphan books to third parties. Amended GBS Agreement, *supra* note 37, at § 6.2(b)(i).

[266] *See, e.g.*, Samuelson Letter, *supra* note 131, at 2-3 (suggesting that academic authors would generally consider scanning books for indexing purposes to be fair use in contrast to the Authors Guild whose lawsuit asserts that such acts are not fair use). Different legal perspectives among class members have sometimes resulted in dismissal of class action lawsuits. See Vulcan Golf LLC v. Google, Inc., 2008 U.S. Dist. LEXIS 102819 (N.D. Ill. 2008) (denying certification of a class of trademark owners because the legal

GBS settlement suggest that authors, publishers and other rights holders have extremely diverse interests and legal opinions; there is probably no one class of all rights holders that can, in fact, be certified.

A second option is for the plaintiffs to press on with the litigation. Google could ultimately win its fair use defense for scanning-to-index. This is a win that many librarians and other researchers would greatly cheer.[267] Alternatively, the plaintiffs could press on with the litigation and win on the merits, albeit on behalf of a far smaller class. Even so, the court would likely recognize the public benefit of the GBS corpus and order that damages, rather than injunctive relief, should be awarded.[268] It is unimaginable that a court would order the GBS corpus to be destroyed, but it might well rule that Google has to get the permission of rights holders before commercializing any books in the corpus.

A third option, assuming disapproval of the GBS settlement, would be for the parties to take the matter to Congress to resolve. Some critics of the GBS settlement have argued that Congress, not the courts, is the most appropriate forum for addressing the orphan works issue for books.[269]

B. BUILDING AN ALTERNATIVE RESEARCH CORPUS OF BOOKS

It would be socially desirable for there to be a digital corpus of twenty or so million books from major research libraries that would be available through institutional subscriptions at reasonable prices, which would be run by a consortium of nonprofit educational institutions, not by Google or any other for-profit firm. This proposal would be desirable regardless of whether the GBS settlement is approved or disapproved.

Development of this corpus should be publicly funded—a kind of Human Genome Project-like initiative—and implemented by the major research libraries themselves working in cooperation with one another.[270] The knowledge embedded in books of these research libraries are part of the cultural heritage of the humankind which should be widely available and preserved for future generations. Research librarians would be more likely than Google to care about the quality of the scans and about the accuracy of the metadata which are essential if a research corpus is actually going to serve well the research and educational communities for which it should principally be

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claims of the named plaintiffs were not typical of members of the proposed class, some of whom would have thought the challenged action was fair use)

[267] Google's success with its fair use defense in the *Authors Guild* case would have emboldened libraries to scan other materials in their collections that are not commercially available, at least for preservation and other non-display purposes.

[268] The U.S. Supreme Court has endorsed withholding injunctive relief in copyright cases based on public interest factors. See, e.g., New York Times Co. v. Tasini, 533 U.S. 483, 505 (2001) (public interest in access to historical record may justify withholding injunctive relief); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n. 10 (1994) (public interest in access to second-generation creations may justify withholding injunctive relief in close fair use cases).

[269] *See* Amazon Objection, supra note 231, at 14.

[270] Harvard Librarian Robert Darnton has suggested nationalizing the GBS corpus and making it into "a truly public library." Robert Darnton, *Google and the New Digital Future* at 6, N. Y. REV. OF BOOKS, Dec. 17, 2009. Or if that proved too ambitious, he proposes a mass digitization project funded by foundations and economic stimulus funds. He estimates the cost of this project at $750 million and suggests that it could be done over a period of 10 to 20 years. *Id*. at 6.

designed.[271] This digital library should be built on open architecture principles, so that improvements could be added from multiple sources over time.

The research corpus should be maintained on more than one institution's servers. Redundancy is important to ensure that if servers at one host site go down, the corpus will still be available from other host sites. In keeping with its historical role as a great library of books, the Library of Congress would seem an appropriate site for one of the repositories. Security measures to protect the corpus should be strong, as there is a risk that it may be an attractive target for hackers.

The biggest hurdle to building such a digital repository of books, of course, is copyright. Taking inspiration from GBS, I recommend that Congress allow mass digitization of books from major research libraries. Participating libraries should be able to use corpus for preservation and other legitimate library purposes, although no more than snippets of the books' contents should be displayed unless the appropriate rights holders have consented. Owners of copyrights in out-of-print books could be strongly encouraged to make their books available in the research corpus for noncommercial purposes. Congress should offer a tax credit for rights holders who dedicate their books to the public domain or at least to noncommercial uses of the research corpus. Print-on-demand or e-book purchases could still be within the rights holders' control. Inclusion of a book in the research corpus might well attract readers who would often become paying customers.[272]

Because most of the books in major research libraries were written by scholars for scholars, and because open access has become a strong value within academic communities, it should be possible for the research communities themselves to organize in support of an open access corpus of books. Even those who have assigned copyrights in books to their publishers should generally be able to make their books available on an open access basis. Courts have held that assignments to publish works "in book form" cover only the right to print physical books, not to control publication of electronic versions.[273] Even those who have explicitly assigned electronic rights to publishers will be entitled, after a period of years, to terminate those transfers.[274] They too could be encouraged or incented to make their scholarly books available on an open access basis. Finally, many authors of scholarly books have contracts with publishers under which copyrights revert to them if and when the book goes out-of-print. They too could make their books available for open access use in the research corpus.

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[271] Darnton suggests that if libraries and archives scanned books for a truly digital library "the job would be done right , with none of the missing pages, botched images, faulty editions, omitted art work, censoring, and misconceived cataloging that mar Google's enterprise." *Id*. Library control over the corpus would also ensure preservation "because Google is not committed to maintaining its corpus." *Id*.

[272] It is reasonably common for research scholars to borrow books from libraries, and as they prove useful, to buy a copy for longer term use. Many presses are recognizing that allowing the full text of their books to be available online is compatible with selling copies of the books to people who prize them enough to want to own them. Some publishers have come to recognize that online access can promote sales of books. The National Academies Press, for instance, typically publishes online the texts of books of studies conducted by the Academies which the Press also sells in print form. See David Pogue, *Should e-Books be Copy-Protected?*, N.Y. TIMES, Dec. 17, 2009, *available at* http://www.nytimes.com/2009/12/17/technology/personaltech/17pogue-email.html (reporting that sales of Pogue's books increased when he made the books available without copy-protection).

[273] See supra note 112.

[274] 17 U.S.C. §§ 203, 304(c).

It would be desirable for all researchers, whether from profit or nonprofit institutions, to be eligible to make nondisplay uses of the research corpus and to develop innovative new products and services that would interoperate with the research corpus.[275] This would help to create a more open and competitive ecosystem for digital books. The existence of this corpus and the ability to build on it may provide meaningful competition to GBS.

Of course, there is more than the legacy of books already in research library collections for which plans should be made.[276] New books will obviously continue to be published. The research corpus should accordingly grow to encompass new books of interest to research communities. Copyright law currently requires rights holders to deposit a copy of new works with the Library of Congress.[277] One of the two copies of print books that rights holders must submit to the Copyright Office to obtain for a registration certificate goes to the Congressional library.[278] Once the proper infrastructure was in place, it would be a simple thing to allow digital copies to be deposited with the Library of Congress, perhaps as an alternative to deposit of print books.[279]

A committee formed by the coalition of research libraries responsible for maintaining the digital research corpus could decide which books should be added to this corpus, perhaps by purchasing a copy for the corpus. Some books not selected for the research corpus might still be included in the collections of particular research libraries for which the books might nonetheless be attractive because of special interests of their institutions' researchers or the contributions the books would make to their specialized collections.

Accommodation will also need to be made for new kinds of books, the creation of which digital technologies will enable. Some are likely to be books of significance for researchers. Harvard Librarian Robert Darnton has conceived the desirability of multilayered historical works in digital form.[280] The top layer might consist of a high level narrative synopsis of the key findings or points to be made in the book, with deeper layers of argumentation or analysis available to researchers who want to know more. Another deeper layer might provide access to data or other sources that provide documentation for points made in higher levels of the book. Digital convergence will enable books to become multimedia works, in which video and audio files are embedded

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[275] The GBS settlement agreement restricts non-consumptive uses of books in the GBS corpus to non-profit researchers and forbids them from commercializing products or services that they might create from uses of the corpus. *See* Amended GBS Settlement, *supra* note 37, § 7.2.

[276] GBS is backward-looking in that it focuses on books published on or before Jan. 5, 2009. *Id*. at § 1.13.

[277] 17 U.S.C. § 407(a). The Register of Copyrights has authority to exempt certain categories of works (e.g., sculptures) from the deposit requirement. *Id*., § 407(c).

[278] *Id*., § 407(b).

[279] *See, e.g.*, Frank Pasquale, *Beyond Competition: Preparing for a Google Book Search Monopoly*, Feb. 4, 2009, http://balkin.blogspot.com/2009/02/beyond-competition-preparing-for-google.html. ("A rational copyright policy would have required digital deposit of all books granted copyright since digitization became widespread. It would have put government in the position of providing a service like Google book search, at least with respect to more current books. Just as Medicare provides a benchmark for private insurers' actions, that Public Book Search could be both an alternative to and a model for Google--and could learn from Google, too."); Peter S. Menell, *Knowledge Access and Preservation Policy in the Digital Age*, 44 HOUS. L, REV. 1013 (2007). *See also* Peter Brantley, *Books for a Digital Nation*, June 16, 2008, http://blogs.lib.berkeley.edu/shimenawa.php/2008/06/16/books_for_a_digital_nation.

[280] DARNTON, *supra* note 14, at 79-102.

in texts, to attract younger readers who live in an image-rich world.[281] Also in need of curation and possible inclusion in a research corpus are scholarly books that are "born digital."[282] Multivalent documents, which can be richly layered, are another digitally enabled information resource which a digital library might include.[283]

Lending is a practice that has long been associated with libraries; indeed, it is an emblematic activity as to libraries and books. Books have not only been available to be read inside the walls of the library; they are also available for patrons of libraries to check out, take home, and later return them. The freedom that libraries have to lend books they purchased comes from the U.S. copyright rule that allows rights holders to control only the first sale of a copy to the public. [284] The first sale rule has also insulated libraries to some degree from higher prices that publishers might otherwise want to charge them for books that may be lent to many people.[285]

Librarians believe that digital books should be as lendable as print books have been.[286] However, publishers have thus far been reluctant to accept that the first sale rule applies to digital books.[287] Someone who owns a Kindle that has been loaded with its owner's favorite books can, of course, lend the Kindle itself to a friend. The friend can then read one or more of the owner's books on that Kindle, but one cannot lend just one book from a Kindle. Barnes & Noble has publicized the new lending feature of its new e-book reader, the nook, but looking at the fine print, one learns that lending a book on a nook can only be done one time and even then only if the publisher has allowed it.[288]

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[281] *See, e.g.*, Terence O'Brien, *Hybrid Vooks Bring Video to Books*, SWITCHED, Oct. 2, 2009, *available at* http://www.switched.com/2009/10/02/hybrid-vooks-brings-video-to-books/.

[282] DARNTON, *supra* note 14, at 52-55.

[283] *See* Thomas A. Phelps & Robert Wilensky, *Multivalent Documents*, 43 COMM. ACM 83 (June 2000).

[284] Lending books is explicitly permitted as a matter of copyright law under the "first sale" rule of copyright. 17 U.S.C. § 109(a). In some countries, however, public lending libraries must pay a fee based on the library materials that have been lent. *See, e.g.*, Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346) 61, art. 2(1), (3). *See also* JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 375-76 (2d Ed. 2006) (discussing the lending right).

[285] *See, e.g.*, Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 111-12 (2003) ("Among its other advantages for libraries, the first sale doctrine helps prevent price discrimination, because it allows those who buy a work at a low price to resell it to an entity that otherwise may have been targeted for a high price. In other words, publishers cannot effectively tack surcharges onto books they sell to libraries, even though those copies are likely to be read by more people than copies sold to individuals, because libraries can 'arbitrage' books from those who are able to purchase them at lower prices. When the first sale doctrine is circumvented through contract provisions governing licensing, reselling can be prevented (since there was never a 'first sale' to engage the eponymous doctrine) and libraries become vulnerable to price discrimination.").

[286] *See* Rebecca Tushnet , *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977 (2006) (discussing experiments by some libraries to facilitate lending of digital books).

[287] *See, e.g.*, Alicia Ryan, *Contract, Copyright, and the Future of Digital Preservation*, 10 B.U. J. SCI. & TECH. L. 152, 158 (Winter 2004) (discussing licensing practices for digital materials). *See also* U.S. COPYRIGHT OFFICE, DIGITAL MILLENNIUM COPYRIGHT ACT SECTION 104 REPORT (2001), http://www.copyright.gov/reports/studies/dmca/dmca_executive.html (last visited Nov. 21, 2009) (recommending against a "digital first sale" amendment to the first sale provision).

[288] *Nook Features, eBook Reader, eReader*, BARNES & NOBLE, http://www.barnesandnoble.com/nook/features (last visited Nov. 26, 2009). However, administrators on the B&N support forum have confirmed that purchasers may only lend the digital book a single time. *See, e.g.*, Posting of Kristine_S to eBooks Help Board – Barnes & Noble Book Clubs,

The Internet Archive has introduced a new book lending server system, which aims to promote a digital lending system modeled on first sale-related concepts.[289] Whether lending will become part of the GBS or an alternative research corpus remains to be seen. The GBS institutional license envisioned may serve some of the same purposes as lending as to out-of-print books in the corpus, in that patrons can access and read them, but in-print books will generally not be available through institutional licenses. Library patrons that want access to in-print books should have some alternative—hopefully, through library lending—to the otherwise stark choice of paying for the whole book or not being able to access it at all.[290]

CONCLUSION

Google has made two bold moves with GBS. The first was to undertake the scanning of millions of books in order to index their contents, make snippets available to potential readers, and make nondisplay uses to refine its search technologies. The second was to settle the lawsuit brought against it charging the firm with copyright infringement so that Google could commercialize most of the books it had scanned. At first blush, this seems like a win-win-win, that is, a win for Google which would now be able to develop revenue models from which to recoup its investment in GBS, a win for authors and publishers who would enjoy a substantial share of the revenue stream generated from GBS books, and a win for the public which would have increased free access to books, as well as opportunities to have even greater access through subscriptions and purchases.

The second bold move has, however, proven to be far more controversial than the first. Even those who follow developments in the publishing industry closely have expressed reservations about it:

> [W]as it ever reasonable to think that such a revolutionary, unprecedented pact, negotiated in secret over three years by people with loose claims of representation, concerning a wide range of stakeholders, both foreign and domestic, involving murky issues of copyright and the rapidly unfolding digital future, could be pushed through as a class action settlement within a period of months, in the teeth of a historic media industry transition?[291]

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http://bookclubs.barnesandnoble.com/t5/eBooks-Help-Board/Can-you-only-loan-a-book-once-and-once-only/m-p/402346#M918 (Oct. 22, 2009, 15:39 PM).

[289] *See* Internet Archive, *A Future for Books—Bookserver*, *available at* http://www.archive.org/bookserver (last visted Nov. 21, 2009) (describing a new open architecture for vending and lending digital books over the Internet). For a discussion of the Archive's Bookserver, *see, e.g.*, Nancy Herther, *Internet Archive Dishes Up BookServer as Digital Books Market Heats Up*, INFORMATION TODAY, Nov. 2, 2009, http://newsbreaks.infotoday.com/NewsBreaks/Internet-Archive-Dishes-up-BookServer-as-Digital-Books-Market-Heats-Up-57760.asp.

[290] *See, e.g.*, R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 616 (2003) ("To some extent, new dissemination patterns may enhance affordability or availability, producing similar, or perhaps greater, effects than the first sale doctrine has. In many other ways, however, digital dissemination may reduce the doctrine's affordability and availability effects, forcing policymakers and academics to consider whether the copyright system can find other mechanisms to promote affordability and availability.").

[291] Albanese, *supra* note 122, at 4.

This Article has shown that although there are some reasons to be optimistic about the future of books in cyberspace if the GBS settlement is approved, there are even more reasons to be worried about the settlement and its consequences for competition and innovation down the line, as well as for sustained public access to knowledge, and to doubt that the bright promise proclaimed by GBS proponents is likely to be achieved.

The future of public access to the cultural heritage of humankind embodied in books is too important to leave in the hands of one company and one registry that will have a de facto monopoly over a huge corpus of digital books and rights in them.

Google has yet to accept that its creation of this substantial public good brings with it public trust responsibilities that go well beyond its corporate slogan about not being evil.