

# GOOGLE BOOK SETTLEMENT AS © REFORM

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## INITIAL GBS AS © REFORM

- Google thought it should be able to digitize in-© books to index them, make non-display uses, & provide snippets
  - Snippets as insubstantial parts of books
  - Too costly to clear rights to snippets on book-by-book basis
  - G K'd to provide library partners with digital copies of books G scanned from their collections
    - Beyond uses that 108 permits; 11<sup>th</sup> A protection for state univs
  - G probably also wanted to be ready to make “orphan books” available either through fair use or OW legislation
- Way to improve access to millions of books for this and subsequent generations
- Most in-print books being made available by agreement with RHs through Google Partner Program

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## AUTHORS GUILD v. GOOGLE

- Authors Guild + 3 members sued G for © infringement on behalf of a class of © owners of books in U Michigan library in Sept 2005
  - Illegal to scan in-© books for purposes of indexing contents & making snippets available
  - G's main defense: fair use
- 5 trade publishers brought a separate suit making same essential claims 1 mo. later
- G's fair use defense was not a slam-dunk, but quite strong
  - G had the resources & willingness to litigate this; libraries & others would benefit by FU ruling
  - But G was risking billions in statutory damages

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## GOOGLE BOOKSEARCH

### Publishers/authors:

- Commercial purpose; nontransformative
- Systematic copying of © works of all genres
- Whole thing, systematic, stored permanently
- Presume harm; harm because lack of control, risk of loss; we want to license such uses

### Google:

- + transformative; promoting public access
- + necessary to copy to make snippets available
- + copy whole thing, but only snippets displayed
- + links promote sales of books, lawful access
- + transactions costs  
problems with clearing rights book-by-book

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## GBSS

- Instead of litigating the FU issue, AG + AAP proposed a settlement in spring of 2006; parties reached agreement on core terms quickly, but took 30 months to hammer out GBSS 1.0
- Proposed settlement class: RHs in books, with Author Subclass and Publisher subclasses
  - 1.0 would have given G a license to virtually all books in © in the world!
  - Class definition narrowed somewhat in Nov 2009
- Fairness hearing held Feb. 2010; awaiting ruling

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## CORE OF SETTLEMENT

- G to provide \$45M to compensate © owners as to books scanned as of May 2009
  - \$60 per book, \$15 per insert (e.g., chapter)
  - For US works, only those registered with © office as of 1/5/09
- G to fund creation of a new collecting society, the Book Rights Registry, out of \$34.5M set aside for administrat'n
  - But has already spent \$12M on notice
- Authors and publishers can sign up to get payments from that \$45M + to share in any new revenues BRR collects that are subject to the revenue split
  - BRR to get 67% for BRR-registered and unclaimed books
- \$45.5M to be paid to class lawyers

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## GBS REVENUE GENERATION

- G would be able to make “display uses” of OOP books (unless RH said no)
  - Up to 20% of OOP book contents could be displayed in response to searches
  - Whole of OOP books to be available through public access terminals in public libraries, higher ed
- Revenue-generation from 4 sources for OOP books:
  - certain ads run vs. queries yielding book results
  - sale of books to individuals “in the cloud”
  - institutional subscriptions fees to OOP book database
  - print-out fees from public access terminals
- G committed to providing 63% of revenues to RHs signed up with BRR
- Other new revenue models possible in future

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## HOW IS GBSS LIKE © REFORM?

- GBSS will give G a license to scan ALL books to index, & make non-display uses of all of them, including in-print books (unless RH requested removal)
- GBSS will allow G to commercialize all OOP books (unless RH opts out), including orphans
  - Institutional subscription database of millions of books—where the “big \$” is likely to be made
  - De facto compulsory license
- Att. A of GBSS would solve the e-book ownership controversy, at least for Google
- GBSS would allow libraries to make use of LDCs

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## MORE ON GBSS AS © REFORM

- Non-consumptive research regime likely to very beneficial for scholars (akin to 108 reform)
- Promise of enhanced access to millions of books for print-disabled persons (akin to 121 reform)
- Public libraries and higher ed eligible to get free public access terminals
- But per-page-print-out fees (that would o/w be fair uses)
- Limitations on statutory damages, other remedies
- Compulsory arbitration for virtually all disputes (e.g., over e-book rights, public domain status, etc.)
- Safe harbor for good faith mistakes about public domain or orphan status

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## GBSS AS I-E?

- Several powerful arguments in favor of the GBS settlement resonate with the intergenerational equity theme of this symposium:
  - Public libraries & higher ed libraries would be able to make millions of books from GBS corpus available to patrons for free, equalizing access to knowledge for small colleges & minority communities
  - Approval of GBSS may lead to vast improvement in access for print-disabled persons over time
  - GBS would serve new generations of readers who expect everything important to be online

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## I-E AS REASON TO OBJECT?

- Academic author objections to the settlement express intergenerational equity concerns:
  - Risks of price-gouging for ISD
    - Too few checks & balances on pricing; reasons to expect prices to rise to exorbitant levels over time
    - DOJ views GBSS deal as a means to achieve cartel pricing
  - Inadequate privacy protections
  - Turning research libraries into shopping malls
  - Orphan books should be available on open access
  - GBS corpus could go dark over time, get sold to Rupert Murdoch or China; inadequate backup plan

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## GBSS & ORPHAN WORKS

- Clever idea: let G commercialize OOP books, valuable ones will generate \$, use some of that \$ to find RHs, sign them up to pay them their due
  - Financial Times has estimated that 2.8-5 M of the 32 M U.S. published in-© books are orphans; likely more
- Likely to make up big part of ISD, maybe very big part
- G will have de facto monopoly over the orphans because BRR has no power to license 3d parties except with RH permission
- Under the settlement, orphans will be priced at profit-maximizing rates, even though no RH has been found, through the end of © terms
- Would take act of Congress to give same rights in orphans to others (e.g., Amazon or Internet Archive)

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## ORPHAN FUNDS

- GBSS 1.0 would have allowed funds from unclaimed books to be paid out to BRR-registered rights holders after 5 years
  - Blatant conflict of interest within class
  - Inconsistent with state unclaimed funds laws
- GBSS 2.0 envisions appointment of unclaimed work “fiduciary” (UWF) to handle this
  - Use funds to find RHs, sign them up
  - After 10 years, pay out \$\$ to literacy charities
  - Not clear how independent UWF will be, what fiduciary responsibilities it will have
  - Strange set of powers (& limits on powers)

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## WRONG SOLUTION

- Congress, not private parties, should address the orphan book problem
- Inconceivable that Congress would give one company a compulsory license of this breadth
- If RHs can't be found after 5-10 years of looking for them, books should either be available for free use or at least be available for licensing by more than G
  - Free use endorsed by © office, in bills in Congress
- Approval of GBSS would interfere with legislative prerogatives by setting up escrow regime
- ISD pricing implications
  - If orphans = open access after 10 years, ISD prices will fall
  - Under the escrow regime of GBSS, ISD prices would not fall, would likely rise over time, as BRR pressed G for higher \$\$\$

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## ATT. A AS © REFORM

- Att. A to GBSS addresses uncertainties between authors & publishers over who owns e-book rights for new uses not foreseen under original publishing contracts
  - Compromise in Att. A:
    - 65% for authors of pre-87 books
    - 50-50 split for post-86 books
    - Not a great deal for authors if *Random House* case is right!
- DOJ: this gives G a huge advantage over others
  - Resolves © ownership & revenue split for G, but not for rivals
  - Att A allows compulsory arbitration to allow au/publr to contest claims as to G, but not available to rivals either
  - Not directly in issue in *AG v. G*, so beyond complaint
- Maybe this is a fair compromise as to ambiguous Ks, but should it be available to all, as would happen with legis?

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## DEEP QUESTION #1

- Is the perfect the enemy of the good?
  - The perfect may be Robert Darnton's National Digital Library proposal, but there are reasons to doubt that Congress would support it
  - GBSS may not be perfect, but if the alternative is that the books in the GBS corpus will not be available online, is opposition to the settlement from people like me cutting off our noses to spite our faces?

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## DEEP QUESTION #2

- Do the ends justify the means?
  - Dan Clancy’s gambit: “Pam, the only way to achieve copyright reform for these books is by this class action settlement because Congress is so broken about ©”
  - Thousands of authors and publishers would say no, as they have objected to the GBSS, asserting that it is not fair, reasonable, and adequate to the class
  - Even if one discounts their concerns, serious questions exist about whether class action settlements can be used to achieve legislative results

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## DOJ STATEMENT II

- Worthy objectives:
  - Electronic distribution of out-of-print & orphan books
  - Searchable texts of millions of books
  - Creation of book rights registry
  - Enhancing accessibility of books to print-disabled
  - Overcoming difficulties of achieving goal through other means
  - Addressing unclarity about digital ownership

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## DOJ II: A BRIDGE TOO FAR

- Class counsel has obligation to litigate the claims brought vs. D or to settle THOSE claims
- Complaint alleged infringement for scanning for purposes of snippet-providing
  - GBSS goes far beyond this to address issues that were not in litigation, no plausible fair use defense for selling books or ISD licensing
  - Would give G a benefit that it could get neither from winning the litigation nor from private negotiations
- GBSS does not further purposes of ©
  - © norm that must ask permission first
- For Congress to address OW issues
- DOJ's conclusion: judge lacks the power to approve this settlement

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## LEGISLATION v. CLASS ACTION?

- No clear criteria for when a matter is legislative in nature cf. suitable for litigation and settlement
- Clear that some matters start in litigation and get resolved through legislation (e.g., ClearPlay)
- Heightened scrutiny when quasi-legislative:
  - the greater the likelihood of diverse interests among class members
  - the more difficulties the task of getting adequate notice to all class members
  - the broader the settlement is compared to the issue in litigation
  - the more extensive its impact on the future
  - the more there will be spillover effects on 3d parties
  - the more likely the settlement is to confer an unfair advantage to defendant (giving it more relief than if it won the case)

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## WHAT IF GBSS IS APPROVED?

- Orphan works legislation less likely
  - Will skew orphan works bill toward paid uses of orphans if did pass; CO recommended vs. this
- Likely to lead to more class action lawsuits in © cases, efforts to achieve legislative-like resolution of disputed issues
- G could use GBSS as leverage with rights holders of © in other types of works
  - “Who’s next?” (not all of the world’s info is in books)
- Why not use class action to achieve reforms of all laws? What do we need a legislature for anyway since it is so dysfunctional? What does this mean for democracy?

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## PLAN B?

- DOJ has endorsed alternative settlement:
  - \$60 for past infringements (as in GBSS now)
  - Opt-in to forward-looking commercial regime envisioned in GBSS
  - Google has said this would “eviscerate” the purpose of the settlement, but may become more receptive if the deal they want is off the table
- Go back to litigation, with G winning (or losing) the fair use defense, or more likely AG unable to certify class
- G starts tracking down RHs to make deals
- Orphan works legislation tailored to deal with problems presented by GBSS
- Initiatives by universities and libraries to promote open access for OOP scholarly books

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## ELEMENTS OF LEGISLATION?

- Allow nonprofit libraries & other qualifying firms to scan books for legitimate purposes
  - Such as to preserve or repair the works, to index them, provide snippets, & make non-display uses (unless request to remove)
- Allow nonprofit libraries and researchers to authorize/make nonconsumptive research uses of LDCs
- Resolve the e-book ownership controversy
- Provide open access uses of orphan works
- Develop a database/registry about orphans, PD works
- Enhanced access for print-disabled persons
- Safe harbor for good faith determinations that works are in the public domain or orphans; SD limits

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