

# COPYRIGHT & OTHER LEGAL ISSUES POSED BY GOOGLE BOOK SEARCH

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July 9, 2010

## OVERVIEW

- Review of Google Book Search Project, the lawsuits it provoked, & the plausibility of G's fair use defense
- Reasons why the parties wanted to settle
- Core parts of the proposed settlement
- Arguments made by proponents of GBSS
- Objections to GBSS
- Judge Chin's choices as to GBSS
- International dimensions of GBSS

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## BOOK SEARCH PROJECT

- Google Book Search (GBS) began in 2004
- GBS corpus now includes @2M books scanned with authorization from publishers under the Google Partner Program (GPP)
- Corpus also includes more than 10 million books scanned from university research library collections
  - Michigan & UC, in part because of large collections & likely 11<sup>th</sup> A immunity from damage awards
- Varying estimates of eventual size of GBS corpus
  - Ranging from @20M to 174M

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## GBS PRE-SETTLEMENT

- For @2M books in the public domain, G makes whole book available for download in pdf (with G's watermark)
- As to books in ©, G now makes “snippets” available
  - It has not run ads vs. the snippets so far, but wants to
  - It provides links so users can buy pertinent books from Amazon or find them in libraries
- G says it is willing to remove book of GBS corpus if © owner so requests
- For @2M in-print books in GPP, © owners can negotiate with G about how much of their books to make available, with revenue-sharing arrangements
- GBS settlement mainly about 8M+ out-of-print (OOP) books

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## AUTHORS GUILD v. GOOGLE

- In Sept. 2005, AG + 3 members sued G for © infringement for scanning books, storing and processing the scanned books, & displaying snippets
- AG brought lawsuit as a class action on behalf of all rights holders whose books were scanned from U Michigan library
  - AG had theory that authors owned © in e-books
- G's main defense was fair use
  - Although might well attack certification of the class if case goes forward
- Similar lawsuit brought by 5 trade publishers soon thereafter, not initially a class action

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## FAIR USE

- Is not © infringement in the US
- 4 factors typically considered:
  - Purpose of D's use
  - Nature of the ©'d work
  - Amount and substantiality of the taking
  - Harm or potential harm to the market
- G was relying heavily on *Kelly v. Arriba Soft* decision to support FU
- AG & publishers analogized GBS to *UMG v. MP3.com* & *AGPU v. Texaco*

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## KELLY v. ARRIBA SOFT

- Kelly, a photographer, sued AS for © infringement for making “thumbnail” images of photographs from his website
- Kelly argued not fair use because:
  - AS had a commercial purpose & did not transform the photos
  - The photos are highly creative works that deserve strong protection
  - Copies were being made systematically of whole photos
  - Kelly wanted license revenues for this use, so harm to the market existed

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## 9<sup>th</sup> CIR IN *KELLY*

- “Transformative” because thumbnail used for different purpose than the original, also smaller
- Kelly made his work available on the Internet, and knew ‘bots spider the web
- Whole works copied, but copies were incidental to facilitating better access to works
- No harm to Kelly’s market, indeed thumbnails may help customers find Kelly to license images
- Indexing is important to proper functioning of the Internet; thumbnails promote public access to content on the Internet

G argues that snippets in *GBS* are like thumbnails in *Kelly*

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## UMG v. MP3.COM (SDNY)

- RIAA firms sued MP3.com for © infringement for “ripping” music from CDs for database of sound recordings for new service to allow its customers to listen to digital copies of recordings they owned
- MP3.com argued this was fair use because it facilitated users’ access to their collections, didn’t harm market because customers already owned the CDs
- UMG prevailed in © infringement ruling
- Lawsuit was settled for \$53M
  - Judge indicated intent to award \$118M unless parties settled, even though no actual damages to plaintiffs and no profits made by MP3.com on service

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## AGPU v. TEXACO (2d Cir)

- Publishers of journals sued Texaco for photocopies made by its researchers of articles in journals to which T subscribed
- Texaco argued fair use: for research purposes, sci-tech fact-intensive works have “thicker” fair use, only few articles copied, no harm to market because of subscriptions
- AGPU won (2-1), mainly because CCC had program for licensing of photocopying of articles
  - 2d Cir also emphasized commercial and archival nature of copies, whole works copied systematically

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## FAIR USE IN AG v. G?

### Authors & publishers argue:

- G has commercial purpose; is making non-transformative uses of the books
- Systematic copying of © works of all genres, creative works
- Whole thing copied, systematic, stored permanently
- Presume harm to the market; also harm because lack of control, risk of losses if security breaches occur; besides, we want to license such uses

### Google:

- + transformative ala *Kelly*, promoting public access to information
- + necessary to copy to index, make snippets available; access to orphan books
- + whole thing, but only snippets available unless au/pubr agrees to more thru GPP
- + transactions costs problems with clearing rights = market failure; GBS enhances market for many books (we'll link to where you can buy them)

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## WHITHER FAIR USE DEFENSE?

- If Judge Chin does not approve the GBS settlement (GBSS), matter will either go back into litigation, or a new settlement will be proposed
- Case is actually in early stages of litigation because settlement talks commenced quite soon after lawsuits were filed
- Commentators have varying opinions about G's fair use defense, although most scholars are supportive of it, as are most librarians
- No lawsuit thus far vs. libraries, but threat of contributory liability is out there unless GBSS is approved
  - Less worrisome for public university libraries as they seem to be immune from damage awards under SCT's 11<sup>th</sup> A jurisprudence
- Case is pending in the 2<sup>nd</sup> Cir, not the 9th

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## MOTIVATIONS TO SETTLE

- Litigation is expensive, takes years to resolve definitively
- Outcome in doubt because dispute over fair use
- Also unclear whether class could be certified
  - if class not certified, G would take objecting authors' books out of the repository; exposure much smaller than with class action
- G facing big damage exposure, possible injunction vs. scanning, & order to destroy its database of in-© works
- G had better technology & ideas about how to create new markets for books in digital environment than AAP, AG
- Settlement created an opportunity for a “win-win” if G willing to share revenue streams with authors/pubrs
  - Oh, and incidentally to give G a license to all books in © that none of its competitors could get

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## CORE OF GBSS

- G to provide \$45M to compensate © owners as to works scanned as of May 2009
  - \$60 per book, \$15 per insert
- G to fund creation of a new collecting society, the Book Rights Registry (BRR), for \$34.5M
  - \$12M of this has already eaten up with notice program to class members
- Authors and publishers can sign up with BRR to share in any new revenues from GBS
  - BRR gets 63% for © owners, G gets 37%

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## CORE OF GBSS

- G entitled to offer 3 initial services:
  - display parts of books in response to Internet search queries, run ads alongside
  - sale of books to individuals (which will be accessible only in the cloud)
  - License institutional subscription database (ISD)
- BRR allowed to authorize G to adopt additional revenue models in the future (e.g., print on demand)
- G free to scan all books within the settlement, make “non-display” uses of them
- Class action lawyers get \$45.5 M in fees

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## DEFAULT RULES OF GBS

- G to determine if book is commercially available (i.e., in print) or not (out-of-print)
- If in-print, default is no-display of contents
  - © owner must opt in to display uses
  - Most in-print © owners likely to sign up for GPP
- If OOP, default is G can make display uses (including all commercializations)
  - Display of up to 20% of contents for preview uses
  - But BRR-registered © owner can opt out, insist on no-display
  - Arbitration process available if dispute over in- or OOP
- © owner can ask for removal of books from corpus
  - But “remove” only means these books are dark-archived
  - Rights to remove will expire in 2011

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## ATTACHMENT A

- Is one of the most important parts of GBSS
- Addresses big dispute between authors & publishers over who owns e-book rights (new use not foreseen under original K)
  - *Random House v. Rosetta Books*: “to publish the work in book form” is a limited grant; e-book rights remain with authors
  - But publishers disagree that e-book rights remain with authors
  - Compromise in Att. A: 65% for authors of pre-87 books; 50-50 split for post-86 books
  - Arbitration also available to resolve disputes over ownership
- Also sets forth procedures for dealing with reversions of ©s to authors for OOP books

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## GBSS AS TO LIBRARIES

- Those who have contributed books for GBS corpus can get back from G a digital copy of those books
  - Settlement means they will no longer be risking liability for having contributed books to G or taking back digital copy
- G can give discounts to libraries that supply them with books for scanning
  - e.g., U Michigan will get GBS subscription for 25 years for free
- Expected that non-profit research libraries will license ISD which will contain millions of OOP books
  - ISD users will be able to view whole books, not just the 20% available for preview uses
  - Also able to print out small # of pages, but fee for printing

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## MORE ON GBS & LIBRARIES

- Public libraries are eligible for 1 terminal each for accessing ISD, but must pay for each page of text printed out
  - 1 GBS terminal may suffice in small towns, but G expects most public libraries to license ISD
- No special deal for public school libraries, gov't libraries, other libraries, although ISD may be available to them too
- Discipline-specific mini-ISD subscriptions also in contemplation (e.g., computer science books for licensing to IBM et al.)

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## NON-CONSUMPTIVE RESEARCH

- GBSS contemplates that two nonprofit educational institutions (probably Michigan & Stanford) would be able to host a complete copy of all books in GBS corpus for purposes of allowing nonprofit researchers to conduct non-consumptive research
  - Example: searching for the frequency of certain words for a linguistic analysis
  - Example: testing search algorithm

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## DISPUTES & SAFE HARBORS

- Disputes about whether book is in-© or in public domain, who owns ©, what revenue split should be, etc. must be resolved through mandatory arbitration under BRR umbrella for any rights holder who is within the GBSS class
- G gets a safe harbor from liability if it acted in good faith in determining © status, who was owner, whether book is in-print, etc.

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## BENEFITS OF GBSS

- Removes a dark cloud of liability from the heads of G and cooperating libraries
- Will vastly enhance public access to books
- Revenues will flow to authors and publishers who register with the BRR or join GPP
- Those authors and publishers who do not want their books in GBS can ask for removal
- New business models, choices for consumers
- GBS books will be accessible on multiple platforms (unlike the Kindle & Nook)
- In-the-cloud so can access from anywhere

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## OTHER PRO-GBSS ARGUMENTS

- G has committed to enhancing access to books for print-disabled persons
- Public library access will promote educational opportunities for poor and minority communities
- Non-consumptive research on corpus @ 2 sites will enable novel learning opportunities, lead to new insights
- GBS will enable G to improve its search technologies, build new tools (e.g., automated translation programs)

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## CLASS ACTIONS

- US law allows small # of individual plaintiffs to sue a firm that has committed the same wrongful acts vs. them and similarly situated people
- Courts must certify that the class representatives adequately and fairly represent the claims of absent class members
  - If court perceives conflicts among class members (some want X, others want Y; some think X is unlawful, others think o/w), this can lead to disapproval of the class, in which case the individual plaintiffs can only sue on their own behalf
- Typically, class action lawyers get 1/3 or more of any \$ award if the class action is successful
  - Threat of aggregated damages on behalf of the class gives class action lawyers a lot of leverage to press for a settlement
  - Jon Band estimates that G's potential liability is \$3.6 trillion

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## CLASS ACTION SETTLEMENTS

- Litigants cannot settle class action lawsuits without judicial oversight
- Once a settlement has been announced, US judges typically will provisionally approve the settlement class for purposes of allowing the litigants to give notice of the settlement to class members
- Class members then have a chance to opt-out, object, or comment on the settlement
- Settling parties have an opportunity to respond to objections
- Judge holds a “fairness” hearing to determine whether the settlement is “fair, reasonable, & adequate” to class members, whether notice was adequate, etc.

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## OPT OUT cf. OBJECT?

- Opting out means the GBSS doesn't apply to you at all
  - Don't need to say why you are opting out
  - Doesn't mean G won't scan your books and make at least non-display uses of them
  - Doesn't mean you can't become a Google partner either
  - You can bring a separate lawsuit vs. G if you want
- Objecting means that you explain to the judge why you think the whole or some parts are not “fair, reasonable or adequate” to you as a class member
  - But you are willing to be bound by the agreement if the judge decides to approve it without change
  - Possible that a specific objection will cause the judge to advise the litigants to renegotiate the deal

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## GBSS SCHEDULE

- GBSS was announced on 10/28/08
  - Two lawsuits were combined, now a class action with author subclass & publisher subclass, AAP class rep as to pubrs
- Original GBSS opt-out and objection deadline was early May 2009
- GBS fairness hearing was originally scheduled for June 2009
- Judge granted 4 month extension of time at request of some class members
- After DOJ recommended vs. approval of the settlement in Sept. 2009, parties withdrew the original settlement & asked for time to amend it

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## GBSS AMENDMENT SCHEDULE

- Litigants filed an amended GBSS on Nov. 13, 2009
  - Judge Chin ordered supplemental notice to class members
  - Deadline for objections & opt-outs to GBSS 2.0 was set at Jan. 29, 2010
  - Fairness hearing was held Feb. 18, 2010
  - Decision about whether to approve GBSS 2.0 expected any day
  - Approval will only allow US to benefit from GBSS, even though many foreign books in corpus
- NB: American Society of Media Photographers v. Google filed April 10, 2010 (previously tried to intervene)

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## MAJOR CHANGES IN GBSS 2.0

- Class definition was narrowed:
  - Had included all owners of US © interests in books or inserts (in other words, all in-© books in the world!)
  - Now only owners of book & insert ©s published in UK, Canada & Australia + owners of book & insert ©s registered with the US © Office
  - This narrowing was in response to many foreign rights holder objections to GBSS 1.0
- Authority of G & BRR to approve new business models in the future was (seemingly) limited to 3 additional business models
  - GBSS 1.0 contemplated G & BRR could adopt any new business model upon which they could agree

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## OTHER CHANGES

- GBSS calls for appointment of an unclaimed work fiduciary (UWF) to make certain decisions about books whose RHs have not registered with BRR [or signed up for GPP]
  - Unclaimed work funds would go to charities after 10 yrs, rather than to BRR-registered RHs ala GBSS 1.0
- Several changes were made to respond to DOJ's concerns about antitrust implications of GBSS, particularly as to price-setting

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## TYPES OF OBJECTIONS TO GBSS

@500 submissions to the Court on the settlement, > than 90% critical of it:

- Class action issues
- Antitrust concerns
- Competitor objections
- International RH issues
- US author & author group issues
- Unclaimed funds law violations

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## CLASS ACTION ISSUES

- Representativeness of the named Ps, AG
- Definition of the class after *RE v. Muchnick*
- Intra-subclass conflicts, especially orphans
- Adequacy of notice
  - To whom notice was sent (and not sent)
  - Content of the notice (misleading statements)
  - Failure to translate SA into other languages
- Adequacy of compensation to RHs
- Releases from future liability cf. from past infringement

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## REED ELSEVIER v. MUCHNICK

- *Tasini v. NY Times*: freelancers sued NYT for licensing of their works to database firms; this was beyond contractual grants; not a revision, so infringement
- Settlement thereafter negotiated between defendants and a class of freelancers
  - \$X for © owners who had registered their claims of © with the U.S. Cop. Office, less for unregistered © owners
  - Irving Muchnick was one of the unregistered freelancers who objected to lesser amounts for them
  - Trial judge approved the settlement over Muchnick's objection
- Instead of deciding Muchnick's claim on the merits, 2d Cir ruled that settlement could not be approved at all
- GBSS was negotiated while 2d Cir decision was the law

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## REED ELSEVIER CASE

- Non-US RHs can bring infringement lawsuits in US courts without registering © claims with US Cop. Office
- However, US RHs must register to bring suit
- 2d Cir thought that because unregistered US RHs can't sue, they can't participate in a class action settlement
- GBSS was cleverly crafted to allow only those US RHs who had registered with Cop. Office to participate in GBSS
- But SCT in March reversed the 2d Cir, ruled it was OK for unregistered RHs to be in a class action settlement
- Has implications for GBSS because parties made no effort to notify unregistered RHs, & there is no principled basis for excluding them after *Reed Elsevier* decision

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## INTRA-CLASS CONFLICT?

- Internet Archive argued that AG & AAP did not adequately represent the interests of RHs of “orphan” books
- Many reasons why RHs may be difficult to find
- Because orphan book RHs cannot be found, they cannot get adequate notice, have opportunity to opt-out, etc.
- One simple change requested: Make GBSS an opt-in regime instead of an opt-out regime
  - G has said this kind of deal is unacceptable to it

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## DOJ: ABUSE OF CLASS ACTION

- Class counsel has obligation to litigate the claims they brought vs. G or to settle THOSE claims
- Complaint alleges 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 the purposes of ©
  - © norm that must ask permission first
- DOJ’s conclusion: judge lacks the power to approve this settlement because it is “a bridge too far”

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## ANTITRUST ISSUES

- Price fixing
  - G as designated sales agent for class of © owners & algorithmic pricing coordination risks for OOP books
  - 63/37 split fixed for all OOP books
  - Limits on discount provisions = price-fixing
- Horizontal agreement because AAP and AG dreamed up the scheme and brought it to G for endorsement; price fixing is nearly inevitable
- Att. A will give G an advantage that no other competitor can get
  - Solves the digital rights ownership issues on which publishers and authors disagree

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## COMPETITOR OBJECTIONS

- Yahoo!, Microsoft, Open Book Alliance: GBSS would give G an unfair advantage because non-display uses of books to fine-tune search engine technologies to satisfy “tail” queries
  - Risk of entrenching G’s search monopoly
  - Risk that G would leverage this monopoly to give it a competitive advantage for other G-affiliated services
- Amazon.com:
  - we only scan books with permission; G should get permission too; GBSS “turns © on its head”
  - abuse of class action because of future claim release

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## EXCLUSIVITY?

- GBSS states that it is a non-exclusive deal
  - It is true that any RH can make a deal with any of G's competitors to make their in-© books available to the public
- But approval of GBSS will give G, and G alone, a license to make non-display uses of every book in-© within the settlement
- GBSS will also give G a license to commercialize all OOP books
  - Although individual RHs can opt not to allow this

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## EXCLUSIVITY?

- Rivals cannot get the benefit of the license G will get from the class
- Rivals would have to incur large transaction costs by licensing books, one-by-one,
- And it is not possible for rivals to license orphan books
  - GBSS anticipates that Congress might pass orphan work legislation to allow BRR to license the orphans to 3d parties
- Comprehensive ISD depends on inclusion of orphan books
  - Thus, GBSS will confer a de facto monopoly over books to G, as DOJ has recognized in both submissions to Judge Chin
  - ISD is where AG & AAP thinks “the big money” is

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## FOREIGN OBJECTORS

- France & Germany
- 35 Dutch publishers, Dutch Publishers Assn
- Japan P.E.N. Club
- Harrasowitz, Hachette Livre
- Res Polana
- Syndikat (Austrian crime writers group)
- Plus dozens of other authors & publishers from various nations (e.g., New Zealand, Australia, Finland, Spain, Sweden, Norway)

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## INTERNATIONAL OBJECTIONS

- Many publishers & author groups from other countries objected to initial class definition
  - Would have given G a license to all in-© books in the world
  - If books were not commercially available in the US, GBSS 1.0 would have treated them as OOP, so G could commercialize
- Class narrowed to books published in Canada, UK, Australia + those registered with the U.S. Cop Office
  - But many foreign books are still within the settlement because publishers or authors registered with the Cop Office
  - Non-US publishers often do not keep good records re this
  - G will make judgment about national origin based on sites listed in front of book
- Berne Convention, TRIPs violation asserted

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## BERNE/TRIPS ISSUES

- BRR registration requirement to participate in the settlement may be a formality that contravenes Art. 5(2) of BC
- Discriminatory treatment of non-US RHs violates national treatment principle
- Violation of most-favored-nation clause of TRIPs
- Mandatory collective licensing after 2011 (i.e., can't remove your book from the corpus after this) does not satisfy 3-step test

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## OTHER FOREIGN RH ISSUES

- Many books and inserts published in the Netherlands & other non-Anglophone countries are not within the GBSS settlement class
- But G may well have scanned their books if research library partner had a copy on their shelves
  - Or G may scan these books in the future
  - G is likely to make at least non-display uses of the books, maybe provide snippets too
- Being outside the settlement class means that you can't opt-out of the settlement, nor object to it
- Not clear that parties outside of GBSS can opt-in to the regime either, although possible to sign up for GPP
- Yet, possible to ask G to remove your books from GBS, but G can only be compelled to do so if you bring a suit

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## U.S. AUTHOR OBJECTIONS

- Writers Guild, Sci Fi Writers, among others, objected to unfairness of terms for authors
- Ursula LeGuin, Arlo Guthrie, & Harold Bloom were among well-known authors who criticized GBSS
- I filed objections on behalf of academic authors about provisions of GBSS that were inconsistent with academic norms
- Some authors of books on sensitive subjects objected to GBSS because it provides insufficient privacy protections, which might inhibit sales of their books

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## AUTHOR ISSUES

- 1000s of authors have opted out of the settlement; every US-based author group but AG vs. it
  - How good a deal is it if so many are opting out?
  - Only Dr. Seuss estate wrote in support of GBSS
- Distrust of Google, AAP, Authors Guild, new BRR
- No longer possible to give exclusive license, as G will have license to your book or insert no matter what
- Some prefer federal courts to compulsory arbitration
- Reverse of usual © norm:
  - No one can use my work w/o making a deal with me
  - My ability to get compensated for my work should not depend on my being forced to join a new collecting society (BRR)
  - G is going to scan my books unless I direct it not to (and even then G only says it will use best efforts to comply with this)

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## MORE AUTHOR ISSUES

- G can scan & make non-display uses of all books whose RHs haven't opted out
  - If you don't become GPP or sign up for BRR, UWF can allow G to commercialize your in-print books, use the \$ to find you to talk you into signing up with BRR
- Staying in GBSS means authors give up possible claim to 100% rights in e-books, which they might o/w have under *Random House v. Rosetta*
- GBSS provides that authors must waive TM, right of publicity, interference with K claims
  - You may even have to pay G for use of your name, book or character names as key words for AdSense program

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## FURTHER AUTHOR ISSUES

- No rights to control ads that will be run alongside the contents of your books
- Authors of inserts (short stories in edited collections, book chapters, & the like) cannot make more than \$500 total for all uses of books
- Google will have the right to exclude books from the ISD for editorial or non-editorial purposes
- G also negotiated for the right to alter the texts of books (with RH or UWF consent)
- GBS corpus can be sold to anyone at any time

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## ACADEMIC AUTHORS

- We want LOTS of books in the ISD
  - The more RHs take books out of the GBSS, the less the vision of the universal digital library will be achieved
- We want prices for the ISD to be low
  - Many RHs probably want them to be high!
  - We want competition to be possible so price-gouging is less likely
- We want to be able to annotate freely, share annotations
  - Some RHs don't want their works to be annotated
- We want open access opportunities
  - AG/AAP: open access as “plainly inimical” to interests of the class
- We worry about GBS being sold or discontinued
- Most of the books in the corpus were written by scholars for scholars, so our perspective should count too
  - We are also more likely than other RHs to think scanning to make an index of contents is fair use

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## PRIVACY ISSUES

- GBSS calls for considerable monitoring of individual uses of GBS books
  - Need to have this data to decide how much of the ISD license fees should go to each RH
  - Also need to have fine detail data about users in order to serve ads
  - G's staffers can observe the reading of particular pages of books (1 guy read a page of a 1910 book for 4 hours!)
- Only GBSS privacy-protective provision is one that allows RHs to keep data about them private
- G has said its usual privacy policy will apply
- But so far G has been unwilling to make more specific commitments re GBS as to privacy

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## PRICE GOUGING RISK

- Prices of ISD to be set based on # of books in the corpus, services provided, & prices of comparable products & services
  - More books + more services = higher prices; no comparables
- Prices may be modest at first to get institutions to subscribe, but history & logic suggest prices will rise over time to excessive levels because G will have a de facto monopoly on ISD, as happened with journal prices
- Only check on price hikes is complicated arbitration process in Michigan side agreement
  - Libraries can complain to UM that prices are excessive
  - UM decide to initiate arbitration, but will it?

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## TOO BIG TO FAIL PROBLEM

- Let's assume that GBSS is approved in modified form and works as intended for 10-15 years
  - Libraries, researchers become dependent on it, shed books since they no longer seem necessary
  - G could sell GBS to Rupert Murdoch or China
  - Need for public-regarding backup plan (e.g., library partners can get together and reconstruct the corpus and make it available)
- Also, what happens to researchers if G's servers go down?
  - "404 Google Books not found"

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## GBSS AS OW SOLUTION

- Many books, especially older ones, are in-© but costly to locate owner, seek rights clearance for book-scanning
- GBSS is clever: let's generate \$ from commercializing the OOP books, give 63% to BRR, & let it use part of this \$ to look for rights holders
  - When © owners located, they will likely sign up to get \$\$\$; no need to get advance permission
  - AG asserts orphan works are a myth!
- Initial plan was for \$ from orphan books to be paid out to BRR rights holders after 5 years
  - DOJ objected, so now plan is to escrow for 10 years, then give away to charities
  - But if books are true orphans, why should charities get the \$?

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## ORPHAN WORK STUDY

- © Office did a study of works in-© for which it was difficult or impossible to locate RHs to get permission
- Report recommended legislation that would allow reuses of in-© works as long as the reuser made a reasonably diligent search for the RH
  - If RH later shows up, limit on damages; reuser may have to stop further use
  - CO considered & rejected escrow alternative
- Legislation passed the House, interest in the Senate, but not yet adopted
- But it would require book-by-book clearances

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## GBSS: PRIVATE LEGISLATION?

- Congress, not private parties, should address the orphan book problem
- Inconceivable that Congress would give one company a compulsory license of this breadth
- If © owners can't be found after 10 years, books should either be available for all to use freely 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
- Important to universities because substantial part of the ISD will be orphan books
  - If open access after 10 years, ISD prices will fall
  - Under the escrow regime of GBSS, ISD prices would not fall

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## © DYSFUNCTIONS → GBS

- SCT's 11<sup>th</sup> A jurisprudence: no damage actions can be brought vs. state entities
  - U Michigan, UC, U Wisconsin are among G's library partners
- Overly narrow, outdated library & archive exceptions
  - Should at least be able to digitize to preserve, make fair uses
- Congress unable (so far) to pass orphan works legislation
  - Problem largely due to © term extensions
    - All books published before 1953 would be in PD by now
    - Many books published before 1978 also if © not renewed
- © office renewal records not automated, so can't tell which books from '23-'63 are in public domain
  - 60% likely are in the public domain in the US, but which ones?

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## PROCEDURAL DYSFUNCTIONS

- Statutory damage risks
  - G facing potential liability of \$3.6 trillion because of per-work liability up to \$150K, even though no actual damages to RHs from scanning books, making snippets available
- Registration as jurisdictional requirement for US works
  - Affected scope of settlement—only registered US works are eligible for “benefits” of the settlement
  - Authors Guild did not try to get anything for unregistered works
- Litigation is expensive, so settlement creates private law
  - Safe harbors for G, releases of liability for past and future acts
  - Only actual damages recoverable
  - Compulsory arbitration of most disputes

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## OWNERSHIP DYSFUNCTIONS

- Disputes over who owns rights in e-books
  - Random House v. Rosetta interpreted assignment to publishers of rights to publish the work “in book form” did not extend to e-book rights
  - Publishers contest this; one reason for separate publisher lawsuit vs. G (so AG can’t get 2d ruling that authors own them)
  - Settlement adopts a revenue split model:
    - 65-35 split in favor of authors as to pre-1987 works
    - 50-50 split for works after 1987
- Reversion policies not working well, so settlement establishes procedure to ensure reversions happen
- Formalistic termination-of-transfer provisions also contribute to ownership uncertainties

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## CLASS ACTION AS © REFORM?

- GBSS is brilliant because it is using the existence of a genuine dispute on one specific issue to restructure the market and bind absent class members to a far-reaching commercial transaction through the class action mechanism
- G is solving the orphan books problem for itself!
- If GBSS was approved, would it encourage more uses of class action lawsuits to achieve © reform?
  - Even if GBSS is relatively benign, a next class action lawsuit may be much less so (e.g., sue small maker of DVRs, settle with tech mandate binding class)

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## LEGISLATION v. SETTLEMENT?

- No clear criteria for when a matter is legislative in nature cf. suitable for litigation and settlement
- Clear that sometimes matters start in litigation and get resolved through legislation
  - ClearPlay exception for “family-friendly” DVD viewing
- Legislation is more appropriate than class action settlement when:
  - 1) the larger the # of people in the class
  - 2) class interests are diverse
  - 3) the settlement goes well beyond the matter in litigation
  - 4) the externalities for third parties are large

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## WHAT WILL JUDGE DO?

- 3 main options:
  - Approve GBSS as is (unlikely)
  - Disapprove it as an abuse of class action (quite likely given DOJ's position)
    - Inadequate notice to the class; too many conflicting interests among class members; etc.
  - Identify # of troubling aspects of GBSS and indicate an unwillingness to settle unless they are appropriately addressed (possible)

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## NEXT STEPS?

- Whatever Judge Chin rules, an appeal is likely
- Litigation may resume, but parties cannot be looking forward to this
  - Only G can really afford to litigate this issue, and publishers are really worried that G could win FU
- Parties may also try to negotiate further changes to GBSS
  - DOJ urged an opt-in vs. opt-out approach
    - Fairer to class, more consistent with © norms
  - But opt-in would exclude the orphans & settlement is mainly valuable to G because of the license to them
- Seek legislation to approve?

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## GBS INTERNATIONALLY

- G's strategy has seemed to be:
  - Scan books in the US where it has a plausible FU defense
    - But French court has ruled that GBS scanning violates French law, but this decision is on appeal
  - Make snippets available to all because likely to be too insubstantial to infringe non-US © laws
  - Get GBSS approved by US courts
  - Let AAP & AG persuade foreign RHs that they should go along with the deal
  - Other countries will want GBS to be available to their citizens so they won't be left behind
    - All that needs to happen is to give G a © pass

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## BEST SUCCINCT STATEMENT

- “[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?”
  - Andrew Albanese, Publishers' Weekly

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# CONCLUSION

- GBSS is one of the most significant developments for © & for the book industry in decades
- GBSS is exceedingly clever, will bring some important benefits if approved
- But so many objections have been raised, it is hard to believe it will ultimately be approved
- Yet, even if it isn't approved, GBS has dramatically changed the landscape in the US & abroad—digital library initiatives in many places