

WHY THE GOOGLE BOOK SETTLEMENT FAILED—AND WHAT COMES NEXT?

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OVERVIEW

- Why did Google undertake the Google Book Search (GBS) project?
- Why did the Authors Guild & certain publishers challenge it?
- Why did the litigants propose to settle this lawsuit, and on what terms?
- What are the main arguments in favor of it?
- Why did Judge Chin reject the settlement?
- What are the options at this point?
- Among those options, what is the most likely? What would be the best outcome?

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INITIAL GBS PROJECT

- Google has been scanning books since 2004
- Uncontroversial part: Google Partner Program
 - © owners negotiate with G about how much of which books to make available, on what revenue-sharing terms
 - @2M books scanned as part of GPP
- Controversial part: Google Library Partner Program
 - G has scanned @13M books for GBS from library partner collections so far; scanning more every day

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GBS LIBRARY PROGRAM

- Google had the vision for GBS, the technology & the financial resources to digitize books
- Major research libraries had the books & the desire to digitize the books, but not the resources to do this
 - They were also more cautious than G about ©
 - 11th A immunity for state universities (no \$ damages), so no wonder they offered Ms of books first
- Google was willing to indemnify libraries & give them Library Digital Copies (LDCs) of books from their collections that G scanned
- Several major research libraries signed up for this

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WHY DID G DIGITIZE BOOKS?

- To make indexes of book contents
- To make computational uses (e.g., improve search technologies, automated translation tools)
- To provide snippets in response to search queries
- To build services for processing texts
- To develop corpus of books that could be licensed?

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LIBRARY MOTIVATIONS

- To preserve books that are falling apart
- To preserve collections more generally
- To manage collections more efficiently
- To enable non-consumptive research on the corpus of books (e.g., trace thinker's influence over time)
- To improve access for print-disabled
- To provide as much access to books as possible

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ACCESS TO GBS BOOKS

- G now makes @2-3M public domain books available for free downloads of whole thing in pdf
 - with G's watermark, noncommercial use restriction
- G has been displaying “snippets” of most in-© books
- Some rights holders (RHs) have agreed to allow G to display more than snippets under GPP
- G is willing to remove book from GBS corpus or stop snippet displays if © owner so requests

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GBS POSED © RISKS

- Google was well aware that scanning in-© books without © permission was risky
 - © owners have exclusive right to control reproduction of protected works in copies
- Google thought it had a good fair use defense if anyone decided to sue
- Authors Guild & 5 trade publishers sued in the fall of 2005, claiming scanning-for-snippets infringed ©s; AG lawsuit = class action

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AG/AAP: NOT FAIR USE

- Commercial purpose; non-transformative use
- Systematic copying of © works of all genres, creative works
- Whole thing copied, systematic, stored permanently, copies given to library partners
- Presume harm; harm because lack of control, risk of loss from inadequate security; we want to license such uses
- Very nature of © to require users to get permission in advance

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GOOGLE: FAIR USE

- + transformative; promoting public access to information
- + necessary to copy to index, make snippets available; orphan books opened up
- + whole thing, but only snippets available unless au/pubr agrees to more thru partner program
- + transactions costs problems with clearing rights = market failure; GBS enhances market for many books (we'll link to where you can buy them); not serving ads
- + we'll take your book out if you want

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MOTIVATIONS TO SETTLE

- Litigation is expensive, takes years to resolve definitively
- Outcome in doubt because of novel fair use claim
- If AG & AAP won, G was facing very big damage exposure, might have been enjoined from using GBS or even ordered to destroy scans of in-© works
- G had better technology & ideas about how to create new markets for books in digital environment than Ps
- Settlement created an opportunity for a “win-win-win”
 - G, AG, & AAP would get \$; libraries/public would get ISD

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CORE OF SETTLEMENT

- Settlement was announced Oct. 28, 2008
- G was to provide \$45M to compensate © owners as to books already scanned (\$60 per book)
- G was to fund creation of a new collecting society, the Book Rights Registry, for \$34.5M
- Authors and publishers could sign up with BRR to share in revenues from GBS (63% for © owners)
- Class action lawyers would get \$45.5 M in fees

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GBSS DEFAULT RULES

- Settlement would mainly affect out-of-print (OOP) books
 - First step: determine if book was in- or out-of-print
 - G to look to specific information resources for this
- If in-print, default rule: G could not display book contents
 - © owner must opt in to display uses by G
 - Most in-print © owners likely to sign up through GPP, not GBSS
- If OOP, default was that G could make “display uses”
 - G would be allowed commercialize all such books
 - Plus G could display of 20% of contents in response to query
 - Registered © owner could opt out, insist on no-display for OOP

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GBSS REVENUE GENERATION

- GBSS authorized G to generate revenues from OOP books in 4 ways:
 - Fees for institutional subscription database (ISD)
 - Consumer purchase model (books “in the cloud”)
 - Certain ads run vs. queries yielding book results
 - Print-out fees from public access terminals
- G could propose new revenue models in the future; BRR must agree to them

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LIBRARIES UNDER GBSS

- Those who contributed books to GBS corpus would get back from G an LDC of those books
 - Settlement would mean they would no longer be risking liability for having contributed books to G or taking back digital copy
 - Non-consumptive research on LDC privilege
 - Libraries allowed to provide print-disabled access to LDC books
- Public libraries would get 1 terminal for accessing ISD corpus, higher ed 1 terminal per so many students for free
- Many colleges & public libraries expected to become institutional subscribers to GBS ISD
- No special deal for public school libraries, gov't libraries, other libraries, although institutional subscriptions might be available to them too

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BENEFITS OF SETTLEMENT

- Would remove a dark cloud of liability from the heads of G and cooperating libraries
- Would lead to more public access to more books than if G had not undertaken to make GBS at all or if G won the litigation with AG & AAP
- Revenues would begin to flow to authors and publishers who register with the BRR (old books = new life)
- New business models, choices for consumers
- Commitment to provide access to reading-disabled
- Non-consumptive research on whole GBS corpus @ 2 sites

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BUT IS GBSS “FAIR”?

- Class action lawsuits can only be settled if judge is persuaded that settlement is “fair, reasonable, & adequate” to the class on whose behalf settlement was negotiated
- Class members must be given notice & opportunity to object or opt-out of the settlement
 - 6800 opted out of GBSS
 - Thousands more objected to the settlement on wide array of grounds
- Fairness hearing held Feb. 18, 2010
- Judge Chin ruled vs. GBSS on March 22, 2011

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6 PROBLEMS WITH GBSS

1. Scope of the settlement cf. issue in litigation
2. Adequacy of representation by class counsel
3. Antitrust issues
4. User privacy concerns
5. Copyright issues
6. International concerns

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1: “BRIDGE TOO FAR”

- DOJ: Class counsel has obligation to litigate the claims they brought vs. G 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 (e.g., no plausible fair use defense for selling books)
 - 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”; Chin agreed

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ORPHAN WORKS

- Millions of books in GBS corpus likely to be “orphans”
 - RHs cannot be found after reasonably diligent search
 - Likely to make up substantial part of ISD
 - G to charge profit-maximizing prices to end of ©
- 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

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UWF

- GBSS 2.0 envisioned appointment of unclaimed work “fiduciary” (UWF)
 - After 5 years, BRR can use some unclaimed funds to find RHs, sign them up
 - After 10 years, \$\$ to be paid out to literacy charities
 - Not clear how independent UWF will be, what fiduciary responsibilities it would have
 - Strange set of powers (& limits on powers)

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OW = LEGISLATIVE ISSUE

- Congress, not private parties, should address the orphan work 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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2: REPRESENTATION

- Authors Guild hired a lawyer to represent some of its members & class of RHs whose books G had scanned or was planning to scan
 - Class reps & counsel have duty to represent interests of *all* class members, not just the interests of some
- Chin agreed with me that academic authors have different interests than Guild members
 - Academics are more likely to want OOP books available on open access basis; not profit-maximizers like Guild members
 - AAP, Guild brief: interests of open access advocates are “plainly inimical” to the interests of the class
 - But far more books in GBS are scholarly books than are Guild member books, far more academic authors than Guild members

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3: ANTITRUST ISSUES

- GBSS would give G a de facto monopoly over commercialization of OOP books
 - This would allow it to offer an ISD of OOP books that no competitor could match
 - Creates risk of excessive pricing
- GBSS would arguably entrench G’s monopoly in the search market
 - GBS will help G better respond to “tail queries,” MS & Yahoo! at disadvantage
 - Implication: should G have to give MS & Yahoo! access to GBS to improve their search technologies?

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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 (+ type of institution)
 - More books + more services = higher prices
 - No comparable products or services
 - G arguably planning to scan all 120M+ books in the world
- Prices might be modest at first to get institutions to subscribe, but history & logic suggest prices will rise over time to excessive levels because G would have a de facto monopoly on ISD (cf. journal prices)
- Only check on price hikes was complicated arbitration process in Michigan side agreement
 - Libraries could complain to UM that prices are excessive
 - UM could decide to initiate arbitration, but will it?

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4: PRIVACY

- GBSS would require G to collect extensive amounts of information about users' reading habits
- Almost nothing in the GBSS to protect user privacy interests, to limit G's reuses of it
- G has said it will apply usual privacy policy, but is this enough?
- Chin: not by itself reason to disapprove GBSS, but troubled by this
 - Hints that revised settlement should address this

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5 & 6: ©, INT'L ISSUES

- “Fundamental” to © that reusers have to get RH’s consent
- Many opt-outs and objectors were upset about GBSS because of shift in © default from opt-in (ask me first) to opt-out (I have to come forward to tell you to stop)
- France, Germany, many foreign RHs complained that the settlement violated US treaty obligations
- Chin: not deciding int’l treaty objections are sound, but this disturbed him also; why Congress should deal with

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WHAT’S NEXT? OPTIONS

- Appeal
 - possible but unlikely because of 2d Cir precedents
- Revised settlement agreement
 - Guild & AAP want this more than G does
 - Judge has signaled that this is preferred choice
- Resume litigation
 - Guild & AAP have little stomach for this; costly & risk of losing
 - Not clear class can be certified because of divergent interests & legal positions within class
- Legislation

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NEW SETTLEMENT?

- At the fairness hearing, G's lawyers said that there would be no settlement unless it was an opt-out regime
- DOJ, among others, suggested GBS settlement could be approved if opt-in regime
 - More consistent with © law, also with antitrust law
- G more likely to agree to this if opt-in only as to commercialization
 - G will want to be able to make non-display uses of books on opt-out basis
 - But is BRR viable under an opt-in regime?
- Need for orphan work legislation?

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OPTIMAL LEGISLATION

- Allow mass digitization of books with tiered access by qualified entities, including sponsors of DPLA, willing to commit to security measures
 - OK to digitize books for preservation purposes
 - OK to display snippets for in-© books (unless RH says no), with links to sources from which books can be lawfully acquired
 - Non-consumptive research privilege, at least for nonprofit researchers
 - Non-expressive uses privilege (e.g., to improve search tools)
 - Full text access for public domain and books known to be “orphans”; opt-in to open access by academics

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PROSPECTS FOR LEGISLATION

- Difficult for Congress to act in general; public choice problems with © well-known
- OW legislation reasonably likely
- More ambitious legislative package would aim to enable the creation of a DPLA

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CONCLUSION

- GBS settlement is one of the most significant developments in © & class actions for decades
- Even though the settlement wasn't approved, GBS has dramatically changed the landscape in the US & abroad
- Many aspects of the settlement agreement are brilliant
- But other aspects are deeply troubling, maybe even evil
- Is it possible to get the good parts of GBS while averting the evil? That's my next project

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