

**University of Massachusetts Amherst**

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November 5, 2009

# The Google Book Search Settlement and the View from the Public Interest World

Laura Quilter, *University of Massachusetts - Amherst*



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# The Google Book Search Settlement and the View from the Public Interest World

Laura Quilter  
Boston Bar Association, Nov. 5, 2009

# roadmap

- (1) introductions
- (2) GBS project.
- (3) the litigation.
- (4) the settlement.
- (5) Q&A

"The Proposed Settlement is one of the most far-reaching class action settlements of which the United States is aware; it should not be a surprise that the parties did not anticipate all of the difficult legal issues such an ambitious undertaking might raise." -- DOJ Statement of Interest

# Summary of Google Books

## A) Publishers Program

- publishers provide indexed copies
- display as authorized
- shared ad revenue

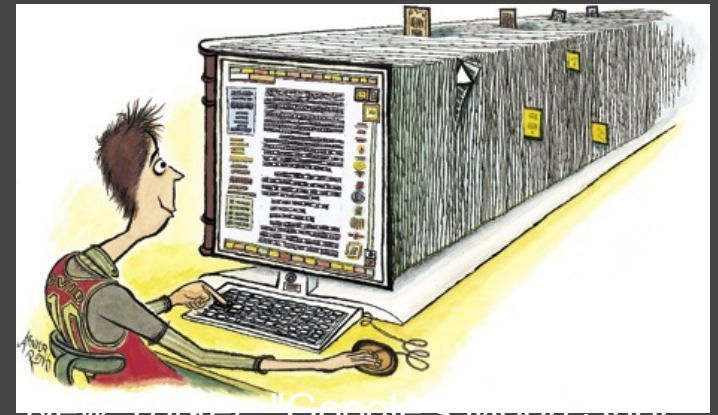
## B) Library Program

- scanning / OCRing books from library collections
- partner libraries: Harvard, Michigan, Stanford, NYPL, Oxford; UC, CIC; foreign libraries
- most libraries permitted all scanning; Oxford & NYPL permitted only public domain



# Summary of Google Books' Library Project

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New Yorker, "Google's Moon Shot"

# Who got what

## Google:

- full copy
- exclusive delivery of that copy outside the contributing library
- ad revenue

## Libraries:

- Subsidized scanning -- \$750M worth
- Copy of scan & OCR (albeit crippled)
- Rights to use their scan/text, restricted by contract (for both in- and out-of-copyright works)
- unspoken quid pro quo: litigation flypaper

# Who got what

## Users:

- full access to "public domain"\* (as deemed by Google)
- search within all books
  - up to 3 "snippets" per hit
  - "snippet" = search term + surrounding sentences
  - no snippets for reference books
- annotations, "My library", etc.

## Copyright holders:

- Exposure--plus links to borrow or buy
- No ad revenue for library program (shared ad revenue for publishers program)
- Opt-out option



"emma goldman"

Search Books

[Advanced Book Search](#)

Books Showing:

Books 1 - 10 of 2,166 on "emma goldman". (0.14 seconds)

[List view](#) [Cover view](#)

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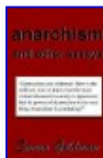
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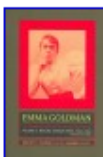
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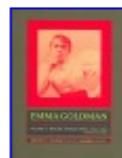
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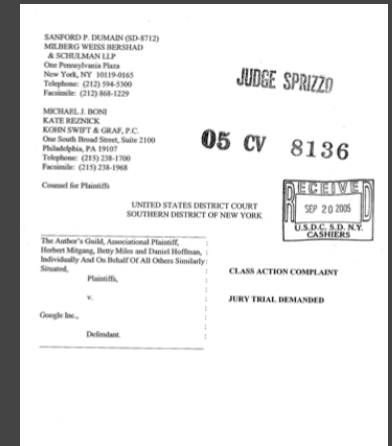
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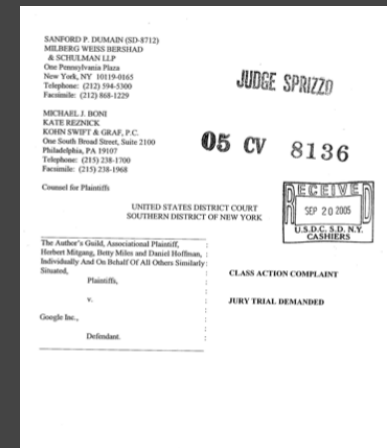
# Major copyright litigations

- Two lawsuits, Authors Guild (Sept. 2005) & publishers (Oct. 2005); consolidated in 2006.
  - Authors Guild: represents 8000 authors;
  - publishers: McGraw-Hill, Pearson, Penguin, Simon & Schuster, & Wiley;
  - Publishers continue to cut deals with Google
  - Broad class definition by authors, citing all copyright-holders at UM, was roundly criticized; see, e.g., Lawrence Solum
  - authors sought damages + injunction; publishers sought only injunction



# Owners: "Turns copyright on its ear"

- Claims focused on copies in the search database rather than on the displayed "snippets"
- At heart the argument is
  - (1) it is *unfair* for Google to make money from their works, and
  - (2) that rightsholders have the *right* to authorize digitization (even "intermediate" digitization).
- Pat Schroeder, AAP: **Opt-out "turn[s] every principle of copyright law on its ear" by "shifting the responsibility for preventing infringement to the copyright owner rather than the user."**

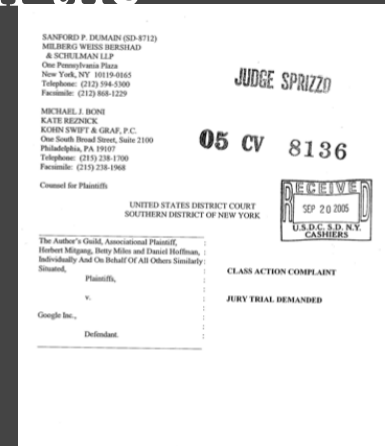


# Google: Fair Use! *Kelly v. Arriba*

- Google describes the copies in its search database as "**intermediate copies**", drawing language from the computer game reverse engineering cases of the 9th & Federal Circuits (e.g., *Sega v. Accolade*)

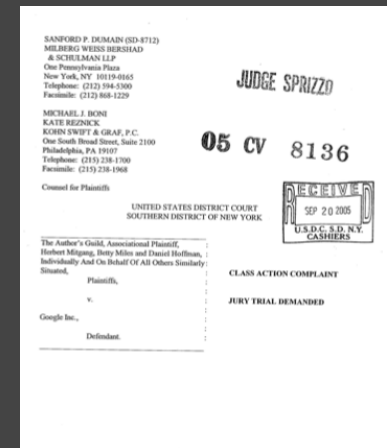
- *owners said: software not books*

- Focused on the end use of the copies, citing *Kelly v. Arriba* for the principle that an index is transformative and a fair use
  - *owners responded with an implied license theory -- and pointed out that in SDNY, MP3.com would*



# Libraries: Fair Use! *library catalogs!*

- Libraries care because this is about *indexing* -- and libraries have for a long time engaged in services that index the text in varying ways
- Siva Vaidhyanathan worried that Google was "*betting the Internet*" because the "implied license" + opt-out was the same logic underlying Google's web index. If 2d Circuit found differently than 9th in *Kelly v. Arriba*, Google's web index would be in serious trouble



# Precedents

- *Kelly v. Arriba* (9th Cir)
  - Thumbnails
- *Sega v. Accolade* (9th)
  - Intermediate copying
- *Perfect 10 v. Google* (9th 2003)
  - thumbnails
- *Field v. Google* (DNV)
  - opt-out
- *MP3.com* (SDNY)
  - “Retrans[mission] in another medium” not protected
  - Entire CDs
  - Usurping potential future market
  - Distinguishing software transitory copying cases
- *American Geophysical Union* (2nd Cir)
  - Circulating entire copies in for-profit co.
- *Boces* (WDNY)
  - Loaning copies of broadcast recordings

"The Proposed Settlement is one of the most far-reaching class action settlements of which the United States is aware; it should not be a surprise that the parties did not anticipate all of the difficult legal issues such an ambitious undertaking might raise." -- DOJ Statement of Interest

# Settlement

- Oct. 2008 - Settlement announced
- Settlement terms:
  - Google ponies up \$125M
  - class defined as holders of a "copyright interest" in a work that would be used -- i.e., in one of the partner libraries
    - includes foreign rightsholders
    - Google makes a first-pass determination of copyright status & commercial availability (in/out-of-print)
    - in-print books removed from search database
  - one-time cash payouts to authors that "claim" OOP works (\$60 / work; \$45M total)
  - Authors had until May 2009 to opt out of class

# Settlement

- Settlement terms (cont'd)
  - sets up **Book Rights Registry (BRR)**
    - Google can sell out of print / in copyright books
    - pricing formula set to maximize profits
    - 2/3 ad & booksales revenue goes to BRR; 1/3 to Google
    - rightsholders have 5 years to claim a book -- then revenue from unclaimed books stays w/ BRR
    - BRR initially funded by Google (\$34.5M), to be a self-sustaining non-profit



# Settlement

- Settlement terms (cont'd)
  - library partners
    - library copies significantly restricted / deleted
    - instead libraries can "subscribe" to a service (pricing set to maximize profits, but Google subsidizes at first)
    - Google establishes "research corpus"--but no competitive uses permitted
    - Google will provide one terminal per library for free public access to search
  - public search
    - enables display / printing up to 20% of the work, supported by ad revenues
    - "purchase" copies; print or keep online



# Response to the Settlement

Bombshell -- Oct. 28, 2008 a surprise. Very little library representation, and utterly hush-hush.

- Authors scurried to try to make the May 2009 deadline;
- May 2009 hearing rescheduled for October 7, 2009
- Sept. 2009 - comments deadline
  - Numerous (hundreds) of comments submitted
  - DOJ weighed in; likely non-compliant with copyright & antitrust law
  - Sept. 2009 - Copyright Office excoriated the settlement
- Oct. 7, 2009 - J. Chin set Nov. 9 for revised settlement; DOJ working with parties
- Nov 9, 2009 - this upcoming Monday. We'll see!

How Many Filings?		
Class-member Objectors	(domestic)	82
	(foreign)	295
Amicus Objectors	(domestic)	10
	(foreign)	3
Classmembers with Reservations		3
Amicus Filers with Reservations		5
Classmember Supporters (all domestic)		8
Amicus Supporters (all but two are domestic)		29
Opt Outs		>50 <sup>3</sup>

Of Key Filers, What Are Their Concerns? <sup>4</sup>	
Anti-competitive <sup>5</sup>	10
Anti-rightsholder <sup>6</sup>	23
Anti-user <sup>7</sup>	12

Of Key Supporters, Why Did They Support?	
Pro-competitive <sup>8</sup>	4
Pro-rightsholder <sup>9</sup>	1
Pro-user <sup>10</sup>	22

> 1000 opt-outs through settlement administrator

source: American Library Assn, Assn of Research Libraries, Assn of College & Research Libraries (2009 Sept. 29), "The Google Books Settlement: Who Is Filing and What Are They Saying?"

## II. GBS settlement - concerns & criticisms

1. library / preservationist concerns: metadata, archival quality
2. use rights: fair use, use of public domain works
- 3. civil liberties & intellectual freedom**
- 4. consumer issues: no meaningful cost restraints**
- 5. unfair to classes of classmembers**
- 6. anti-competitive**
7. fundamentally shifts / violates copyright norms
8. violates state unclaimed funds laws

## II. GBS settlement - concerns & criticisms

### 3. civil liberties & intellectual freedom (see ALA, CDT, EPIC)

censorship: Google retains the right to exclude up to 15% of scanned books from "institutional subscription database", *at Google's discretion*, for editorial or non-editorial reasons. Entire classes of material could be excluded; individual works could also be excluded. No notice required.

reading privacy: A core value of libraries, and enshrined in the law of all states (48 state laws, + 2 AG ops).

- Google not covered by the state laws
- new database will enable much, much more fine-grained reading data
- settlement does not address user privacy;  
*cf.* 17 pages of security requirements for libraries

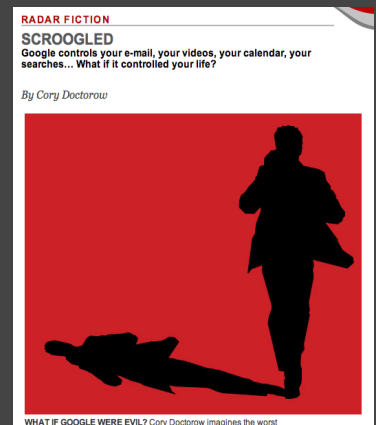


## II. GBS settlement - concerns & criticisms

### 3. civil liberties & intellectual freedom (see ALA, CDT, EPIC)

#### intellectual freedom:

- Google protectionism in the research corpus: no uses that would be competitive. But no appeals process on determinations of competitiveness.
- Publisher / author appeals for misclassification of books as public domain; but no consumer appeals for misclassification as in-copyright.
- Contractual restrictions on use of public domain book copies (original library contracts).



## II. GBS settlement - concerns & criticisms

### 4. consumer issues: no meaningful cost restraints

- algorithms set to maximize revenue
- representation on BRR Board is 4 publishers & 4 authors--  
no consumers, no librarians, no diversity
- pricing does not represent interests of all rightsholders
- no caps in the settlement for institutional subscription pricing
- no likely competitors to keep prices down -- and no  
likelihood of comparable products in the future



## II. GBS settlement - concerns & criticisms

### 5. unfair to classes of classmembers

"Moreover, the most sweeping forward-looking licensing provisions of the current Proposed Settlement (which give open-ended control to the Registry and Google for the exploitation of the rights of absent class members unless those class members opt out of those provisions) both exacerbate potential conflicts between the interests of the class representatives and those of absent class members – especially rightsholders of out-of-print works and foreign rightsholders – and are difficult to square with the requirements of Rule 23. In addition, as discussed below, the record at this time does not establish that the class was afforded adequate notice, which is critical given the size and geographic scope of the class, and the alteration in copyright protection that the Proposed Settlement would effectuate." -- US DOJ Statement of Interest

## II. GBS settlement - concerns & criticisms

### 5. unfair to classes of classmembers

#### foreign rightsholders --

- in-print/out-of-print determinations, using U.S. sources!
- significant paperwork burden to challenge status
- U.S. tax / tax ID on Google revenues

#### orphan works rightsholders --

- 5 years or you lose-- DOJ observed the settlement pits classmembers against each other

#### academic writers --

- interest generally in ensuring dissemination, not revenue;
- corpus scanned from research libraries -- one-year stats:
  - 1/3 from university or nonprofit presses
  - > 2/3 "specialist"; none for "wide readership"
  - only 3% "popular"

## II. GBS settlement - concerns & criticisms

### 6. anti-competitive

two competition problems --

1. rightsholders. class-members and non-class-members; the BRR sets up a one-time-only institution that cannot bargain for future writers.
2. Google competitors.

## II. GBS settlement - concerns & criticisms

### 6. anti-competitive

#### DOJ Statement of Interest

- does not currently meet copyright & antitrust requirements;
- revenues for "unclaimed" works would be flowing to owners of claimed works -- unfair to absent class members, i.e., orphans and foreign rightsholders;
- BRR, dominated by large publishers, would be setting prices for its own competition
- nobody else could develop a comparable product -- Google/BRR would have cornered the market on digital book collections / subscriptions.

"Google founder Sergey Brin has said that 'anyone can do what we did.' This is misleading because GBS began as a scan-to-index project -- for which there was, at least before this settlement, a plausible fair use defense -- that has now morphed into a joint venture to sell books."

-- Pam Samuelson, "The Google Book Settlement: Real Magic or a Trick?", *The Economists' Voice*, Nov. 2009

“This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database – i.e., one that does not include the millions of orphan works – cannot compete effectively with the seller of a comprehensive product. Foreclosure of newcomers is precisely the kind of competitive effect the Sherman Act is designed to address.”

- Dept. of Justice, Statement of Interest, Sept. 18, 2009 [emphasis added]

“As a threshold matter, the central difficulty that the Proposed Settlement seeks to overcome – the inaccessibility of many works due to the lack of clarity about copyright ownership and copyright status – is a matter of public, not merely private, concern. A global disposition of the rights to millions of copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement. If such a significant (and potentially beneficial) policy change is to be made through the mechanism of a class action settlement (as opposed to legislation), the United States respectfully submits that this Court should undertake a particularly searching analysis to ensure that the requirements of Federal Rule of Civil Procedure 23 (“Rule 23”) are met and that the settlement is consistent with copyright law and antitrust law. As presently drafted, the Proposed Settlement does not meet the legal standards this Court must apply.”

- Dept. of Justice, Statement of Interest, Sept. 18, 2009 [emphasis added]

# further reading

- ALA, <http://wo.ala.org/gbs/>
- The Public Index, <http://thepublicindex.org/>
- <http://googlebooksettlement.com/>

notable commentators:

- Paul Courant (Univ. of Mich. Univ. Librarian; supporter)
- James Grimmelman (critic)
- Pam Samuelson (critic)

just out & of possible interest:

- issue in GCP <http://globalcompetitionpolicy.org/>
- D is for Digitize conference, NYLS