

*The Google Book Settlement:  
Towards a True Digital Library?*

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# Outline

- I. The Google Book Search project
- II. The amended Google Book Settlement (GBS or ASA for Amended Settlement Agreement)
  - What is it? Where do we stand?
- III. The effects of the GBS and the future for books:
  - What are the likely changes for the whole book chain: *authors, publishers, bookshops, libraries, researchers and the general public?*
  - As books go digital, “*A page is turned*” (FT, 9 Feb. 2010) or are we at a turning point?

# I. *Google Book Search*

- A commercial service of *Google, Inc.*: scanning of books to allow full-text search of digitised books
  - October 2004: Google starts to scan the books of US libraries
  - October 2009: over 10 millions books from two sources:
    - *Google Book Partner Program*: agreements with > 20.000 publishers for copyrighted works (in-print books)
    - *Google Library Program*: agreements with about 30 libraries for their collections:
      - Five initial libraries (Michigan, Harvard, Stanford, New York Public Library, Bodleian Library); now with libraries in Lyon, Lausanne, Ghent, Madrid, Keio, etc.
- Different from other online libraries:
  - *Internet Archive*: non-profit undertaking
    - Over 1 million scanned public domain books
  - *Europeana*: public project (European Commission and national libraries)
    - Nov. 2008: over 3 millions digital objects (old maps, illustrations, ...)
    - For 2010: aims at reaching 10.000 digital objects (but: (i) not books; (ii) no similar search tools)

# II. The Google Book Settlement (GBS)

- A settlement:
  - A private agreement between the parties to a dispute with the objective to terminate the litigation
    - 2005 in the US: the *Authors Guild* (8000 members) and five publishers and the *American Association of Publishers* sue Google for copyright infringement before a New York District Court
    - Copyright issues:
      - « fair use » or not under Article 107 US Copyright Act?
      - Prior authorisation (opt-in) or opt-out from rightholders?
    - Same in France: *La Martinière/Seuil v. Google* : NOT COVERED by the GBS
      - Decision of Dec. 18, 2009 (TGI, Paris): infringement (no applicable exception)
- A class-action settlement:
  - In a class-action, the plaintiffs claim to represent a class of persons who suffered the same harm (if common issues + desirable to adjudicate the claims in one lawsuit)
- A class-action settlement with broad ramifications:
  - US Department of Justice (DoJ): « *the most far-reaching class action settlement of which the United States is aware* » (Sept. 2009)

# Issue: private ordering

- A global public issue (book / knowledge access) is defined through a set of private contracts:
  - The GBS between Google and US authors and publishers for out-of-print books
    - Hopefully: input of public authorities: US DoJ, France and Germany
  - The contracts between Google and the libraries for the scanning of books whether public domain, out-of-print or in-print books (Google Library Program)
    - Google benefits from the investments made by the libraries over the years (acquisition, preservation of books)
    - Provision prohibiting the library to offer the digital copy for indexing by a third party even for public domain books
  - The contracts between Google and the publishers for the in-print books (Google Partner Program)
- See EU Council information note (24 Nov. 09): « *Commercial projects alone cannot cover the public interest dimension of the digitization of cultural objects* » (p. 11)

# The GBS: where do we stand?

- Oct. 28, 2008:
  - release of the draft GBS submitted for approval by the US District Court of New York (Judge Chin)
- Sept. 2009:
  - *amicus briefs* by the US DoJ asking for amendments to the existing draft GBS and by other interested parties
- Since Sept. 2009:
  - ongoing discussions between the parties and the DoJ
- Nov. 13, 2009:
  - amended GBS (here: GBS 2.0) submitted for approval
- Additional filings: close to 1000 (ex.: DoJ, 4 Feb. 2010)
- Febr. 18, 2010: final fairness hearing
- 2010: approval or rejection of the GBS 2.0

# The GBS in a nutshell

- A few hundred pages agreement (including annexes) authorizing Google to (i) scan and (ii) monetize books in exchange for payments to copyright holders (authors and publishers)
  - Compromise: authorisation but compensation
  - Possible because of the uncertainties of the « fair use » exception (Art. 107 U.S. Copyright Act): a use is fair if justified by:
    - The purpose and character of use;
    - The nature of copied work;
    - The amount and substance used;
    - The effect on market or value of work.
  - Google is better off: autorisation to scan and monetize
    - Advantage over possible competitors (Yahoo! etc.): they will not benefit from the GBS (they have to start to litigate and reach a similar agreement)
  - The copyright owners are better off: compensation
    - Allowed to control future uses of digital books

# Key aspects of the GBS

- Covered works:
  - books and inserts (such as prologues, afterwards, etc.)
    - NOT periodicals, works in the public domain, personal papers
    - NOT books published after Jan. 5, 2009
    - Mainly the out-of-print books, including the orphan books
      - Orphan books are books for which the copyright owners cannot be traced (relative notion: it depends on the efforts undertaken)
  - scanned in the US (but many non-US books in the US libraries: > 50%)



# The covered books (in the US)

40m (in US Libraries)

>50 % = non US books

of the 32m under  
copyright:

- 7m-9m in print

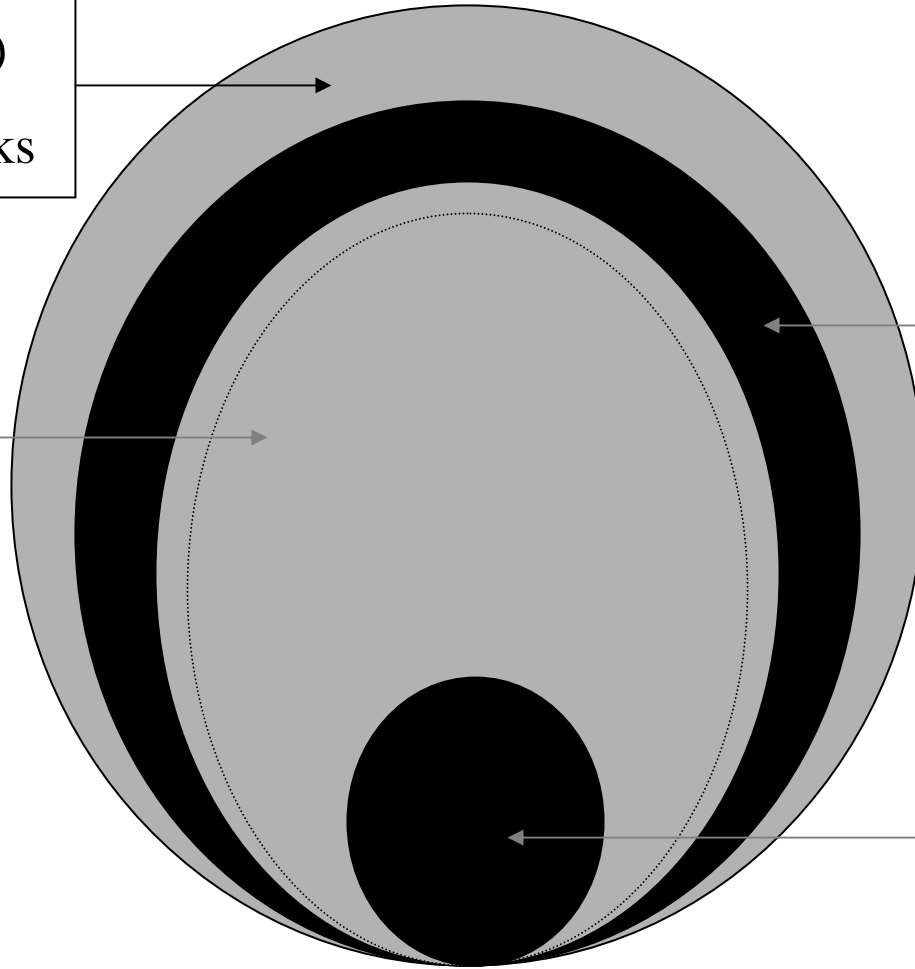
- 23m-25m out-of-  
print

8m out of  
copyright

32m covered by  
copyright

of the 23m-  
25m out-of-  
print:

2.5m – 5m  
orphan works



Source: *FT*, 13 August 2009

# The GBS 2.0

- Key change released on Nov. 13, 2009:
  - Covered works are more limited: not all books in US libraries, but:
    - books registered in the US:
      - What portion of foreign books? According to the *Tessier Report* (France, 12 Jan. 2010) on the digitisation of books: « a substantial portion of the catalog of certain French publishers » (p. 11); same for Germany (p. 3 of Jan. 28, 2010 submission)
  - +
    - books published in the US + Canada, the UK, and Australia (only in countries with common legal heritage, but why not Ireland or New Zealand then?)
- Effect: some (how much?) non-Anglophone books are out of the settlement, but most academic/scientific books and (nearly) all English translations of foreign books (as published in English with Anglophone publishers) will be covered

# Key aspects of the GBS

- Allowed monetization depending on the type of book:
  - Distinction between « commercially available » or « not commercially available »
    - Google decides whether commercially available or not
    - « commercially available » if the book is offered for sale through at least one customary channel of trade in the US
      - » NEW in GBS 2.0: if it is for sale new by a seller anywhere in the world to a buyer in the US, UK, CA and AU
    - A book classified as « commercially available » is presumptively considered as « in print » and a book classified as « non commercially available » is presumptively considered as « out-of-print »
  - If book in print / commercially available: Google may only offer « Non-Display Uses »: no display of protected expression (only metadata about the book, no sequence > 3 contiguous words)
  - If book out-of-print / not commercially available: Google may offer a wide range of « Display Uses » allowing to monetize the book's content

# Key aspects of the GBS

- Permissions given to Google (and not to other providers) for a wide range of uses of out-of-print books :
  - Continue to digitise books
  - Sell subscriptions to libraries (institutional subscriptions)
  - Sell online access to individual books
  - Sell advertising on pages
  - Display of snippets (up to three « snippets » or extracts: about 3 to 4 lines of text per search term)
  - Display portion of books in a preview format to encourage online sales
  - Display bibliographic information
  - Make digital books available for « non-consumptive research »: for ex. computational analysis of occurrences of words in books

# Key aspects of the GBS

- Obligations for Google: payment of about \$125 million to get the online licence for most Anglophone books
  - Pay \$34,5 million to establish the Book Rights Registry (BRR): new collective society to locate rightholders, to create database with works, to collect revenues from Google and to distribute them to rightowners
    - US authors and publishers will manage this Registry (no representation of (i) users/libraries and of (ii) foreign rightholders except from UK, CA & AU?)
  - Pay \$45 million to a settlement fund for cash payment to rightowners for books digitised without authorisation
    - Minimum \$60 per Principal Work, \$15 per Insert
      - » But sign up with the BRR + get a US tax ID number (according to Australian objector to GBS, it would cost about \$300?)
    - Possibility to claim directly or through a European collecting society (Assuocopie in Belgium, etc.)
  - Pay \$45,5 million for the lawyers representing the authors and publishers
  - Share 63% of revenues resulting from the Google uses to monetize the digital books (Google keeps 37% of the revenues): the 63/37 split

# III. The future impact of the GBS

- US DoJ: it seeks to « *implement a forward-looking business arrangement rather than a settlement of past conduct* » (Sept. 09, p. 2)
- Prof. Grimmelmann: « *Control over the past will translate into control over the future of books* »
  - The risks are not in the making available of the out-of-print books = small market (today, second-hand volumes make less than \$1bn of the \$25bn US books market)
    - However: with the new possibilities of access, this market will grow
  - The risks are in the acquisition of a central/highly dominant position for the future delivery of new digital books
    - In Google's vision: books dematerialize and move into the « cloud » (they sit as digital files in Google's data centres: > 470.000 servers)

# GBS 2.0: many interested parties

- The US parties to the GBS:
  - Google Inc.
  - the Authors Guild (8000 members) + other US authors
  - the American Association of Publishers (members) + other US publishers
- The owners of copyright on foreign books covered by the GBS
  - Authors and publishers (i) in UK, Canada and Australia + (ii) for books registered in the US
- The other US interested parties :
  - The libraries and users in the US
- The other interested parties:
  - The authors and publishers outside the US, UK, CA, AU
  - The libraries outside the US
  - The public of the readers / researchers outside the US
  - States (France, Germany, etc.)
  - The competitors

The challenge of building a  
digital library that benefits all  
*(or the largest possible section of the  
public)*



# Who opposes the GBS?

- US DoJ:
  - Risk of anticompetitive practices (horizontal agreement for G to use an algorithm to price books, benefit for G. online search business, etc.)
- France and Germany:
  - violation of copyright rules (de facto compulsory license under the guise of IP class action), not fair for foreigners, BRR is a domestic US institution for a worldwide class, cultural heritage (primacy of English)
- Libraries (US and abroad):
  - fear that the Registry will impose excessive prices for institutional subscriptions (de facto monopoly)
- Publishers (in particular in Europe):
  - conditions for online distribution risk to be imposed by the GBS/BRR
- Bookshops (including online):
  - having the most comprehensive collection of old books, Google will be the default first choice for book buyers
- Competitors in the online search market (Yahoo!, Microsoft)
- Various NGOs/academics (copyright, competition, privacy, etc.)

# Point of view of libraries/users

- Digitised books will only be accessible to libraries and users in the US (§ 17.7(a) GBS)
  - Major restriction for universities and education institutions outside the US (competitive advantage)
  - No benefit for less developed countries (where no brick-and-mortar libraries)
  - Discrimination (however, commanded by the nature of the GBS as a settlement of a US class action)
    - Back with the question: can we accept that the book / knowledge access is only ruled by a (set of) private contract(s)?

# What arguments against GBS?

- Policy-oriented arguments from various parties:
  - Expropriation of the rights of foreign authors and publishers (less with the GBS 2.0)
  - Appropriation of national heritage (digitisation of French books in the US libraries will continue even for the books not covered by the GBS 2.0)
  - No access outside the US
- Class-action (procedural) issues:
  - No adequate representation of class-action members or notice
- Copyright:
  - Minimalist view: to scan (and index?) books should be fair use (>< broader uses)
  - Standard view: an opt-out approach is against copyright rules
- Competition law
- Adequate representation within the Books Rights Registry
- Freedom of expression:
  - Editorial reasons to remove a book = censorship
- Privacy: monitoring of users habits without guarantees

# What is Google Book after the GBS?

- A digital « library of Alexandria » (S. Brin, Oct. 9, 09)?
  - True, Google has the mission (and not so modest ambition) to « organize the world's information »
  - But Google is a for profit entity: what if its noble mission clashes with the pursuit of profit?
    - Google does not have the obligations libraries have: can discontinue the service, impose (high) fees for access, invade user privacy, censor books
      - See Prof. P. Samuelson, « Google Book is not a library » (Oct. 13, 2009)
- The dominant platform for distributing content and selling ads or an inquisitive « shopping mall » for content?
  - Risk « *to transform research libraries in shopping malls* »? (Prof. P. Samuelson)

# The GBS 2.0: need for improvement

- From a US perspective (+ UK, CA, AU?), some positive aspects:
  - For the parties: Google, the covered authors and publishers
  - For users (in the US): possibility to search, preview, buy million of books that are out-of-print, no more available
    - The GBS « *will breathe life into millions of works that are now effectively off limits for the public* » (US DoJ)
- But there are still unacceptable effects and the private ordering linked to the GBS should be improved.
  - Because:
    - Non-US libraries and users are excluded from its benefit
    - Non-US authors and publishers of books registered in the US are less likely to get the same benefits as US (+ UK, CA, AU) authors and publishers
    - Risk of excessive pricing for libraries and universities (in the US)
    - Risk of pollution by advertising
    - Competitors will in reality be foreclosed to compete (despite the removal of the most favored nation clause in GBS 2.0)
    - Public authorities are bypassed (private way to define copyright policy/orphan works rules)
    - Users sell « units of privacy » with no protection: possibility to monitor the pages you read and notes you take in the « margins »

# Thank you

For more food for thought:

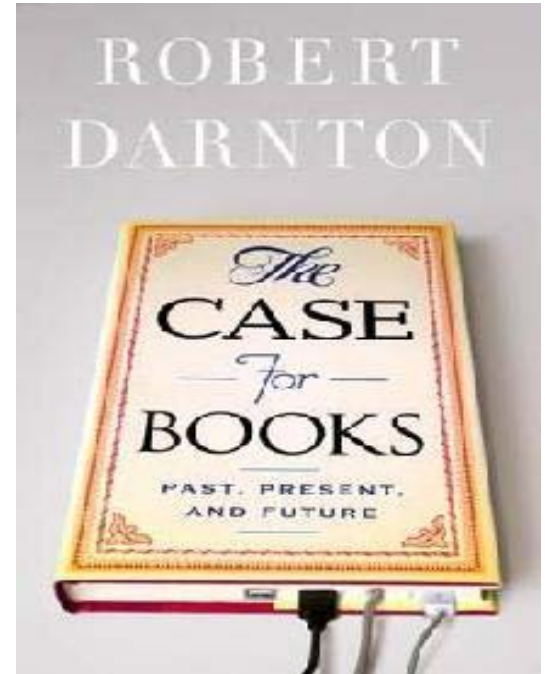
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