

*Google Books : a digital library, a global  
publisher or something else?*

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# Outline

- The draft Google Book Settlement (GBS)
  - What is it? Where do we stand?
- The effects of the GBS and the digital future for books:
  - What are the likely changes for the *universities*?  
What is the broader impact for the whole book chain: *authors, publishers, printers, bookshops, libraries, researchers and the general public*?

# I. The GBS: what it is?

- A settlement:
  - A private agreement between the parties to a dispute with the objective to terminate the litigation
    - 2004: Google starts to scan the books of US libraries
      - Google Library Project >< Google Partner Program: with publishers
    - 2005: the Authors Guild (8000 members) and five publishers sue Google for copyright infringement (legal issue: fair use or not?)
      - Same in France: La Martinière/Seuil c. Google (+ Germany): NOT COVERED by the GBS
- 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* »

# Broad problem: 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 US DoJ, Commission, France and Germany
  - The contracts between Google and the libraries for the scanning of books (Google Library Project)
    - 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)

# 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
- 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
- Jan. 2010: fairness hearing
- Beginning of 2010: approval or rejection of the GBS 2.0

# The GBS in a nutshell

- A few hundred pages agreement 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) if justified by:
    - Purpose and character of use;
    - Nature of copied work;
    - Amount and substance used;
    - Effect on market or value of work.
  - Google is better off: autorisation to scan and monetize
    - Advantage over other players (Yahoo! etc.): they will not benefit from the GBS
  - 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)

# The covered books

40m (in US Libraries)

>50 % = non US books

of the 32m under  
copyright:

- 7m-9m in print

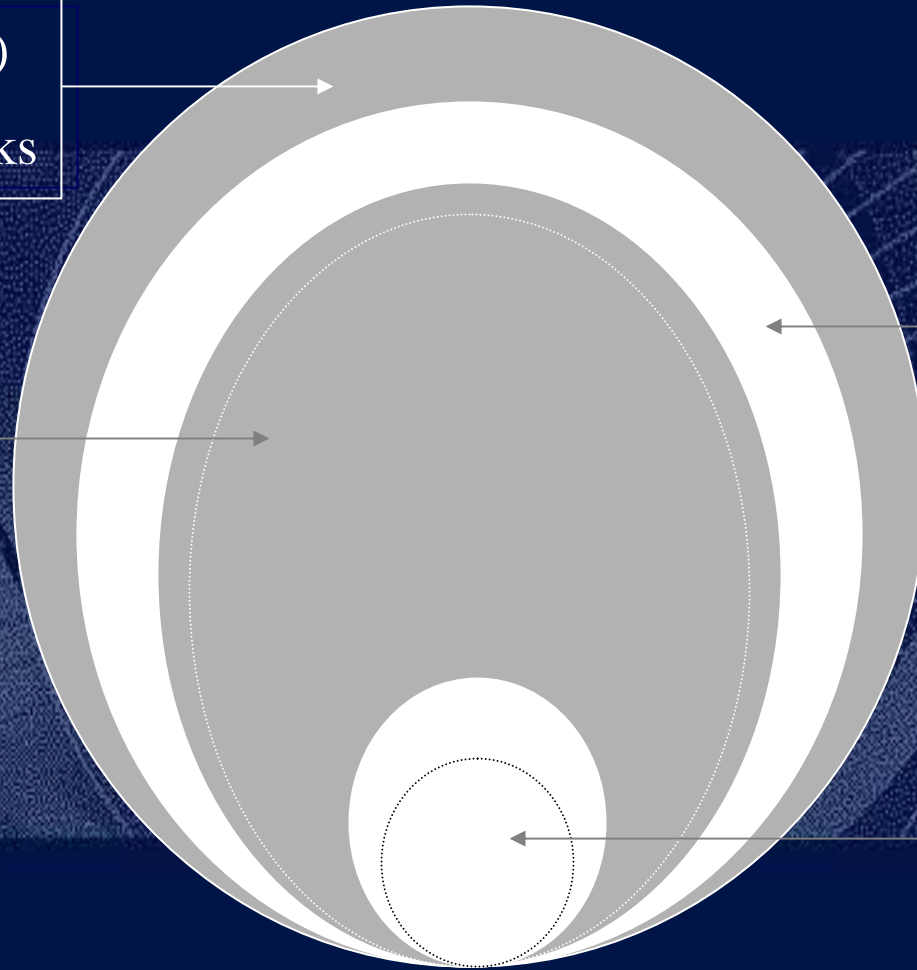
- 23m-25m out-of-  
print

8m out of  
copyright

32m covered by  
copyright

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

2.5m – 5m  
orphan works



# 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 (probably not a majority of European books?)
  - +
  - books published in Canada, the UK, and Australia (only in countries with common legal heritage, but why not Ireland or New Zealand then?)
    - Possible effect: most foreign non-Anglophone books are out of the settlement, but most academic/scientific books (as published in English) will be covered

# Key aspects of the GBS

- Digitised books will only be accessible to libraries and users in the US (§ 17.7(a) of the GBS)
  - Major restriction for universities and education institutions outside the US
  - Unfair treatment (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 private contract?

# 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 (thus, not for many European books)
      - » 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:

- Pay \$34,5 million to establish the Book Rights Registry: new collective society to locate rightholders, to create database with works, to collect revenues from Google and to distribute them
  - US authors and publishers will manage this Registry (no representation of users/libraries and of foreign rightholders except from UK, CA & AU)
- Share 63% of revenues resulting from the Google uses to monetize the digital books (thus Google keeps 37% of the revenues)
  - How to determine those revenues from ads? Similar issues for copyright owners in the case of « User-Generated Content » sites (ex. YouTube)
- 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
  - Possibility to claim directly or through a European collecting society (Assuocopie in Belgium, etc.)

## II. The future impact of the GBS

- US DoJ: it seeks to « *implement a forward-looking business arrangement rather than a settlement of past conduct* » (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)
    - With the new possibilities of access, this market will grow a lot
  - 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)

# GBS 2.0: many interested parties

- The (directly) interested parties to the GBS:
  - Google Inc.
  - the Authors Guild (its 8000 members who are US authors)
  - the US publishers and the American Association of Publishers
  - Authors and publishers in UK, Canada and Australia
- The (partially) interested parties outside the GBS:
  - The libraries and users in the US
  - The authors and publishers outside the US, UK, CA, AU
- The other interested parties:
  - The libraries outside the US
  - The public of the readers / researchers outside the US
  - National States
  - The competitors

# Who opposed the GBS 1.0?

- US DoJ:
  - Risk of anticompetitive practices, need to revise the terms of the GBS
- France and Germany:
  - filed amicus brief before the New York District Court
- Libraries:
  - fear that the Registry will impose excessive prices for institutional subscriptions (de facto monopoly)
- Academics:
  - Main view: higher barrier to entry than if Google had prevailed on fair use
- Publishers (in particular in Europe):
  - the conditions for online distribution risk to be imposed by the GBS/Registry
- 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)

# What arguments against GBS?

- Class-action (procedural) issues:
  - No adequate representation of class-action members = some of YOU
- Policy-oriented arguments from various parties:
  - Expropriation of the rights of foreign authors and publishers
  - Appropriation of national heritage (J. Julliard in *Le Nouvel Obsc* (4/11/09): « *la plus gigantesque rafle ...sur les biens culturels du monde entier*”)
  - No access outside the US and worldwide discrimination
- 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:
  - Most favored nation clause during 10 years: strong barrier for entry
- Freedom of expression:
  - Editorial reasons to remove a book = censorship
- Privacy: monitoring of users habits without guarantees

# Who gained from GBS 2.0?

- YES: US DoJ:
  - Obtained that the 63/37 split is negotiable and that Google can discount books
- YES: publishers and others (+ France and Germany):
  - Non US (+UK, CA, AU) publishers obtained an exclusion of non-Anglophone books (if not registered in US) + UK, CA, AU benefit from the GBS and are in Registry
  - Better distribution of revenues from unclaimed works (Court-appointed fiduciary): no diversion in favor of Registry
- NOT CLEAR: for bookshops:
  - Easier to sell online access to out-of-print books? will benefit from a fraction of the 37% Google's share of revenues?
- NO: libraries in the US (gain from additional terminals at public libraries):
  - But risk of excessive pricing for institutional subscriptions (de facto monopoly)
- NO: libraries and users outside the US:
  - No access to digital books
- NO: academics advocating fair use or those advocating for opt-in approach
- NO: competitors (but removal of most favored nation clause)

# Some arguments after GBS 2.0

- Access to knowledge argument outside US / discrimination
  - Of course: possible to extend scope outside the US if new GBSs are negotiated
- Transparency: a lot of additional « ad money » without any real means to control (the 63/37 split for ex.)
- Competition law:
  - Positive: removal of most favored nation clause (possibility of more favorable terms to third parties)
  - Negative: Google remains the only provider for orphan works (disincentive to push for legislative change)
  - Extension of beneficiaries (+ UK, CA, AU) means higher chance that worldwide standard for book access and dominant position at global level
- 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 global publisher?
  - True, Google will market out-of-print (in print) books
  - But Google does not play an editorial role
- 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
      - See P. Samuelson, « Google Book is not a library » (Oct. 13, 2009)
- The dominant platform for distributing content and selling ads thus the « global shopping mall » for content:
  - Risk « *to transform research libraries in shopping malls* » (Prof. P. Samuelson)

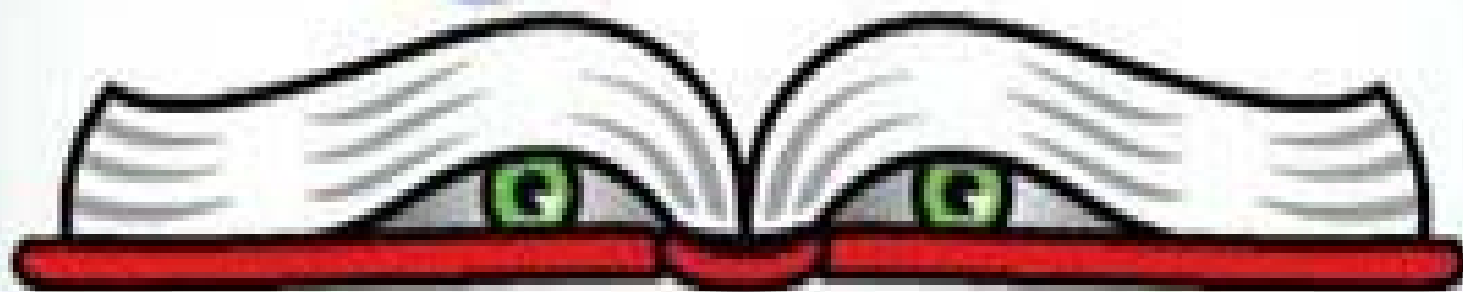
# Google Book is not *Europeana*

- Europeana is the Commission-led programme to create a true European digital library (see: [www.europeana.eu](http://www.europeana.eu))
  - Not-for-profit organisation based in The Hague
  - Has digitised more than 5 million cultural objects
  - Respects obligations in terms of access, etc.
- The European Commission is following the GBS:
  - DG Markt: hearing on Sept. 7, 2009 (42 speakers)
  - DG InfSo + Markt: call for a change of copyright rules and a collective copyright licensing system on Oct. 19, 2009 (Communication on Copyright in the Knowledge Economy)
    - Commissioner Reding speech: « *if we do not reform our European copyright rules on orphan works and libraries swiftly, digitisation and the development of attractive content offers will not take place in Europe, but on the other side of the Atlantic* »

# 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. A lot.
  - 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 (including 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 »

# Google Books?



Don't Let Google Close the Book on Reader Privacy!

# Thanks for your attention

For more food for  
thought:

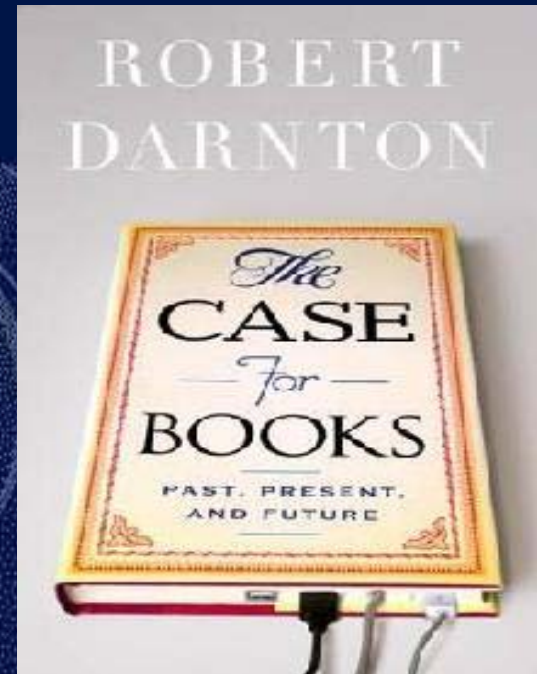
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