

ACADEMIC AUTHOR OBJECTIONS TO THE GOOGLE BOOK SEARCH SETTLEMENT

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INTRODUCTION	491
I. THE GENESIS OF THE PROPOSED GOOGLE BOOK SETTLEMENT	492
II. MIXED REACTIONS TO THE PSA	494
III. ACADEMIC AUTHOR OBJECTIONS TO THE PASA	497
A. <i>The Authors Guild Failed to Adequately Represent the Interests of Academic Authors</i>	499
B. <i>Objections to the Unclaimed Work Provisions of the PASA</i>	503
C. <i>The Apparent Exclusion of Unregistered Inserts Is Unfair, and the Exclusion of Unregistered Books May Be Unfair Under a Recent Supreme Court Case</i>	508
D. <i>The Court Must Require Disclosure of Any Termination Agreement That Pertains to the GBS Settlement</i>	511
E. <i>The Publisher Plaintiffs May Be Undermining the PASA</i>	512
F. <i>Consolidated Academic Author Objections</i>	514
APPENDIX 1	517

INTRODUCTION

The vision of a universal digital library that would contain the accumulated knowledge embodied in tens of millions of books from the collections of major research libraries—a digital library that would last forever—is unquestionably an inspiring one.¹ Proponents of the Proposed Amended Settlement Agreement (PASA) of the *Authors Guild v. Google* lawsuit hold out this vision as the principal reason why courts

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1. Google is far from the only seer to recognize the societal value of a vast digital library of books. See, e.g., ROBERT DARNTON, *THE CASE FOR BOOKS: PAST, PRESENT, AND FUTURE* 10–20 (2009).

should approve this proposal.² The PASA would give Google a license to make available to members of the public millions of books and inserts (e.g., separately authored book chapters) published in the United States, Canada, the United Kingdom, and Australia.³ Following approval of the PASA, Google plans to make digital books available for free through one public access terminal at each public library and through “preview” uses of the books (displaying up to 20% of their contents) in response to Google search queries.⁴ Full texts of these books could also become available through institutional subscriptions or consumer purchases of individual books.⁵ While academic authors and researchers can easily understand the appeal of this vision and heartily hope that this vision will be realized, this Article will explain why approval of the PASA is unlikely to fulfill the universal digital library ambition and why academic authors should object to some of its important terms.

I. THE GENESIS OF THE PROPOSED GOOGLE BOOK SETTLEMENT

Google did not initially set out to create a universal digital library with the Google Book Search (GBS) project. In early public statements, Google spokesmen proclaimed that Google was scanning books to promote greater public access to them by indexing their contents, providing a few small snippets of texts responsive to Google users’ search queries, and supplying links to libraries from which relevant books could be obtained and to vendors from whom the books could be purchased.⁶ While Google scanned some books for GBS with the permission of copyright owners through its Partner Program,⁷ the overwhelming majority of books in the GBS corpus have come from the collections of major research libraries, such as the University of Michigan’s library.⁸ These libraries contracted with Google to provide it with books to be

2. See Sergey Brin, *A Library to Last Forever*, N.Y. TIMES, Oct. 8, 2009, at A31; see also Proposed Amended Settlement Agreement, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Nov. 9, 2009), http://thepublicindex.org/docs/amended_settlement/amended_settlement.pdf [hereinafter PASA].

3. PASA, *supra* note 2, §§ 1.13 (definition of “Amended Settlement Class”), 1.19 (definition of “Book”), 1.75 (definition of “Insert”).

4. *Id.* §§ 4.3 (preview uses), 4.8(a)(i) (library access).

5. *Id.* §§ 4.1 (institutional subscriptions), 4.2 (consumer purchases).

6. See Eric Schmidt, *Books of Revelation*, WALL ST. J., Oct. 18, 2005, at A18. At that time, GBS was known as “Google Print.” *Id.* Other early public statements characterized Google Books as an “enhanced card catalog.” See Google Books Library Project, <http://books.google.com/googlebooks/library.html> (last visited Feb. 11, 2010).

7. Schmidt, *supra* note 6.

8. See, e.g., Jeffrey Toobin, *Google’s Moon Shot*, NEWYORKER.COM, Feb. 5, 2007, http://www.newyorker.com/reporting/2007/02/05/070205fa_fact_toobin (reporting that the University of Michigan expected Google to copy all seven million books in its collections in six years).

scanned, in return for which they expected to get digitized copies of books from their collections for preservation and other legitimate purposes.⁹ Google's library partners also expected Google to provide links to books in their collections so that readers would have better access to books.¹⁰

There are currently about 12 million books in the GBS corpus, of which about 2 million are in the public domain and 10 million in-copyright.¹¹ Google has consistently asserted that this scanning, indexing, and snippet-providing is a fair and non-infringing use of in-copyright books.¹²

The Authors Guild (Guild) and the Association of American Publishers (AAP) disagreed with this assessment. In September 2005, the Guild and three of its members brought a class action lawsuit against Google alleging that its book-scanning project was copyright infringement.¹³ Soon thereafter, five major trade publishers—at the time, all members of the Google Partner Program—brought a similar lawsuit.¹⁴ Rather than litigate, however, the parties soon entered into settlement negotiations.¹⁵ Representatives of the publisher plaintiffs and of the Authors Guild approached Google with the idea of settling the two lawsuits by combining them into one class action. The combined class action would have a publisher subclass and an author subclass, and the settlement would establish a new digital marketplace for books.¹⁶

9. A collection of agreements between several major research universities' libraries and Google concerning the scanning of books from the libraries' collections can be found at the New York Law School website, The Public Index, <http://thepublicindex.org/documents/libraries> (last visited Mar. 13, 2010).

10. See About Google Books, <http://books.google.com/googlebooks/about.html> ("borrow this book" links provided for Google Books).

11. See, e.g., Posting of Fred von Lohmann to DeepLinks Blog, Google Book Settlement 2.0: Evaluating Access, <http://www.eff.org/deeplinks/2009/08/google-book-search-settlement-access> (Nov. 17, 2009).

12. See Schmidt, *supra* note 6; Toobin, *supra* note 8.

13. See Class Action Complaint, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005), <http://thepublicindex.org/docs/complaint/authors.pdf>.

14. See Complaint, McGraw-Hill Cos. v. Google Inc., No. 05 CV 8881 (S.D.N.Y. Oct. 19, 2005), <http://thepublicindex.org/docs/complaint/publishers.pdf>.

15. See, e.g., Objection of Scott E. Gant to Proposed Settlement, and to Certification of the Proposed Settlement Class and Sub-Classes at 3 n.5, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Aug. 19, 2009), <http://thepublicindex.org/docs/objections/gant.pdf> [hereinafter Gant Objection] (pointing out how little discovery and motion practice have been done in the case). At the October 7, 2009 status conference, Michael Boni, lawyer for the author subclass, stated that no depositions had been taken in the case. Transcript of Status Conference at 9, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Oct. 7, 2009), http://thepublicindex.org/docs/case_order/Status%20Conference%20Transcript.pdf.

16. See Objection of Amazon.com, Inc. to Proposed Amended Settlement at 2, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Jan. 27, 2010), http://thepublicindex.org/docs/amended_settlement/amazon.pdf (describing the negotiations). These negotiations produced the Proposed Settlement Agreement, Authors Guild, Inc. v.

Under this deal, Google would pay a relatively modest sum (such as the \$60 per book in the Proposed Settlement Agreement, or PSA) to copyright owners whose books it had scanned, and the settlement class would then give Google a license to commercialize out-of-print books.¹⁷ Copyright owners would get paid most of the revenues from this commercialization through either the Google Partner Program or a Book Rights Registry that would be created with funds from the settlement.¹⁸ Google found this proposition agreeable; and the parties spent thirty months hammering out the details.¹⁹ Google's library partners participated in some of these negotiations, for the agreement included commitments to provide institutional subscriptions at reasonable prices to these libraries, along with releases of liability that the libraries might otherwise have incurred for contributing to Google's scanning project.²⁰ The PSA was announced on October 28, 2008.²¹

II. MIXED REACTIONS TO THE PSA

Harvard's Librarian, Robert Darnton, was among the first commentators to express reservations about the PSA.²² Though he recognized the substantial benefits of improving access to books, Darnton worried about the long-term consequences of giving one firm a monopoly over access to millions of books.²³ Darnton's concerns were echoed and amplified in a joint statement by three library associations—the American Library Association, the Association of Research Libraries,

Google Inc., No. 05 CV 8136 (S.D.N.Y. Oct. 28, 2008), <http://www.googlebooksettlement.com/intl/en/Settlement-Agreement.pdf> [hereinafter PSA].

17. PSA, *supra* note 16, §§ 2.1(a)–(b), 2.2.

18. *Id.* § 2.1(c).

19. See Press Release, Google Inc., Authors, Publishers, and Google Reach Landmark Settlement (Oct. 28, 2008), http://www.google.com/intl/en/press/pressrel/20081027_booksearchagreement.html [hereinafter Google Press Release].

20. See PSA, *supra* note 16, arts. IV, VII, VIII, X.

21. See Google Press Release, *supra* note 19. The PSA anticipated that \$45 million would be set aside as payouts to rights holders whose books Google had already scanned, \$60 for each book, \$15 for each insert, and \$5 for each partial insert. PSA, *supra* note 16, § 2.1(b). The lawyers for the author and publisher subclasses will get a total of \$45.5 million if the settlement is approved. *Id.* § 5.5 (author subclass lawyers will get \$30 million); Updated Notice of Class Action Settlement Agreement 27, http://static.googleusercontent.com/external_content/untrusted_dlcp/www.googlebooksettlement.com/en/us/intl/en/Final-Notice-of-Class-Action-Settlement.pdf (publisher lawyers will get \$15.5 million from the settlement between Google and the publishers in *McGraw-Hill Cos. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y.)). The rest of the settlement funds are being used to create the new collecting society, the Book Rights Registry, which will be created upon approval of the settlement. PSA, *supra* note 16, §§ 5.1, 5.5.

22. Robert Darnton, *Google and the Future of Books*, N.Y. REV. BOOKS, Feb. 12, 2009, at 9.

23. *Id.*

and the Association of College and Research Libraries—on the PSA.²⁴ On the one hand, they welcomed the greatly enhanced public access to books that approval of the settlement could provide,²⁵ and recognized that the settlement was the most efficient way to “cut[] the Gordian knot” of high transaction costs of rights clearances that might otherwise hinder creation of a digital book database.²⁶ Yet, they worried that because no one but Google would be able to create an institutional subscription database (ISD) of these books, subscription prices would over time become prohibitively expensive.²⁷ And unless the court retained jurisdiction and engaged in vigilant oversight, the associations warned that approval of the settlement might “compromise fundamental library values such as equity of access to information, patron privacy, and intellectual freedom.”²⁸ In the PSA, Google reserved the right to exclude books from the ISD for editorial or non-editorial reasons.²⁹ There is reason to expect governments and other groups to pressure Google to exercise this censorship power.³⁰

University faculty also became concerned about the proposed settlement. In late April 2009, for example, sixteen professors sent a joint letter to Judge Denny Chin who was scheduled to preside over the fairness hearing on the PSA to ask for a six month postponement of that hearing and a concomitant extension of time for opting out, commenting on, or filing objections to the settlement.³¹ This letter pointed to considerable ignorance and confusion about the proposed settlement among academic authors, and expressed concern that some of its terms, including provisions for close monitoring of uses of books without privacy protections and restrictions on annotation-sharing, were inconsistent with norms of academic communities.³² At the behest of the University of California-wide committee on libraries, the Academic Council of the University of California decided to send a letter to the judge to express reservations about the risks of excessive pricing,

24. Library Association Comments on the Proposed Settlement, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. May 12, 2009), http://thepublicindex.org/docs/letters/acrl_ala_arl.pdf [hereinafter Library Comments].

25. *Id.* at 2.

26. *Id.* at 5.

27. *Id.* at 7–9. The core ISD that would be licensed to higher educational institutions would consist of all books eligible for such subscriptions (that is, all out-of-print books whose rights’ holders have not opted to exclude their books from the ISD, plus any in-print books whose rights’ holders have opted in to the ISD). PASA, *supra* note 2, § 4.1(a)(v).

28. Library Comments, *supra* note 24, at 2.

29. PSA, *supra* note 16, § 3.7(e).

30. von Lohmann, *supra* note 11.

31. Letter from Pamela Samuelson, Richard M. Sherman Professor of Law, Univ. of Cal., to Judge Denny Chin, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Apr. 27, 2009), 17-15 Mealey’s Litig. Rep. Intell. Prop. 14 (2009).

32. *Id.* at 2.

inadequate attention to open access preferences of academic authors, and lack of privacy protections that might result from approval of the GBS settlement without modifications.³³

Judge Chin granted an extension of time for comments, objections, and opt-outs to September 4th, and rescheduled the fairness hearing for October 7th.³⁴ By the September deadline, approximately 400 comments, objections, and amicus curiae briefs had been filed with the court, the overwhelming majority of which were highly critical of the settlement.³⁵ France and Germany, as well as numerous publisher and author groups from other countries, were strongly opposed to the inclusion of foreign books in the settlement and expressed outrage at inadequacies of notice to foreign class members.³⁶ Some United States-based author organizations—notably including the National Writers Union—expressed strong opposition to the settlement, largely because its terms were unfair to authors,³⁷ a conclusion with which many authors seemed to agree.³⁸ A September 3rd letter on behalf of 65 academic authors objected to the settlement on numerous grounds, including the lack of

33. Letter from the Academic Council, Univ. of Cal., to Judge Denny Chin, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Aug. 13, 2009), *available at* <http://thepublicindex.org/docs/letters/ucfaculty.pdf>.

34. Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Apr. 28, 2009) (order granting extension), 17-15 Mealey's Litig. Rep. Intell. Prop. 14 (2009).

35. See Brandon Butler, The Google Books Settlement: Who Is Filing And What Are They Saying? 3 (2009), <http://www.arl.org/bm~doc/googlefilingcharts.pdf> (categorizing various types of court filings).

36. Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic at 7, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 8, 2009), *available at* http://thepublicindex.org/docs/letters/french_republic.pdf; Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany at 11, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Aug. 31, 2009), *available at* <http://thepublicindex.org/docs/letters/germany.pdf>.

37. See Objections to Class Action Settlement and Notice of Intent to Appear on Behalf of Class Members Harold Bloom, et al. at 7-8, Authors Guild, Inc. v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 8, 2009), <http://thepublicindex.org/docs/objections/bloom.pdf> [hereinafter Bloom Objections] (including the National Writers Union); see, e.g., Posting of Motoko Rich to Mediader Blog, William Morris Advises Clients To Say No to Google Settlement, <http://mediadecoder.blogs.nytimes.com/2009/08/07/william-morris-advises-clients-to-say-no-to-google-settlement> (Aug. 7, 2009); Posting of Motoko Rich to Mediader Blog, Writers Groups Oppose Google Settlement, <http://mediadecoder.blogs.nytimes.com/2010/01/06/writers-groups-oppose-google-settlement/> (Jan. 6, 2010) (reporting that the National Writers Union, the American Society of Journalists and Authors, and the Science Fiction and Fantasy Writers of America oppose the Google settlement as unfair to authors and are urging authors to opt out).

38. See, e.g., Lynn Chu, *Very Important Notice to All Writers' Reps Clients*, WRITERS REPS, Dec. 22, 2009 ("We urge all of our clients, indeed all authors, to take advantage of this new opportunity to opt themselves out."); Posting of Ursula K. Le Guin to Book View Café Blog, Le Guin on the Google Settlement, <http://blog.bookviewcafe.com/2010/01/07/le-guin-on-the-google-settlement/#comments> (Jan. 7, 2010) (explaining LeGuin's objections to the Google settlement, supplemented with comments by authors who are joining her opposition to the settlement).

meaningful constraints on the pricing of institutional subscriptions.³⁹

Some libraries, researchers, and civil liberties groups expressed support for the GBS settlement,⁴⁰ but the tide turned against the PSA after the U.S. Department of Justice filed a Statement of Interest in mid-September recommending against approval of the PSA.⁴¹ The DOJ also questioned whether the PSA complied with the strictures of Rule 23 of the Federal Rules of Civil Procedure, which establishes standards about adequacy of representation of absent class members, fair notice of the settlement terms, and the like.⁴² The DOJ also regarded numerous provisions to be inconsistent with the antitrust laws.⁴³

Shortly after the DOJ's submission, lawyers representing the author and publisher subclasses asked for a postponement of the fairness hearing to give them a chance to produce a revised settlement agreement that would respond to DOJ and other objections.⁴⁴

III. ACADEMIC AUTHOR OBJECTIONS TO THE PASA

On November 13th, the parties filed the PASA with the court.⁴⁵ Supplemental notice of the amended agreement was ordered, and the fairness hearing was reset for February 18, 2010.⁴⁶ Class members were given a new chance to opt out, object, or otherwise file comments on the PASA by January 28th.⁴⁷ One of the approximately sixty documents filed by that deadline was a letter submitted on behalf of 150 academic authors whose objections to the PASA are set forth in the remainder of

39. Letter from Pamela Samuelson, Richard M. Sherman Professor of Law, University of California on Behalf of Academic Authors, to Judge Denny Chin, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 3, 2009), *available at* <http://thepublicindex.org/docs/letters/samuelson.pdf> [hereinafter Academic Objection Letter].

40. *See, e.g.*, Letter from Members of the Stanford Univ. Computer Sci. Dep't., to Judge Denny Chin, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 3, 2009) (on file with author); Letter from Paul Courant, Univ. Librarian & Dean of Libraries, Univ. of Mich., to Judge Denny Chin, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 10, 2009), *available at* <http://thepublicindex.org/docs/letters/Courant.pdf>.

41. *See* Statement of Interest by the U.S. Dep't. of Justice Regarding the Proposed Settlement, Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 18, 2009), <http://thepublicindex.org/docs/letters/usa.pdf> [hereinafter DOJ Statement].

42. *Id.* at 4-5; *see also* FED. R. CIV. P. 23.

43. DOJ Statement, *supra* note 41, at 16-17.

44. Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Sept. 24, 2009) (order adjourning fairness hearing), *available at* http://thepublicindex.org/docs/case_order/20090924.pdf.

45. *See* PASA, *supra* note 2.

46. Authors Guild, Inc. v. Google Inc., No. 05-CV-08136 (S.D.N.Y. Nov. 19, 2009), http://thepublicindex.org/docs/amended_settlement/order_granting_prelim_approval.pdf (order granting preliminary approval of amended settlement for purposes of authorizing supplemental notice to class members).

47. *Id.*

this article.⁴⁸

This letter supplemented one submitted to the court on September 3, 2009, on behalf of sixty-five academic authors and researchers, which stated numerous objections to the proposed settlement.⁴⁹ Among other things, the earlier letter expressed concerns about the lack of meaningful constraints on price increases for the ISD, the de facto monopoly that Google would obtain to orphan books, which posed risks of excessive pricing of the ISD, inadequate user privacy protections, and excessive restrictions on non-consumptive research.

This supplemental academic author objection letter began by observing that Google's enterprise should not be conceived of as a library.⁵⁰ It is instead a complex and large-scale commercial enterprise in which Google—and Google alone—will obtain a license to sell millions of books for decades to come. If the PASA is approved, millions of rights holders will be forced to join the BRR or the Google Partner Program to exercise any control over Google's use of their books.

The remainder of this Article is derived from the supplemental academic author objection letter. Section A explains that the interests of academic authors were not adequately represented during the negotiations that yielded the PSA and the PASA. Section B discusses objections to provisions in the PASA concerning the collection and disposition of revenues derived from "orphan" and other unclaimed books. Section C discusses an amendment to the proposed settlement that is susceptible to an interpretation that would disadvantage academic authors of what the PSA and PASA designate as "inserts" (e.g., book chapters). Section D objects to PASA amendments omitting reference to a termination agreement negotiated by the litigants. If there is a termination agreement that is still in force, it ought to be disclosed to members of the class, as well as to the Court. If not, the litigants should explicitly abjure it.

Section E raises concerns about whether the parties' professed

48. Letter from Pamela Samuelson, Richard M. Sherman Professor of Law, Univ. of Cal., to Judge Denny Chin, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-08136 (S.D.N.Y. Jan. 27, 2010), available at http://thepublicindex.org/docs/amended_settlement/Samuelson_supplemental_objection.pdf [hereinafter Supplemental Academic Objection Letter] (addressing the supplemental academic author objections).

49. Academic Objection Letter, *supra* note 39. For a more complete discussion of the possible benefits and risks of the proposed GBS settlement, see Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 95 MINN. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535067.

50. See Pamela Samuelson, *Google Books Is Not a Library*, HUFFINGTON POST, Oct. 13, 2009, http://www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html. Nor will GBS be "universal," given the narrowing of the class, the opt-out, exclusion and removal requests, and directions from some rights holders not to scan their books. See also Lawrence Lessig, *For the Love of Culture*, THE NEW REPUBLIC.COM, Feb. 4, 2010, <http://www.tnr.com/article/the-love-culture>.

aspirations for GBS to be a universal digital library are being undermined by their own withdrawals of books from the regime the settlement would establish, as well as by actions of other rights holders who have opted out of the settlement because they find its terms unacceptable. Information has come to light since early September 2009 that undermines the confidence of academic authors that the settlement will bring about the public benefits the litigants say they intend.

Section F offers a list of changes that should be made to the PASA to make the settlement fair and adequate as to academic authors. Even with these modifications, however, serious questions remain about whether the class defined in the PASA can be certified consistent with Rule 23, whether the settlement is otherwise compliant with Rule 23, whether the settlement is consistent with the antitrust laws, and whether approval of this settlement is an appropriate exercise of judicial power. These questions have been addressed in numerous other submissions,⁵¹ and while the supplemental academic author objection letter does not discuss them, it joins the misgivings that others have expressed.

While approval of the GBS settlement would unquestionably bring about some public benefits, chiefly by providing significantly improved access to books, it is important for the court to recognize and give appropriate weight to the substantial risks that the proposed settlement poses. These risks can be avoided or ameliorated in one of two ways: either by rejecting the settlement altogether or by conditioning its approval on the parties' willingness to make changes to the PASA that address meritorious objections.

A. The Authors Guild Failed to Adequately Represent the Interests of Academic Authors

The litigants who spent two and a half years negotiating the initial PSA and now the PASA have interests and preferences that dramatically diverge from those of many rights holders who were not at the negotiating table, including academic authors.⁵² It is thus unsurprising that hundreds of authors and other rights holders have objected to the

51. See, e.g., Gant Objection, *supra* note 15; Statement of Interest by the U.S. Dep't. of Justice Regarding the Proposed Amended Settlement, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Feb. 4, 2009), *available at* http://thepublicindex.org/docs/amended_settlement/usa.pdf [hereinafter Second DOJ Statement].

52. Nor is it surprising that several public interest organizations have expressed opposition to the settlement. See, e.g., Brief for Consumer Watchdog as Amici Curiae Opposing Settlement, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Sept. 7, 2009), *available at* <http://www.jdsupra.com/post/documentViewer.aspx?fid=d2009bc1-6a12-40b5-b92d-6a6965dddbb1>; Brief for Public Knowledge as Amici Curiae Opposing Settlement, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Sept. 8, 2009), <http://www.publicknowledge.org/pdf/pk-gbs-amicus-20090908.pdf>.

settlement and even more have opted out.⁵³

The supplemental academic author letter reaffirmed the September 3rd academic author objections to the PSA because the PASA does not adequately respond to objections set forth in that letter.⁵⁴ The supplemental letter stated some new objections because certain amendments to the PASA are contrary to the interests of academic authors, members of the Author Subclass.

The academic author objections are rooted in the same fundamental flaw in the GBS settlement process: the Authors Guild and the named author plaintiffs did not fairly and adequately represent the interests of academic authors in negotiating either the PSA or the PASA.⁵⁵ Simply put, the Authors Guild and its members do not share the interests, professional commitments, or values of academic authors.⁵⁶ Only a small fraction of Authors Guild members write scholarly books of the sort likely to be found in major research libraries.⁵⁷ Nor does the AAP share

53. See, e.g., Bloom Objections, *supra* note 37; Letter from Science Fiction & Fantasy Writers of Am., Inc. et al., Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Jan. 27, 2009) (letter on file with author). The Plaintiffs report that 6800 rights holders opted out of the PASA. See Memorandum Supporting Plaintiffs' Motion for Final Settlement at 37, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Feb. 11, 2010) (Memorandum on file with author).

54. An exception is a provision of the PASA that now expressly recognizes that some rights holders may want to make books and inserts available on an open access basis, such as by Creative Commons licenses. See PASA, *supra* note 2, § 4.2 (a)(i). However, there is still reason to be concerned that the Book Rights Registry (BRR) will not welcome and might even discourage academic authors' exercise of this option because the BRR will collect no revenues from Google if books are available on open access terms. BRR will find it difficult to have sufficient revenues to sustain its operations if academic authors exercise this option with any frequency.

55. Scott Gant has made a set of vigorous objections to the PSA as to class action notice deficiencies and other Rule 23 problems with the PSA. See Gant Objection, *supra* note 15; see also Supplemental Objection of Scott E. Gant to Proposed Amended Settlement Agreement and to Certification of the Class, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Jan. 26, 2010), available at http://thepublicindex.org/docs/amended_settlement/Gant_Objection.pdf. The Plaintiffs in the Authors Guild case disagree. See Plaintiffs' Supplemental Memorandum Responding to Specific Objections, Authors Guild, Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Feb. 11, 2010), available at http://thepublicindex.org/docs/amended_settlement/Plaintiffs_Supplemental_Memorandum_of_Law.pdf [hereinafter Supplemental Memorandum].

56. The Authors Guild, for instance, generally limits its membership to authors who have contracts with established American publishers that include a "royalty clause and a significant advance." See Guild Membership Eligibility, <http://www.authorsguild.org/join/eligibility.html> (last visited Feb. 20, 2010). Few academic authors would meet these criteria. The interests of professional writer-members of the Authors Guild in maximizing revenues are reflected in the PSA and the PASA. An example is PASA, *supra* note 2, § 4.8(a)(ii) that requires paying fees for pages printed out at public access terminals. Academic authors would regard printing a few pages from an out-of-print book to be fair use. See Academic Objection Letter, *supra* note 39, at 2-7.

57. The Authors Guild website links to approximately 3000 of their members' websites. See Member Websites, http://www.authorsguild.org/news/member_websites/a.html (last visited

the commitments and values of scholarly authors, as is evident from its recent efforts to thwart open access policies for government-funded academic research,⁵⁸ policies which scholars generally support.⁵⁹ Academic authors, almost by definition, are committed to maximizing access to knowledge. The Guild and the AAP, by contrast, are institutionally committed to maximizing profits.

Nor does the Guild have the same legal perspective as most academic authors on the central issue in litigation in the *Authors Guild* case, to wit, whether scanning books in order to index their contents and make snippets available constitutes copyright infringement.⁶⁰ Academic authors are more likely than Guild members to consider scanning books for information-locating purposes to be a non-infringing use because indexes and snippets advance scholarly research and improve access to knowledge, especially when, as with GBS, searches yield links to libraries from which the relevant books can be obtained.⁶¹

Rule 23 of the Federal Rules of Civil Procedure requires courts to consider whether there is sufficient commonality of interest and typicality of claims among those who are within a putative class before certifying it or approving a class-binding settlement.⁶² While this Article focuses on academic author objections to the PASA, there are other

Mar. 15, 2010). A review of those websites reveals that slightly over 10 percent of these Guild members have written books of the sort likely to be found in major research libraries whose collections Google has scanned. So far as one can discern from these websites, the Guild's members primarily write works aimed at non-scholarly audiences. They write, for instance, romance novels, erotica, travelogues, magazine articles, and magic books. They may be accomplished writers, but they are unrepresentative of the interests of academic authors whose books constitute most of the GBS corpus.

58. Ass'n of Research Libraries, Issue Brief: AAP PR Campaign Against Open Access and Public Access to Federally Funded Research (Feb. 2007), <http://www.arl.org/bm~doc/issue-brief-aap-pr.pdf>.

59. The negotiating party whose interests most closely align with the values of scholarly communities is, ironically enough, Google. However, that firm cannot be an adequate representative of the interests of scholarly authors in negotiating a class action settlement.

60. This issue necessarily forms the basis on which any settlement must be based. See Second DOJ Statement, *supra* note 51, at 7 (noting the serious questions of validity that arise when parties try to resolve future claims well beyond the facts of the complaint in the absence of class members).

61. Most academic commentary on Google's fair use defense supports it. See, e.g., Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors or Napster for Books?*, 61 U. MIAMI L. REV. 87 (2006) (arguing that scanning books to index them is fair use); Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, N.Y.U.L. Rev. (forthcoming) (manuscript at 11–25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437812 (comparing the proposed GBS settlement to fair use outcome); see also Frank Pasquale, *Copyright in an Era of Information Overload*, 60 VAND. L. REV. 135 (2007) (discussing the need for broad fair use for search engines to help people find information). The DOJ recognizes that Google's pre-settlement conduct was carefully kept within plausible fair use bounds. Second DOJ Statement, *supra* note 51, at 7.

62. FED. R. CIV. P. 23(a); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 201–02 (2d Cir. 2008).

rights holders who believe the Guild and the AAP had interests quite different from and/or in conflict with theirs. Indeed, when one considers the diverse complaints about the settlement expressed in the hundreds of objections already filed in this matter, it is natural to question whether the Rule 23 standards have been and can be met for a class consisting of all persons owning U.S. copyright interest in one or more books or inserts published in the United States, the United Kingdom, Canada, or Australia.

That said, the perspectives of academic authors on the PSA and the PASA should be given particular weight in the court's determination about whether the PASA is fair and worthy of approval. The overwhelming majority of books in the GBS corpus are from the collections of major research libraries, such as the University of Michigan and the University of California.⁶³ Not surprisingly, a large majority of those books were written by scholars for scholarly audiences.⁶⁴ Academic authors also far outnumber the members of the Authors Guild. There are more than a million full-time academics working at colleges and universities in the United States,⁶⁵ for many of whom publication of books, book chapters, and the like is a career requirement, as well as a source of deep satisfaction. The books and inserts written by academic authors are also of the sort likely to be found in the collections of major research libraries.

Of course, academic authors sometimes assign their copyrights to publishers of their books, but this does not necessarily change the calculus. Rights to authorize electronic editions of these books may well be new and unforeseen uses of their works, rights that seem to reside with authors under *Random House, Inc. v. Rosetta Books L.L.C.*⁶⁶ This case held that authors of literary works have the right to authorize third parties to make e-books of them, even though they had assigned rights to publishers to make and distribute print versions.⁶⁷ Many publishing

63. See, e.g., *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 1-3 (2009) (Prepared Statement of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.), available at http://judiciary.house.gov/hearings/printers/111th/111-31_51994.pdf [hereinafter *Hearing*] (estimating that 2 million of the 10 million books then in the GBS corpus are books in the Google Partner Program, while 8 million were obtained from research library partners).

64. See, e.g., Brian Lavoie & Lorcan Dempsey, *Beyond 1923: Characteristics of Potentially In-copyright Print Books in Library Collections*, D-LIB MAG., Nov.-Dec. 2009, (reporting that 78% of the non-fiction books in the collections of three of Google's research library partners are scholarly books and that non-fiction books constitute more than 90% of library collections).

65. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 (2009), <http://www.bls.gov/oco/ocos066.htm> (finding nearly 1.7 million post-secondary teaching positions in 2008).

66. 283 F.3d 490 (2d Cir. 2002).

67. *Id.* at 491. The court considered the widely used contractual language in book

contracts also provide that copyrights revert to authors when their books go out of print (which millions of books in the GBS corpus are). For these reasons, academic authors likely hold the relevant copyright interest in many books and inserts in the GBS corpus.

B. Objections to the Unclaimed Work Provisions of the PASA

The PSA would have created a blatant conflict of interest between those class members who had registered their books with the BRR, as the Guild expects its members to do, and those who had not.⁶⁸ Funds from unclaimed books would have been held in escrow for five years, after which, revenues from Google's commercialization of them would have been paid out to BRR-registered rights holders.⁶⁹ This would not only have given BRR-registrants a windfall from books in which they owned no rights, but it also would have created structural disincentives for BRR to search for owners of unclaimed books. Not surprisingly, the Department of Justice objected to this as inconsistent with Rule 23.⁷⁰

Amendments in the PASA seemingly acknowledge the existence of this intra-class conflict, but do not resolve it in a manner that is fair, reasonable, or adequate to class members or consistent with the public interest.

The PASA calls for the appointment of an unclaimed work

publishing contracts—"to publish, print, and sell their copyrighted works 'in book form'"—as a limited grant, not a grant of all copyright interests. *Id.* It is worth noting that the Authors Guild submitted an amicus curiae brief in support of Rosetta in that case, while the AAP submitted one in support of Random House. Hidden underneath the surface of the proposed GBS settlement is a set of compromises that address serious conflicts that exist between authors and publishers over rights to control and compensation for e-book publications. *See* PASA, *supra* note 2, Att. A. The conflicts are reflected in testimony of Paul Aiken, Executive Director of the Authors Guild, to Congress:

One of the reasons this thing [the PSA] took 30 months to negotiate was that we weren't just negotiating with Google. It was authors negotiating with publishers, and we rarely see eye to eye. So we had months and months and months of negotiations, trying to work out our differences.

Hearing, *supra* note 63, at 143. Had Random House tried to resolve this e-book rights issue by bringing a class action lawsuit on behalf of a class of publishers against a class of authors in order to negotiate a settlement along the lines of Attachment A, the case would have been dismissed because the dispute would have involved both varying contract language and different state laws so that Rule 23 requirements could not have been satisfied. Attachment A takes advantage of the settlement on other issues as to which Google is the antagonist to bring about a new allocation of copyright ownership, licensing, and reversion rights and procedures that, but for the settlement, could only have been accomplished through legislative action.

68. *See* DOJ Statement, *supra* note 41, at 9.

69. PASA, *supra* note 16, § 6.2(a).

70. DOJ Statement, *supra* note 41, at 9–10. The initial willingness of the class representatives to negotiate such a provision reflects considerable insensitivity to the interests of unclaimed work rights holders. It should not have required an objection from DOJ to get fair treatment for these rights holders.

fiduciary (UWF) to make certain decisions about Google's exploitation of unclaimed works and to act as a gatekeeper for funds owed to rights holders of unclaimed works.⁷¹ It also directs that funds generated by Google's commercialization of unclaimed works should be held in escrow for ten years, that these funds are to be used to search for rights holders, and that after ten years, unclaimed work funds can be paid out to charities or otherwise allocated in a manner consistent with state laws.⁷²

These provisions are objectionable for several reasons. For one thing, there are no meaningful guarantees of independence for this so-called fiduciary.⁷³ Nor are there sufficient criteria for how he/she should perform a fiduciary role for rights holders in unclaimed books. The UWF is, for example, to be chosen by a supermajority of the BRR Board,⁷⁴ and will apparently be housed in the BRR offices. The BRR, not the fiduciary, will hold onto the unclaimed funds; after five years, the BRR is authorized to use a significant portion of the unclaimed work funds to search for rights holders, although this is subject to the UWF's approval.⁷⁵

Second, the powers that the PASA grants to the UWF are in some respects too limited and in at least one respect too broad. The UWF can, for instance, choose to change the default setting for an unclaimed in-print book from "no display" to "display" (that is, from a setting that does not allow Google to commercialize the books to one which does allow commercialization), but not the reverse.⁷⁶ The UWF also has the power to approve changes in pricing bins for unclaimed books available through the consumer purchase model,⁷⁷ but seemingly no power to set prices for individual unclaimed books nor to provide input about price-setting institutional subscriptions. This seems strange because all or virtually all of the unclaimed books will be in the ISD and revenues derived from the ISD are likely to be substantial. The UWF also has the power to disapprove of Google's plan to discount prices of unclaimed books,⁷⁸ but

71. PASA, *supra* note 2, § 6.2(b)(iii). The only qualification PASA provides for this position is a negative one: he/she cannot be a book author or publisher. *Id.*

72. *Id.* §§ 6.2(b)(iv), 6.3(a).

73. *See* Second DOJ Statement, *supra* note 51, at 13 (questioning the independence of the UWF).

74. PASA, *supra* note 2, § 6.2(b)(iii).

75. *Id.* § 6.3(a)(i).

76. *Id.* §§ 6.2(b)(iii), 3.2(e)(i). The UWF would have structural incentives to exercise the power to switch the default for unclaimed in-print books from "no display" to "display uses" in order to generate revenues that could be used to search for their rights holders to encourage them to claim the books.

77. *Id.* § 4.2(c)(i).

78. *Id.* § 4.5(b)(ii). There may be little incentive for the UWF to agree to discounts as it would reduce the revenues over which the UWF would have some control. BRR may also not want unclaimed works to be discounted, as these books will compete with those of registered rights holders.

apparently lacks the power to recommend discounts.

Of particular importance to academic authors, the UWF lacks power to make unclaimed books available on an open access basis.⁷⁹ While divining the preferences of all unclaimed rights holders may be challenging, most unclaimed books in the GBS corpus are likely to be books written by scholars for scholars. Most such authors would prefer that their out-of-print books be available on an open access basis, especially insofar as Google is making these books available to institutions of higher learning.⁸⁰ The UWF should have the authority to make books available on an open access basis.

One highly objectionable power the PASA grants to the UWF is the power to authorize Google to alter the texts of unclaimed books.⁸¹ Academic authors can imagine no circumstance under which changes to the historical record embodied in books from major research libraries would be justifiable. Granting the UWF the power to authorize alteration of texts poses serious risks of censorship.

Third, if books remain unclaimed after ten years during which the UWF and BRR have made a reasonably diligent search to find their rights holders, the books should be deemed to be “orphans,” a term which is typically defined to include works whose rights holders could not be found after a reasonably diligent search.⁸² The PASA should contain a provision requiring the UWF to disclose which unclaimed books it has concluded are, in fact, orphans so that others could decide whether to make them available.⁸³

Fourth, the PASA would intrude upon Congressional prerogatives regarding orphan works legislation in a post-settlement world. The PASA gives the UWF authority to license copyright interests in unclaimed books to third parties “to the extent permitted by law.”⁸⁴ Existing law does not allow *any* licensing of in-copyright books to third parties without the rights holders’ permission. The only way that the UWF could get the legal authority to issue such licenses would be from

79. Nor apparently can the UWF direct Google to exclude unclaimed books from any newly approved revenue models or to remove them from the GBS corpus. Most of the UWF’s powers are directed to revenue-enhancement.

80. See Letter from the Academic Council, Univ. of Cal., *supra* note 33, at 4–5.

81. PASA, *supra* note 2, § 3.10(c)(i).

82. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), <http://www.copyright.gov/orphan/orphan-report.pdf>.

83. The settlement agreement should also require the UWF, as well as the BRR and Google, to make publicly available any information they possess about books they discover to be in the public domain (owing, for instance, to the author’s failure to renew copyright). These actors may have financial incentives to withhold this information because they may benefit from Google’s commercialization of public domain books. The PASA even allows registered rights holders to share in revenues mistakenly earned by Google from the sale or licensing of public domain books. PASA, *supra* note 2, § 6.3(b).

84. *Id.* § 6.2(b)(i).

Congress, presumably through the passage of orphan works legislation.

By establishing a private escrow regime for collecting and distributing revenues that Google may earn from its commercialization of orphan books, the PASA seems to be setting up the UWF as an intermediary for the licensing of orphan books to third parties. It also establishes a regime through which revenues from these books are to be distributed (e.g., to the UWF's favorite charities). The UWF would have a financial stake in the continuation and extension of the escrow regime and in persuading Congress that escrowing was the best solution to the problem posed by unclaimed works.

It is, however, for Congress to decide what should be done with orphan works, not for those who negotiated the PSA and PASA, nor for the courts. A substantial restructuring of rights under copyright law is the constitutionally mandated domain of the U.S. Congress.⁸⁵ The orphan works legislation that Congress has considered in recent years has not adopted the escrow model.⁸⁶ Indeed, these bills are more closely modeled on the recommendations of the U.S. Copyright Office, which concluded that orphan works should be freely usable if rights holders cannot be found.⁸⁷

The treatment of orphan books is no small matter. No one really knows how many books will ultimately be unclaimed in the aftermath of a GBS settlement, although one estimate by a disinterested party suggests there may be up to five million.⁸⁸ Google spokesmen have tended to offer fairly conservative estimates about the proportion of books in the GBS corpus that will be orphans. David Drummond, chief legal officer of Google, estimated in his testimony before Congress that about 20% of the out-of-print books in GBS would likely be orphans.⁸⁹ With approximately 8 million such books now in the GBS corpus, Drummond's estimate would yield 1.6 million orphan books; if GBS grows to 50 million books, as some expect,⁹⁰ and the proportion of out-of-print and orphan books remained stable, that would mean that about

85. *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

86. *See, e.g.*, Shawn Bently Orphan Works Act of 2008, S. 2913, 110th Cong. (2d Sess. 2008); Public Domain Enhancement Act, H.R. 2408, 109th Cong. (1st Sess. 2005).

87. *See* REPORT ON ORPHAN WORKS, *supra* note 82, at 8. The Office recommended that if a rights holder later came forward to claim the work, the person who reasonably believed the work was an orphan might continue the use for future compensation. *Id.* at 115.

88. Statement of William Morris, Endeavor Entertainment (Aug. 2009), <http://thepublicindex.org/docs/commentary/wme.pdf> [hereinafter Morris Statement] (noting a Financial Times estimate that between 2.8 and 5 million of the 32 million books protected by copyright in the United States are likely to be orphans).

89. Hearing, *supra* note 63, at 12.

90. *See, e.g.*, Letter from Paul Courant, *supra* note 40, at 1 (estimating that Google will scan 50 million unique books for GBS).

7.5 million books would be orphans.⁹¹

The proportion of orphan books may, however, be higher than Mr. Drummond estimated, perhaps even much higher. “Older” books, especially books published before the 1980s,⁹² are especially likely to be unclaimed. In the thirty years or more since the publication of these books, the publishers may have gone out of business, their authors may have passed away, and their heirs may be ignorant about rights in their forebearers’ books or too numerous or dispersed to track down. Older book authors may also be suffering from debilitating states or otherwise uninterested in overtures from the BRR.

Orphan books will likely be sold through the consumer purchase model at prices ranging from \$1.99 to \$29.99.⁹³ The goal of the PASA pricing algorithm is to maximize revenues for each book.⁹⁴ Google also plans to license these books as part of the ISD to thousands of universities, public libraries, and other entities. ISD subscription prices are supposed to approximate market returns for a multi-million-book database.⁹⁵ There is reason to worry that prices for the ISD will rise over time to astronomical levels.⁹⁶

The PASA provides that after 10 years of collecting profit-maximizing revenues for orphan books, the UWF would become a philanthropist,⁹⁷ distributing these funds to charities in various countries that promote literacy, freedom of expression, and education. The PASA also authorizes the UWF to continue to collect funds for orphan books for the remainder of their copyright terms, and to continue paying orphan funds to these charities. The eleemosynary impulse underlying these provisions may be admirable, but the PASA takes the wrong approach to making orphan books available.

While Congress is the proper governing body for decisions about what to do about orphan works, academic authors are likely to believe that if books are true orphans, they should be freely available for use by all, including non-profit institutions such as the colleges and universities with which we are affiliated. Treating unclaimed orphan books as public domain works would be more consistent with the utilitarian purpose of

91. There is reason to believe that the proportion of orphans and of out-of-print books would be substantially higher as the number of books in the GBS corpus approaches 50 million, for there is a limited number of in-print books, and Google may be scanning most of them through its partner program.

92. Roughly half of the books in U.S. library collections were published before 1977 and one-third before 1964. Lavoie & Dempsey, *supra* note 64. Moreover, research library collections tend to include a higher percentage of older books. *Id.*

93. PASA, *supra* note 2, § 4.2(c)(i) (setting percentages for algorithmic pricing bins).

94. *Id.* § 4.2(c)(ii)(2).

95. *Id.* § 4.1.

96. Academic Objection Letter, *supra* note 39, at 3–5.

97. PASA, *supra* note 2, § 6.3(a)(i)(3).

U.S. copyright law, insofar as unclaimed works lack an author or publisher in need of exclusive rights to recoup investments in creating and disseminating these works.⁹⁸

In contradiction of this utilitarian purpose, the PASA contemplates that the UWF will continue to collect funds from Google for its commercial exploitations of orphan books until their copyrights expire and that these funds should be distributed to charities selected by the UWF. This treatment for orphan works is objectionable.

Finally, it is worth noting that the economics of digital publishing and digital networks have made it possible for unclaimed/orphan books to draw readers online, even though their publishers could not justify keeping the books in print. A high quality digital copy of a print book can be made for \$30; reproduction and distribution of digital copies of the same book are essentially costless. Digital networks make it easier for people with niche interests to communicate about their preferences, so books written long ago on seemingly esoteric subjects may reach audiences in the digital world that would be economically unviable in the print realm. The public interest would be better served by making these books widely available to all, either as public domain works or through licenses to other firms so that the public's interest in access to these books would be subject to the rigors of competition and not to Google's de facto monopoly.

C. The Apparent Exclusion of Unregistered Inserts Is Unfair, and the Exclusion of Unregistered Books May Be Unfair Under a Recent Supreme Court Case

Many academic authors have contributed chapters for edited volumes or written book forewords, works of the sort that fall within the PASA's definition of "inserts."⁹⁹ Under the PSA, academic authors had reason to believe that they were in the settlement class as to these inserts as long as the books in which their writings appeared had been registered with the U.S. Copyright Office.¹⁰⁰ The PASA has amended the

98. It is disheartening that Google Books sometimes provides links to sites where books can be purchased, but not to sites where the same books are available for free. An example is JAMES GOSLING & BILL JOY, THE JAVA LANGUAGE SPECIFICATION, a free copy of which is available at <http://java.sun.com/docs/books/jls/>. Google Books points only to sites where copies of this book can be purchased for prices ranging from \$1.99 to \$999.99. See Google Books, The Java Language Specification, http://books.google.com/books?id=Ww1B9O_yVGsC&sitesec=buy&source=gbs_navlinks_s (last visited Mar. 17, 2010). This book is widely used by Java programmers.

99. PASA, *supra* note 2, § 1.75 (defining "insert").

100. PSA, *supra* note 16, § 1.72. This definition suggested that inserts were within the settlement if the book in which they appeared had been registered with the U.S. Copyright Office.

definition of inserts in a manner that can be construed to exclude inserts that have not been separately registered with the U.S. Copyright Office.¹⁰¹ If this interpretation of the PASA is correct, academic authors object to this change.

Newly published books are commonly registered with the U.S. Copyright Office because of certain benefits of registration.¹⁰² Chapters in edited volumes and other individually authored contributions to books are much less likely to be registered separately from the book, for there is little perceived need to do so. If the book as a whole is registered and infringed, authors of chapters in an edited volume may expect that the book's copyright owner would be able to vindicate the interests of contributing authors. Should the need for separate registration arise—for example, because someone republished one chapter of a book without permission—it is a simple matter for its author to register the copyright at a later time. The Copyright Act of 1976 makes clear that copyright protection is available to authors from the moment their works are first fixed in a tangible medium.¹⁰³ Copyright protection does not depend on registration under current law.¹⁰⁴

The GBS litigants may have restricted the class of rights holders eligible to participate in (or opt out of) the settlement to those who had registered their books with the Copyright Office in deference to a Second Circuit Court of Appeals decision, *In re Literary Works in Electronic Databases Litigation*.¹⁰⁵ That case ruled that unregistered rights holders were ineligible to participate in the settlement of a class action lawsuit alleging copyright infringement because U.S. copyright law requires registration as a precondition of suing infringers of U.S. works.¹⁰⁶

Restricting the GBS settlement class to registered U.S. rights holders may have been understandable because of the Second Circuit's ruling. However, the Supreme Court has reversed that ruling in *Reed Elsevier v. Muchnick*.¹⁰⁷ The reversal would seem to make it possible for owners of copyrights in unregistered books and inserts to participate in class action settlements of copyright lawsuits. Indeed, it may now be unreasonable to exclude them. The PASA defines the settlement class in

101. See, e.g., Posting of Kenneth Crews to Columbia University Libraries, Copyright Advisory Office Website, <http://copyright.columbia.edu/copyright/2009/12/17/google-books-dude-where-my-inserts/> (Dec. 17, 2009).

102. 17 U.S.C. § 412 (2006). Prompt registration allows owners to be eligible to be awarded attorney fees and statutory damages. *Id.*

103. *Id.* § 102(a).

104. *Id.* § 408(a).

105. 509 F.3d 116 (2d Cir. 2007), *rev'd, sub nom.* Reed Elsevier, Inc. v. Muchnick, 130 S.Ct. 1237 (2009).

106. 17 U.S.C. § 411(a) (2006).

107. Reed Elsevier, Inc. v. Muchnick, 130 S.Ct. 1237, 1249 (2009).

a gerrymandered manner so that books owned by Australian, Canadian, and UK rights holders automatically are within the settlement, but those owned by American rights holders are ineligible unless registered.¹⁰⁸ There is no principled basis for this definition of the settlement class now that the Supreme Court has reversed the Second Circuit's ruling.

The academic author objection letter urged the court presiding over the GBS fairness hearing to withhold its decision about whether to approve the settlement until the Supreme Court has resolved this issue. Now that the Supreme Court has decided that unregistered rights holders can participate in copyright class action settlements, the court should ask the litigants to renegotiate the PASA to address the unregistered rights holders issue.¹⁰⁹ Indeed, the lawyers for the Author Subclass should *sua sponte* make a request for reconsideration of the settlement terms in view of the *Reed Elsevier* ruling. The court should refuse to approve the settlement until the class is redefined, as it would be unfair to deny unregistered copyright owners the ability to decide whether they wish to participate in the PASA (or opt out) now that the *Reed Elsevier* decision seemingly allows their inclusion.

It is unclear what uses Google plans to make of inserts that have not been separately registered with the Copyright Office, assuming that these works are not within the settlement and their rights holders are ineligible for compensation for Google's uses of them. The same question arises as to books that Google has scanned that do not fall within the PASA's definition of "book" (i.e., unregistered U.S. books, such as doctoral dissertations on the shelves of many research libraries, and books by foreign rights holders that are no longer within the settlement). The litigants should clarify this matter.

While many academic authors may be pleased for their inserts to be freely available through a digital database such as GBS, they would prefer to have the right to control the dedication of their works to the public domain or to make works available under a Creative Commons license rather than being treated as though they have no right to control Google's commercialization of their works merely because they didn't separately register copyright claims in them.

Finally, it seems that the Authors Guild did nothing to encourage book or insert rights holders to register their claims of copyright before January 5, 2009, the cut-off date for book inclusion in the settlement class. Because the notice to class members did not commence until after the cut-off date, there was no opportunity for those who had not already

108. PASA, *supra* note 2, § 1.19.

109. Expansion of the class to unregistered U.S. rights holders would also seem to require a new round of notice to rights holders since the first round of notice made no effort to reach them.

registered their works to do so in order to participate in the settlement. As explained above, insert authors had reason to believe that their inserts would be within the settlement as long as the books in which the works appeared were registered. Any change in the PASA that alters academic author rights in inserts is objectionable.

D. The Court Must Require Disclosure of Any Termination Agreement That Pertains to the GBS Settlement

Article XVI of the PSA referred to the existence of a supplemental agreement negotiated by the litigants to terminate the PSA if certain unnamed conditions were met. The PSA indicated that the terms of that supplemental agreement were confidential and that the parties did not intend to file it with the Court:

Google, the Author Sub-Class, and the Publisher Sub-Class each will have the right but not the obligation to terminate this Settlement Agreement if the withdrawal conditions set forth in the Supplemental Agreement Regarding Right to Terminate between Plaintiffs and Google have been met. Any decision by Google, the Author Sub-Class or the Publisher Sub-Class to terminate this Settlement Agreement pursuant to this Article XVI (Right to Terminate Agreement) will be in accordance with the procedures set forth in the Supplemental Agreement Regarding Right to Terminate. The Supplemental Agreement Regarding Right to Terminate is confidential between Plaintiffs and Google, and will not be filed with the Court except as provided therein.¹¹⁰

Rule 23(e)(3) of the Federal Rules of Civil Procedure requires disclosure of any agreement among the litigants made in connection with a proposed settlement of a class action lawsuit.¹¹¹ It would seem impossible for the court to determine if the PASA is fair, reasonable, and adequate without having access to the whole agreement, which necessarily includes an agreement setting forth termination conditions and consequences. It is unacceptable that a separate termination agreement, which so deeply affects the interests of class members, would not be revealed to them, or to the court.

The existence of a termination agreement is especially important to academic authors because an important reason many are staying in the settlement and not opting out is because they expect their books and inserts, as well as those of other scholars, to be available through GBS for decades to come. Academic authors also care about their institutions

110. PSA, *supra* note 16, art. XVI.

111. FED. R. CIV. P. 23(e)(3).

having the access to books in GBS through the ISD. That the settlement agreement could terminate at some point in time without academic authors knowing on what basis this could occur is deeply troubling.

The PASA has “intentionally omitted” Article XVI.¹¹² It is not clear what this means. If the termination agreement referred to in the PSA is still in existence and in force, its terms should be revealed not only to the court, but also to members of the class, including academic authors, as it has a bearing on the benefits and risks posed by the settlement. If the termination agreement is no longer in force, the litigants who negotiated it should be required to explain why the termination agreement was itself terminated.¹¹³

E. The Publisher Plaintiffs May Be Undermining the PASA

In testimony before Congress, as well as in other public statements, Google and representatives of the Authors Guild and the AAP have waxed eloquent about the broad public access to the knowledge embodied in books that would be enabled if the GBS settlement is approved.¹¹⁴

While academics were not expecting approval of the settlement to mean that in-print books would be available through ISD subscriptions to our universities, they were given reason to believe that the ISD would include digital copies of many millions of out-of-print books from the collections of major research libraries. Academic researchers would benefit from the broader availability of these books.

The PASA allows rights holders of out-of-print books to withhold their books from “display uses” such as display books in the ISD.¹¹⁵ However, GBS proponents have suggested that rights holders are unlikely to withhold out-of-print books from the ISD because allowing display uses would bring new commercial life to their books.¹¹⁶

The DOJ Statement of Interest, filed on September 18, 2009, raised the possibility that the aspiration that GBS would be a universal digital library of virtually all out-of-print books, as Google’s co-founder

112. PASA, *supra* note 2, at 156.

113. The Plaintiffs have now indicated that the termination agreement is no longer in force. See Supplemental Memorandum, *supra* note 55, at 169–70.

114. See, e.g., Hearing, *supra* note 63, at 37 (Statement of Paul Aiken, Executive Director of the Authors Guild: “[W]e expect the settlement to make at least 10 million out-of-print books available”).

115. PASA, *supra* note 2, § 3.2.

116. See, e.g., Hearing, *supra* note 63, at 5, 14–24 (Statement of Paul Aiken, Executive Director of the Authors Guild). The PASA requires rights holders who want to sell individual books through the consumer purchase model to make the same books available through the ISD. PASA, *supra* note 2, § 3.5(b)(iii).

predicted,¹¹⁷ may be undermined by the publishers who negotiated this settlement. DOJ observed:

It is noteworthy that the parties have indicated their belief that the largest publisher plaintiffs are likely to choose to negotiate their own separate agreements with Google . . . , while benefiting from the out-of-print works that will be exploited by Google due to the effect of the opt-out requirement for those works. There are serious reasons to doubt that the class representatives who are fully protected from future uncertainties created by the settlement agreement and who will benefit in the future from the works of others can adequately represent the interests of those who are not fully protected and whose rights may be compromised as a result.¹¹⁸

This suggests that the parties to this settlement have negotiated a deal that they expect to bind millions of other right holders, including academic authors, but not themselves.¹¹⁹ The PASA does nothing to rectify this problem.¹²⁰ If the GBS settlement is really a fair resolution of the litigation and a fair allocation of rights among all stakeholders, one might expect the named plaintiffs to keep their out-of-print books in the settlement and participate in what they hail as its benefits. Instead, the DOJ Statement suggests they do not intend to include their books in the regime that would be established by the settlement.

Equally important, the aspiration for GBS to be a universal library of out-of-print books may also be undermined by other rights holders' decisions to exclude their books from display uses in GBS, to opt out of the settlement, to insist that Google not scan their out-of-print books, and to demand that Google remove books already scanned.¹²¹ It is

117. See Brin, *supra* note 2.

118. DOJ Statement, *supra* note 41, at 10. One important benefit of the Google Partner Program as compared with the commercial regime to be established by the PASA is that partners can negotiate with Google to reduce the risks of uncertainty about the future for their books and tailor the agreements to meet their concerns. The future of the revenue models in the PASA is much more uncertain.

119. See also Morris Statement, *supra* note 88, at 1 ("Few if any major publishers currently intend to make their in print books available for sale through the Settlement Program It appears that most major publishers will not allow their out of print books to be sold through the Settlement Program either.").

120. See Second DOJ Statement, *supra* note 51, at 12 n.9 (noting that some of the plaintiffs have suggested that they may choose to exercise their rights under § 17.9 which would allow them to reach a bilateral deal with Google that would largely supersede the current agreement).

121. See PASA, *supra* note 2, § 3.5. The corpus of books eligible for inclusion in the ISD has already shrunk by about half because the PASA no longer includes most of the non-English-language foreign books scanned from major research library collections. See, e.g., Lavoie & Dempsey, *supra* note 64 (estimating that half of the books in major research library collections are foreign-language books). Some librarians mourn this loss. See, e.g., Posting of Kenneth Crews to Columbia University Libraries, Copyright Advisory Office Website, GBS

unknown at this point how many books have already been removed, excluded, or opted out; but the court should require the parties to make information of this sort publicly available. If the opt-out rates among sophisticated parties are high, that might suggest that the GBS settlement is not as fair and adequate as Google, AAP, and Guild spokesmen proclaim.¹²²

The Publisher Plaintiffs seem not to be the only ones excluding their books from the settlement.¹²³ Most authors and author groups that have spoken out about GBS have urged authors to oppose or opt-out of the GBS settlement because they regard it as unfair.¹²⁴ It is noteworthy that not a single U.S. author group, apart from the Authors Guild, has come out publicly in support of the GBS settlement.¹²⁵

The more numerous are the requests to exclude books from the ISD or the settlement, the less likely it is that the public benefit of the promised ten million-book database will materialize.

F. Consolidated Academic Author Objections

The ten highest priority academic author objections to the PSA and PASA, as expressed in the September 3rd and January 27th letters to Judge Chin, include:

1. The PASA does not create true independence for the fiduciary for unclaimed works, nor criteria for accomplishing the fiduciary responsibilities and objectives for this role. In particular, this fiduciary should have the explicit authority to set prices for unclaimed books at \$0 or make them available under Creative Commons licenses or other open access terms insofar as there is reason to think that their academic authors would prefer for them to be made available on these

2.0: The New Google Book (Proposed) Settlement, <http://copyright.columbia.edu/copyright/2009/11/17/gbs-20-the-new-google-books-proposed-settlement/> (Nov. 17, 2009) ("Because the settlement is now tightly limited [by the exclusion of foreign books], so will be the ISD [Institutional Subscription Database]. The big and (probably) expensive database is no longer so exciting").

122. The BRR may not be able to sustain its operations if a very large number of rights holders for out-of-print books opt out of the PASA or take their books out of the regime it would establish by signing up as a Google Partner. This would undermine another benefit that the settlement was supposed to accomplish. Only the UWF is guaranteed to have a stable revenue source in the first decade post-settlement.

123. Authors Guild Executive Director Paul Aiken testified before Congress on Sept. 10, 2009, about his expectation that publishers might decline to participate in the settlement. Hearing, *supra* note 63, at 143. Reed Elsevier and Warner Books are among the major publishers that have opted their books out of the settlement. Supplemental Academic Objection Letter, *supra* note 48, at 13, n.62.

124. See *supra* notes 35–39.

125. See, e.g., Bloom Objections, *supra* note 37.

terms. The UWF should not have the power to authorize Google to alter the texts of books.

2. To the extent the PASA anticipates charging profit-maximizing prices for books that remain unclaimed after ten years, this is inconsistent with the proposed legislation dealing with orphan books. It is for Congress, not for the litigants or the Court, to address orphan work issues.
3. The PASA's definition of "inserts" and "books" is unreasonable in light of the Supreme Court's *Reed Elsevier v. Muchnick* decision. The Supreme Court decision means that owners of copyrights in unregistered works are eligible to participate in copyright class action settlements. The court should direct the parties to renegotiate the agreement to offer unregistered rights holders of books and inserts the opportunity to participate in the settlement.
4. The litigating parties have failed to provide this court and members of the class with access to the termination agreement referred to in the PSA, which they negotiated amongst themselves.
5. The PASA, like the PSA, contains no meaningful limits on ISD price increases, especially as to higher educational institutions such as those with which we are affiliated. Because approval of the agreement will give Google a license to tens of millions of out-of-print books—a license that no competitor can feasibly get—the settlement agreement should contain some constraint on price increases. The Authors Guild did not adequately represent the interests of academic authors in negotiations with Google and the Publisher Plaintiffs on this important issue because their members have the same interests as the AAP publishers in prices being as high as possible.¹²⁶
6. There are insufficient privacy protections for GBS users.¹²⁷

126 Academic Objection Letter, *supra* note 39, at 2–5.

127. *Id.* at 6–7. The Privacy Authors' Objection offered numerous specific recommendations about the privacy protections that should be part of any GBS settlement agreement. See Privacy Authors and Publishers' Objection to Proposed Settlement at 1, Authors Guild Inc. v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Sept. 4, 2009), available at <http://www.openbookalliance.org/wp-content/uploads/2009/09/academic-author-letter-090309.pdf>. Although the PASA is better than the PSA in providing that Google will not give personally identifiable data about users to the BRR without legal process, see PASA, *supra* note 2, § 6.6(f), more user privacy protections are needed.

7. The PASA should not require public libraries and other institutions with public access terminals to pay for user print-outs of pages from out-of-print books, which would undermine fair use.¹²⁸
8. The PASA should not be so restrictive about annotation-sharing and non-consumptive research.¹²⁹ Google should make a stronger commitment to improving the quality of GBS book scans and metadata associated with them.¹³⁰
9. The PASA should not grant Google power to exclude books from the corpus for editorial reasons or to exclude up to 15% of books eligible for the ISD from that database.¹³¹
10. The PASA is objectionable because it contains no back-up plan to preserve university access to books in the ISD in the event that Google chooses to discontinue as a provider of required library services under the agreement and no third party provider steps forward to take over this role.¹³² The PASA should be amended so that fully participating library partners in the GBS enterprise have the authority to take over or reassemble from their library digital copies a corpus of books for continuing to provide the ISD to university research communities.¹³³

Whatever the outcome of the fairness hearing, academic authors recognize that the public good is served by the existence of digital repositories of books, such as the GBS corpus. It would, however, be better for Google not to have a monopoly on a digital database of these books. The future of public access to the cultural heritage of mankind embodied in books is too important to leave in the hands of one company and one registry that will have a de facto monopoly over a huge corpus of digital books and rights in them. The settlement of a class action lawsuit is not a proper way to make such a profound set of changes in rights of authors and publishers, in markets for books, and procedures for resolving disputes as the PASA would bring about.

128. PASA, *supra* note 2, § 4.8(a)(ii); Academic Objection Letter, *supra* note 39, at 7.

129. *Id.* at 6, 8.

130. *See, e.g.*, Posting of Geoff Nunberg to Language Log, Google Books: A Metadata Train Wreck, <http://languageblog.ldc.upenn.edu/nll/?p=1701> (Aug. 29, 2009, 05:46 PM) (acknowledging that Google does not have a contractual obligation nor a persuasive commercial incentive to ensure the accuracy of GBS' metadata).

131. Academic Objection Letter, *supra* note 39, at 9–10.

132. *Id.* at 10–11.

133. The HathiTrust would seem to be a likely candidate to take on this responsibility for the nonprofit research library community. *See* HathiTrust, Welcome to the Shared Digital Future, <http://www.hathitrust.org/> (last visited Jan. 25, 2010).

APPENDIX 1

This Appendix provides a list of the 150 academic authors who were signatories to the Supplemental Academic Author Objection Letter submitted to Judge Denny Chin on January 27, 2010, of which this Article is a derivative work. The institutional affiliations of these authors are listed for identification purposes only.

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