Google Book Search - Issues and Concerns

(Copyright, Opt-in & Opt-out, Class Action, Privacy, Antitrust)

Tabrez Ahmad

LLM-IP, May 2010

George Washington University Law School, Washington DC

Declaration: I have worked with Microsoft India as *Head of Industry Affairs* at Legal and Corporate Affairs department for over four years. My key responsibilities were to:

- ✓ Map competition like Google, IBM, Apple, Yahoo, Oracle, SAP, Open Source companies, Sony, etc for policy issues and build industry coalition.
- ✓ Manage the Microsoft India Advisory Board in India on competition, future business streams, policy and regulatory concerns.
- ✓ Advocate Microsoft's policy issues including IP, antitrust, and cyber through federal and state governments and regulators.
- ✓ Support business teams in checking piracy, counterfeit and government procurement.

I had also strategized & established with industry colleagues multiple IP Forums like, ***Domestic Information Technology Forum*** at National Association of Software and Services (NASSCOM) in 2009, ***Intellectual Property Forum for BRIC*** (Brazil, Russia, India and China) at Confederation of Indian Industries (CII) in 2008, ***Alliance*** between CII and Quality Brand Protection Committee (QBPC, China) in 2007, and ***National Initiative Against Piracy and Counterfeit*** at Federation of Indian Chamber of Commerce and Industry (FICCI) in 2006.

Though my tasks were intense on competition till my resignation in August 2009, I have maintained neutrality on this research, didn't used internal information of Microsoft or any other Indian institutions but general understanding on Google and conducted fresh data collection. The study is in no way the position of Microsoft or any other Indian institutions I was associated with. LLM is my personal pursuit and in no way legally or otherwise, I am representing Microsoft or any other Indian institutions.

I have also tried to incorporate technical, economic and business elements with legal perspective of the Google Book Search issues.

Topics

1. Google Inc, core business and diversification.
2. Google Book Search
3. Issues: Copyright
   3.1. Orphan books
      3.1.1. Fair Use, Limitations and cases
      3.1.2. Comparison with EU and other geographies
4. Opt in and Opt out
5. Class Action – is it true representation
6. GBS Settlement Agreement
7. Privacy and Intellectual Freedom
8. The concerns of Antitrust
   8.1. Monopoly over Orphan books
   8.2. Price
   8.3. ASCAP & BMI Analogy
   8.4. What to do to lower the entry barrier?
9. Conclusion

Google Inc

Google is fundamentally an advertising company developed around the 'patented Page Rank' technology invented by Larry Page and Sergey Bring at Stanford University (*www.google.com/corporate*). Stanford still owns the patent and exclusively licensed to Google. The exclusive license will expire in 2011 but can be modified and extend the period (http://investor.google.com). Of course, the initial patent technology has been drastically improved by the high use with the inbuilt artificial intelligence system codes over a period of time due to the 'Network Effect'. The network becomes more valuable as it becomes more widespread and more usage helps it to get better (*Paul Schiff Berman, Patricia L. Bellia, David G. Post, Cyberlaw: Problems of Policy and Jurisprudence in the Information Age, 3d (2007)).*

Google products can be categorized in four:

1. **Search** are Alerts - email service, Blog Search - blogs service, Google Books Search – books online, Checkout - online buying, Google Chrome – browser, Custom Search – for search customization, Desktop – computer customization, Directory – organizer, Earth & Maps – get directions, Finance – for business info, GOOG-411 – phone service, Google Health – for medical records, iGoogle – for games, Images - for images on the web, News – for news strings, Patent Search – info on US Patents, Product Search – buy stuffs, Scholar – for academic papers, Toolbar – browser feature, Trends – records past and present searchs, Videos - searches videos, and of course Web Search - search web pages.
2. **Explore and innovate** are Code – popular among software developers for tools, APIs and resources and Labs – for Google's technology.
3. **Communication, show & share** are Blogger – info to share, Calendar - schedule and event organizer to share, Docs – free productivity suits like word, presentations and spreadsheets, Mail - email, Groups - mailing lists organizer, Knol – knowledge sharer, Orkut – networking platform, Picasa – photo tool for sharing, Reader - blogs feeder, Sites - secure group website, SketchUp – for 3D models, Talk – communicator, Translate – multiple languages facility, YouTube – to share videos, Mobile – phone and service,

Maps for mobile - location and directions on your phone, Search for mobile - search extended on phone.

4. **Make your computer work better** is Pack - free collection of essential software *(www.google.com/corporate).*

Google has year after year beaten the industry expectation in growth and revenue. But it heavily depends on inorganic diversification and acquired Orkut, YouTube, DoubleClick, and Picasa. It has also launched Gmail, Chrome, Apple Safari, FireFox, Operating Systems for computer and smart phones, Google doc, Google Voice, Nexus One and Google Book Search *(www.google.com/corporate).* Despite the diversification from search to productivity suits, browser, operating system, mobile phone, over 96% of its revenue comes from the advertising *(*http://investor.google.com*)*. Google is working hard through organic and inorganic growth to add other revenue streams. Three of its products incl. Google earth, Google Search and Google Book Search have attracted lots of appreciations and controversies.

Google Book Search (GBS)

GBS is the modern dream of may be hundred years to have a universal library for the world with the latest technology. The initial announcement from Google was to scan, index and distribute only the snippets of the books and provide information of the sources to buy over it's traditional search engine. Later on as they started scanning large number of books of libraries to create GBS, the Authors Guild and the Association of American Publishers objected to the Google's position that the scanning and snippet providing is under Fair Use and brought a class action law suit in September 2005 *(Class Action Complaint, Authors Guild, Inc. v. Google Inc. No 1:05 CV 8136 (S.D.N.Y. Sep 20, 2005)).*

The GBS has concerns like copyright, antitrust (monopoly and price fixation), privacy, censorship, its future relationship with public libraries etc (*Robert Darnton: Google and the future of Books NY Rev of Books, Feb 12, 2009).* GBS has also raised question mark on the much

publicized company motto of "Do No Evil". Irrespective of the final outcome of the ongoing suit, the GBS will have tremendous impact on the perception of the company worldwide.

To appreciate the importance of GBS to the present business model of the company, we should look into the necessity of offering free stuffs over Internet. Google provides free products to reinforce its position as 'the most popular Internet destination and resource'. Developing and delivering such products is much cheaper than the direct advertising cost to target audience spread all over the world.

Copyright Issues of GBS

Book is the literary work of copyright under *17 USC § 101*. Any copyright infringer is subject to statutory damages of upto $ 15,000 per book and may be jail term also. The copyright Act in section 101 defines "Copies" as *"material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"*. So the term "copies" includes the material object, other than a phonorecord, in which the work is first fixed". The copyright owners have the exclusive right to reproduce, publicly distributes and display their works *(17 USC § 106)*. It also permits owners of copyright to authorize others under the agreement to copy their works and distribute. The books which are in public domain (*17 USC §§ 301-305. Any book published before 1923 are in public domain. The books getting in public domain published after 1923 depends on with or without notice, renewal of rights, corporate authorship or personal, authors life, etc.)* don't come under the copyright law. Google can scan and distribute books without any liability which are in public domain or under the agreement with its partners. The issue is for the books which are not in public domain and not under agreement with copyright owners. Each time such books are scanned and distributed, there is violation of copyright law.

Google has scanned more than 10 million books of total of 18 million from major libraries. Around 20% of the books are in public domain and it allows a complete downloading of these

books. Roughly 70% of the books are in copyright but not in print. It is also very difficult to locate their authors or the right holders to get the permission to scan books and put them on the Internet. These books are called the "**Orphan Books**" that means where an underline author or the right holder are not located even after the diligent search. The cost of locating, identifying, getting permission is higher than the benefits in case of the Orphan Books.

The second issue is the distribution of copyrighted books. Google offers only the snippets of few lines from these books depends on the safe guards of the doctrine of Fair Use *(17 USC § 107).* Fair use is an equitable doctrine codified in Copyright Act but it doesn't define the boundaries well. Google depends on the amount and substantiality of the portion used in relation to the copyrighted works as a whole *(17 USC § 107(3)).* Google also argues no negative effect of the use upon the potential market for or value of the copyrighted works *(17 USC § 107 (4)).* Google advocates that in fact the market value of such books will go up. But adversaries argue that what is someone compiles a dictionary or basic concept using the snippets.

The advancement in digitization technology and Internet makes an attractive value proposition for the orphan books for the benefit of society. But the **Gridlock** (*1 Heller, Michael. The gridlock economy: how too much ownership wrecks markets, stops innovation, and costs.)* which means that too many people own the pieces of the same thing resulting in – nobody can use it. The multiplying scale of this type of scenario of cost, risk, task and uncertainty is created then it becomes unworkable. The market as such of Orphan books are owned by too many copyright holders individually, making it unviable to develop, package, market and monetize. One solution could be the 'collective licensing' (*Collective licensing or administration, 'owners of rights authorize collective administration organizations to administer their rights' WIPO)* of the online rights and satisfactorily addressing orphan works issues. In case of music, ASCAP and BMI brought market efficiency through collective licensing (case discussed in detail in the Antitrust section).

Fair Use: The "Fair Use" is the reproduction of works for purposes like teaching, scholarship, research, criticism, comment, or news reporting *(17 USC § 107(2006)).* To determine the fair use

several factors need to be considered like commercial or non-profit, amount and substantiality, effect of the use on the market of works.

For example are, the **transformative use** is the parody *(Parody, though not defied in the act, is an imitation of a serious piece of literature, music, or composition for humorous or satirical effect. Should imitate the characteristic style/ comment on the original in some way)* of copyrighted works are fair use in spite of for commercial *(Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994))*. In Campbell case, the court accepted that the commercial parody may qualify as fair use. To decide the question of fair use, the court must subject the parody to an overall balancing process in which the parody's transformative character is more important than its commercial use. For most parodies, first two factors do not favor fair use, so focus on the amount and substantiality and the market effect. **Time shifting** where people recorded movies and television programs on VCRs to view at their convenience is fair use as it was without any detrimental impact on the copyright owner's interest *(Sony Corporation of America v. Universal Studios, Inc., 464 U.S. 417, 454-55 (1984))*. In Sony judgment the dissent highlighted the amount of copying and said that the congress intended to limit the fair use to productive use contexts and that extensive reproduction use, made by the equipment, was an infringement unless specifically exempted.

It is worth mention here due to the relevance of LLM, the 4th Circuit accepted the **transformative use** of copying and archiving the students research papers for the plagiarism software *(A.V. v. iParadigms, LLC, 562 F3d 630, 640)*. Same is true in case of software to discover the **reverse engineering** and malpractice but important to note that the reverse engineering is considered fair use only to the extent that it was necessary to identify and understand the unprotected elements of a copyrighted software program *(Saga Enterprises Ltd v. Accolade, Inc 977 F2d. 596, 607 (9th Cir. 1993).* Court ordered in *Perfect 10 v. Amazon.com* that since the thumbnails of the copyrighted photographs helped in created a great value in search results so court felt it to be more transformative than even parody which is basically for

entertainment purpose and criticism. This case permits us to argue transformative use even where no derivative work has been created.

There are good numbers of cases where the court has **rejected the fair use arguments**. For example, the 6th circuit held that copying excerpts of copyrighted books and providing the compiled course materials to students by a copying service is not fair use. And the rationale was the purpose of the challenged use, it was not the student's use, but was commercial and driven by the motive for profit *(Princeton University Press v. Michigan Document Services (FED App. 0357P 1996 (6th Cir.))*.

Nation Enterprises obtained a stolen unpublished manuscript of President Ford and published it before its release *(Harper Row, Publishers, Inc. v. Nation Enterprises 471 U.S. 539 (1985))*. The defendant failed to establish that unauthorized use of quotations from a public figure's unpublished manuscript was fair use. The unpublished nature of book was a key factor (though not determinative) that negated the defense of fair use. The court found that four statutory factors relevant to determining whether the use was fair were not satisfied. The defendant had the intended purpose of supplanting copyright holder's commercially valuable right of the first publication. Qualitative v. Quantitative dimension - taking the core defining components (qualitative) despite being only a small portion of the overall work (quantitative) can exceed the fair use and be considered excessive. (In *Harper Row* the verbatim copying of only 300 works out of 200,000 of the book was considered excessive because these words constituted the heart of the work.

The court has protected the rights and interests of Zaachini, an entertainer of signature cannon-ball from the unauthorized commercial broadcast of his sporting events by broadcasting company *(Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562 (1977))*. It was a theatrical performance for his living but the broadcaster made the profits. Court has also ruled that recording of content on hard drive is direct infringement *(Cartoon Network*, LLLP *v. CSC Holdings*, Inc., 536 F.3d 121 (2d Cir. (2008)). Photocopy ignorantly is also infringement and ignorance not excusable. With this background, before we explore the copyright violation of the

distribution of the books over the NET, the scanning of the library books in bulk is against the exclusive right of owner to reproduce.

The **EU Copyright Directive** of 2001 too allows statutory exceptions and limitations as long as the copied work doesn't substitute original work's market, an incidental inclusion, non-commercial works like in US statues with proper credits.

Other limitations of Fair Use: The congress ensured the public policy objectives of copyright by putting additional limitations of the fair use on the rights to keep the industries/institutions free from unnecessary litigations and high license fees. For example, libraries and archives can create three copies of books, articles, audios, etc. for preservation and transfer to the other similar entities *(17 USC § 108(b) & (c) (2006))*. Employers are protected from unnecessary litigation under the "work made for hire" even without contract *(17 USC § 101 and 201)*. The limitation is also on the used copyrighted works through the **first sale and no resale royalty** rights by the owners *(Lawrence Lessig, Code 177(2206))*. Record labels not to make multiple arrangements with the song writers through the statutory license as long as they pay a set fee *(17 USC § 155(a)(2) (2006))*, without it the background music producers would have at great competitive disadvantage. Similar respite is for radio, cable television and satellite radio *(17 USCA §§§ 111, 112, 114 (West 2005 & 2008)) (37 C.F.R § 260.2(b) (2006))*. Digital audio home recording device manufacturers also get exception and prohibition from copyright suits *(17 USC § 1008 (2006))*. Webcasters are protected from high fees through statutory licenses of 1/1000th of a dollar when a user listens to a song *(17 USC § 114)*.

There are similar fair use exceptions for libraries, universities, schools, archives, and broadcasters recording works in the Copyright Directive of EU.

The fair use in US, EU and all over the world does a balance between protecting interests of writers and artists and progress of society by ensuring the free flow of information in the public domain. The standards followed for the fair use is flexible and not rigid *(Report of the Register of Copyrights on the General Revision of the US Copyright Law of 1961)*. But the doctrine of fair

use is equally difficult in case of its judicial application. Courts are guided by facts to bring the reason to the decision and reduce the unpredictability in their judgments. They have considered the non exhaustive factors like the purpose of the use, the nature of the copyrighted works, the amount of copied from the original works and its impact on the potential market and the original works. Actually, these factors mention in the § 107 are not exclusive and definitive but only illustrative which is also expressed by the courts in the judgments of *Bond v. Blum F.3d 385, 394 (4th Circuit 2003 and Sony Corporation of America v. Universal Studios, Inc. 480 F. Supp. 429, 448 (C.D Cal. 1979).*

If we closely look at its impact on the potential market or the value of the copyrighted works, most of the experts agree that GBS will have positive impact on the out of print books. GBS has also strong argument for transforming the text to searchable metadata and in the new medium on the Internet. The transformative use doesn't have much effect on the market of the original out of print books. Copyright holders have successfully convinced court that new opportunities through technological innovation should be considered part of the intrinsic value of their works like Napster and Grokster cases. Courts have also refused to accept this argument in Sony and RIAA cases.

Business case for Opt out: Google announced that copyright owners who don't want to participate in the GBS can opt out *(Amended Settlement Agreement: To opt out from the Amended Settlement is to send a written request to be removed from the Amended Settlement. If you opt out of the Amended Settlement (or opted out of the Original Settlement and do not opt back in), you will not receive any of the Amended Settlement's benefits, and you will not be bound by any of its terms, including the release of claims against Google)*. The opt out option should have positive impact on the outcome of the suit. But it also raise the issue of by default the 1st step should be to get the permission before scanning rather than putting the responsibility on the copyright owners to opt out. In other word, the present arrangement unlawfully permits Google to continue to scan and enrich the database of books till the copyright owner gives the reverse command. Many experts are opposing this proposition of the reverse practice. But for Google it is impossible to proceed ahead without this arrangement because of cost of acquiring the permission. Hypothetically, even

if there is around 9 million orphan books and cost of locating, identifying and getting permission of scanning the book is US $ 200 per book then the total cost of permission is US $ 1.80 billion and plus the royalty to be paid. The whole GBS project will become economically unviable.

The rule shifted to 'opt out' for Internet because of its open architecture without our realization. The default rule for web pages is to be viewed for content, arranged in order and display as per the algorithm of the search engine for result. Only minority of the websites put technical codes of robot exclusion in the header for 'no trespassing'. Unfortunately for Google, the copyright owners and law don't think that way.

Since the case is under trail so I would not like to offer any conclusion but it is interesting to note the favorable arguments and unfavorable arguments for the GBS and outcomes of some of the 2nd Circuit cases as mentioned above. Irrespective of the outcome of any litigation, the certain expenditure definitely creates tremendous business pressure on the valuation of stock and the impact of the negative outcome is long term on the image of the company.

Orphan Works a Legislative Reforms and hearing on GBS at Hill: The orphan book problem is a classic case of a legislative issue. The Copyright Office has also highlighted the problem after conducting a survey on orphan works in 2005-6 *(US Copyright Office, supra note 33)*. The study suggested a legislative intervention to limit the damages to 'reasonable compensation' and retrict scope of injunctive relief if there has been good faith and reasonable diligent search to locate the owner of the infringed copyright. Based on the Copyright Office recommendation a proposal was introduced in 110th congress *(Orphan Works Act of 2008 H.R 5889 110th Cong. (2008))*. GBS settlement is a judicial temporary solution to a legislative problem.

There is need to have legislative reform otherwise it will continue to affect lots of people. Fortunately, I do see development for the enactment in this direction. During the hearing at the Capitol Hill on Google Book Search, the issue of the Orphan Book came for discussion and I am sure the congress is going to take conclusive action in this direction.

Is Settlement True Representation of Class Action: The original settlement includes all books irrespective of the nationality of the authors and language published in US between 1923 and January 5th 2009 *(Amended Settlement Agreement § 1.16 (a) – (c) since January 5th was the date of notice for class action settlement)*. This led to objections from many EU countries like France, Germany, UK, etc. and others like India, Japan, China etc. Department of Justice has also shown concerns of inadequacy of the representation of the foreign right holders in the settlement in respect to the requirement Rule 23 *(Department of Justice, Supra note 3 at 5)*. So by legal amputation, the amended settlement covers only books from Australia, Canada, UK and US *(Amended Settlement Agreement § 1.19)*. This reduced the exposure by 50% *(http://www.googlebooksettlement.com)*. That means the amended settlement doesn't free Google from liabilities in other countries and they need to negotiate fresh with each one *(http://books.google.com/googlebooks/agreement)*.

Google Book Settlement Agreement: The settlement protected Google from violating the copyright law by scanning library books. Google promptly mentioned this on the settlement website as *"In 2004, Google announced that it had entered into agreements with several libraries to digitize books, including books protected by U.S. copyright law, in those libraries' collections. Several authors and publishers brought this lawsuit against Google, claiming that its digitization without permission infringed their copyrights. In response to the authors' and publishers' claims of copyright infringement, Google argued that its digitization of the books and display of snippets, or a few lines, of the books is permitted under the U.S. copyright law's doctrine of 'fair use'. Instead of resolving the legal dispute over whether Google's digitization and display of the books is permissible under U.S. law as a "fair use," the parties negotiated a settlement." (http://www.googlebooksettlement.com)*.

The 1st settlement agreement made public was complicated and difficult to understand. It was of 141 pages with 160 definition, 116 clauses, 17 separate articles and 15 attachments *(http://www.googlebooksettlement.com)*. Overall the amended settlement document has a complex

algorithm. It covers books published in United States from 1923 till 2009 irrespective of the nationality of the author and language of the book. The key features of the amended settlement are one timed payment of US $ 100 million and revenue sharing arrangement for rights owners. In return GBS has the right to operate the book search engine, can offer extensive preview, test the market for new revenue etc. The amended settlement opened the door to develop new products like digital version for electronic book purchase and institutional subscription and many more. Otherwise, Google had to continue with minimal information restriction displayed in the form of snippets of works under copyright or full information only for works in public domain. The original settlement also had flaws for the attributable revenue to right holders – identified and not identified.

The amended settlement defines book to exclude periodicals, personal research papers, calendars, sheet music and songbooks and government works. But it covers inserts – forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, excerpts from books/periodicals, tables, charts, graphs but excludes photographs *(Photographs, illustrations, maps, paintings and other pictorial works in Books are covered by the Amended Settlement ONLY when the U.S. copyright interest in the pictorial work is owned by a person who is also a copyright owner of the Book containing the pictorial work. For example, if a copyright owner of a Book on photography is also a copyright owner of photographs in that Book, those photographs are covered by the Settlement. However, the Amended Settlement does not cover any other photographs in the Book whose copyright is owned only by persons who are not copyright owners of the Book. Similarly, if a history Book contains a series of maps where the copyrights to those maps are owned only by persons other than a copyright owner of that history Book, those maps are not covered by the Amended Settlement. http://www.googlebooksettlement.com)*, maps and paintings *(Amended Settlement Agreement § 1.75)*. The agreement has inbuilt flexibility for the right holders to decide the level of access for their works or complete removal – opt out. The settlement covers only the published works till 2009, covers only for the four countries mentioned above that means Google has to negotiate the

future publishers and right holders in other countries and mostly includes English language works *(http://books.google.com/googlebooks/agreement)*.

The cost and revenue sharing between Google and the right holders - Other than the US $ 100 million immediate transfer by Google, it will give minimum of US $ 45 million to the registry to distribute among the right holders for works scanned before the opt out deadline and they will receive minimum of US $ 60 per book and US $ 15 per insert *(Amended Settlement Agreement § 2.1 (b) and 5.1 (a)).* Since the registry doesn't have the operational money so Google will pay US $ 34.5 million for its initial operation and US $ 30 million for the attorney fees *(Amended Settlement Agreement §5.1 (c)).* This looks fair to me that Google is committing US $ 110 million without any revenue. On revenue sharing, the split will be 30:70. 70% of the 'Net purchase and advertising revenue' will go to the right holders with 10% inbuilt operating cost of Google *(Amended Settlement Agreement § 1.89, 1.90).* Google is free to pocket revenue from public domain works.

Google has agreed in the settlement to give free of cost limited access of the GBS to the not for profit higher education institutions and public libraries.

Impact of unclaimed works fiduciary on the outcome of suit: The original settlement created the not for profit 'Book Rights Registry' to safe guard the interests of the represented right holders. In the amended settlement, they created the 'unclaimed works fiduciary' to represent the interests of unregistered right holders. The registry can't represent any sub section of the right holders *(Amended Settlement Agreement § 6.1 (a)-(f)).* Google has to report to the registry and fiduciary all the scanned books, books sold and registry gives list of claimed books by right holders. This mandatory information exchange insures the interests of represented and in future or unrepresented right holders. The registry is responsible of locating, identifying and distributing royalty to right holders *(Amended Settlement Agreement § 6.1 (c)&(d)).* There is anticipation that over a period of time, the list of orphan books will reduce substantially. The registry can give the unclaimed money to the charities but not to registered right holder or keep it to self; if they fail to

locate the unclaimed work's right holders for 10 years. This is a good safe guard to avoid misuse of fund and conflict of interests in not locating the right holders.

What we have to ensure from the registry and the unclaimed works fiduciary?: The basic expectation and obligation the settlement and court has to impose on the registry and the fiduciary is to deal fairly, evenly between the interests of parties, work for the interest of the constituents it is responsible for rather being soft on Google for prices etc. Otherwise it will land in serious antitrust and copyright violation.

Issue of Privacy and Intellectual Freedom

People have freedom and privacy while accessing the books, collecting information and doing research. GBS being online service and equipped with tech power and we hope it to become more powerful and intrusive can gather information about the millions of readers simultaneously book by book, page by page and collate it over a period of time. Keeping in mind that this power is with one company, is pretty horrifying for the potential users. As Professor Lawrence Lessig says in cyberspace, it is very hard to know about the collection of information about you. *(The Law of the Horse: What Cyberlaw Might Teach).*

The librarians have fought the patron-record provision to provide information on the reading habits under the Patriot Act. Under the GBS, the libraries got back the digital copies of the books they gave to GBS for scanning and the settlement requires these libraries are suppose to give Google all the usage of books *(Settlement Agreement § 7.2 (b)(vii).*

Under the settlement, an e-book can't be resold, given on loan the way hard copies of the books are to protect the market interests of the Google. But it poses great consumer interest protection and freedom issue. It also highlight, once libraries have the digital copies accessible on terminal then the management would like to get away with the physical copies of the book because of the cost of handling, storage etc. In such scenario, what happens if Google; the only service provider of this service shuts down the service or go bankrupt or any other situation? The court need to

safeguard the interest of every reader in the final approved settlement (case law in Antitrust Issues).

There are a number of cases in the Cyber law to guide us the least tolerant approach of courts in this direction for private the corporation and even government agencies. For example, Government cannot invade a zone where the individual has a reasonable expectation of privacy. There are number of enactment to provide the privacy to citizens. The **Wiretap Act**, to regulate the interception of telephone and oral conversations *(18 U.S.C. §§ 2510-2522).* The **Electronic Communications Privacy Act** ((ECPA Pub. L. 99-508, Oct. 21, 1986, 100 Stat. 1848, 18 U.S.C. § 2510) extended the reach of the Wiretap Act to prohibit interception of electronic communications. It imposed limits on private and governmental access to dialing and signaling information

Government wiretaps a phone booth to gather evidence about Katz's gambling activities *(Katz v. United States, 389 U.S. 347 (1967)).* Katz challenges it as an unreasonable search/seizure in violation of **4th Amendment**. Govt. can't invade a zone in which a person has a reasonable expectation of privacy without prior judicial authorization based on showing of probable cause.

Doe is an internet access provider. Plaintiff challenges the constitutionality of 18 USC 2709 which authorizes the FBI to compel communication firms to produce customer records whenever these are relevant against international terrorism acts *(Doe v. Ashcroft , 334 F. Supp. 2d 471 - Dist. Court, SD New York 2004).* Plaintiff alleges that this is a violation of the 4th Amendment. The court ruled that the statute violates the 4th Amendment. Warrantless seizures and searches are per se unreasonable (unless they fall under an exception). Subpoena has to be subject to judicial supervision and surrounded by every safeguard of judicial restraint. The national security letters are written in the form that prohibits any ordinary judicial review.

In a case similar to the privacy concerns of GBS, the DoubleClick provides user-specific advertising services *(In re DoubleClick Privacy Litigation 154 F.Supp.2d 497 (2001))*. Plaintiff contended that the placement of the cookie was unauthorized access to their computer and alleges that the information the cookies collect is way too broad only for advertising purposes. Cookies collect three different types of information, GET, POST and GIF. The information is only collected on DoubleClick affiliated websites and there are easy ways to prevent DoubleClick from doing this. Electronic Communications Privacy Act aims to prevent hackers from obtaining, altering or destroying certain stored electronic communication, exception is when user authorizes.

Antitrust Issues

The early protestors of settlement like Librarian Robert Darnton objected on the basis of high concentration of the digital books with one company *(Google and the Future of Books, Robert Darnton, NY Rev of Books, Feb 12, 2009).* Other libraries joined to raise concerns on prohibitive prices of the institutional subscription prices as Google is the only company digitizing the library books. They were raising antitrust concerns along with copyright infringement.

The § 1 of the Sherman Act considers per se illegal "every contract ……. In restrain of trade *(15 U.S.C. § (2000))*. It tries to achieve productivity and efficiency through:

- Allocative efficiency – the allocation of economic resources to the people who value them most.
- Productive efficiency – letting firms achieve the size at which the cost of production is least.
- Dynamic efficiency – the desire to protect the competitive process itself and especially to preserve the opportunity for new firms to enter existing markets or create new ones.
- Small Businesses – to break up the large anti competitive firms to protect competition and prevent the concentration of economic and political power.

GBS settlement cartelizes the entire market for price fixing which is per se illegal. The Registry will negotiate the price, business model, and delivery with Google on the behalf of the complete industry is potentially a dangerous monopoly.

The benefits of consumer and protection of competition in the long run are important. Many people confuse 'competitor' with 'competition'. Antitrust doesn't protect competitors but competition process and consumers. Before finding the antitrust violation, the determination of market *(The market power can be something well short of 'monopoly power'. It is the ability of a firm to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded)* and monopoly *(Monopoly Power is to exclude competition and raise prices substantially above the competitive level or cut back output. The evidence that a firm has raised prices profitably, clearly demonstrates monopoly power. Also, if there is little to no evidence that prices are raised without analyzing competition. Power can be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.)* power is critical.

The reason is that if we define market under analysis narrowly then ordinary competition becomes monopoly where as broad market definition will result in approving the anti competitive practices. Since there are no previous attempt like Google Book Search so we need to look at each of the elements to understand the anti-competitive or pro-competitive nature of the settlement.

Though settlement is non-exclusive that means Google's future competitors can also get in the negotiation with the copyright owners and have their contract. But easier said than done, copyright is exclusive rights, only the right holders can authorize to grant the license and at the same time majority of books are orphan books. Scanning and selling copyright works without authorization is a tort and crime. So unless the settlement of class action has in-built provision of competition, it will remain anti-competitive with high entry barrier. Since market cannot ensure

competition so the court judgment has to ensure the pro competitive nature of the finally approved settlement.

Some of the Antitrust cases discussed below will highlight the issues concerned in case of GBS: Standards Oil built pipelines, penalized those that tried to access those pipelines and had a deal with the railroads that excluded other competitors *(Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911))*. They controlled 90% of the market. Court struck down case under rule of reason. Reasonableness is adopted and ancillary restraints doctrine is rejected. Even direct restraints on trade may be legal if reasonable.

The Antitrust law does not make mere size or high market shares an offense. The existence of un-exerted power is not an offense. Overt acts are required. One need wrong doing of restrictive trade practice which is §1 violation in order to establish the monopoly of §2 violation. The Court also emphasized in case of US Steel that it did not have 100% market share what will be the case of GBS initially till there in market entry by new players *(US v. US Steel Corporation 251 U.S. 417 (1920))*. It will be interesting to see what NY court decides in case of GBS as it is unlikely to be accepted today.

In next case of Griffth, court did look at the conduct which violates Sherman Act §1 to establish a § 2 violation *(United States v. Griffith, 334 U.S. 100 (1948))*. Sherman Act § 2 is not restricted to conspiracies or combinations, it simply condemns monopolization. As long as there is an intent to exclude competition, to destroy a competitor, or gain a competitive advantage, there is a Sherman Act §2 violation.

The Supreme court has stated the Sherman Act §2 standards in Grinnell case *(United States v. Grinnell Corp., 384 U.S. 563 (1966))* as below:

- Interchangeability analysis - in defining the market and the key is to consider the perspective of the buyer, would they be willing to purchase an alternative form, thus

changing the market definition, or are they compelled to buy a certain type of good, thus narrowing the market definition.

- The possession of monopoly power in the relevant market. Here since Google is the only service provider so it is hard for them to show the future behavior above the threshold of violation of § 2.
- Efficiency is positive but anti-competitive goals are not.

A firm's use of strategic dominance to foreclose potential entrants constitutes an attempt to establish a monopoly *(Lorain Journal Co. v. United States, 342 U.S. 143 (1951))*. *Lorain* (1951) publisher of only newspaper in city failed to get a license to operate a radio station, and the newspaper chose to boycott the competition in the next town by refusing to print advertising from any firm that had advertised with the radio station. The settlement has to develop framework for future collaboration for potential entrant by GBS. Otherwise the court in future suit may perceive it as a §2 violation. Single refusal to deal can violate §2 but not §1 because of the *Colgate* doctrine which allows for unilateral conduct in vertical arrangements.

But on contrary to *Lorain,* the court in Aspen (during fourth period of Antitrust) has said that firm with monopoly power does not have duty to cooperate with its smaller rivals *(Aspen Skiing v. Aspen Highlands, 472 U.S. 585 (1985))*. Here, the ski company had 3 of the 4 slopes in the area, Highlands owned the 4th slope. Throughout the years they had all operated through an Aspen program. Ski Co. was going to exclude Aspen from the deal unless Aspen took a lower cut. Court affirmed jury verdict that this had no valid business justification. One cannot refuse to deal with the intent to exclude a competitor on a basis other than efficiency. Exclusion based on the desire for increased profit is not allowed.

The court has ruled that owners of an <u>essential facility</u> must allow their competitors access to it, although they may impose reasonable charges for that access *(United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912))*. This is an alternative remedy of open access where it is not possible to break up the monopoly. In many emerging countries, the telecom and Internet backbone are

owned by federal government but private companies get the access to infrastructure at cost and in turn they roll out value added services to customers. Are the digitized books considered infrastructure for the readers?

Alcoa had 90% of market share, patents necessary to produce aluminum, and before they expired, it entered into cartel agreements with foreign producers and contracted with electric company to supply only to them. Court held per se illegal and said can't distinguish between good and bad monopoly, only allowed to be big if the market goes your way without intent to monopolize *(United States v. ALUMINUM CO. OF AMERICA 148 F. 2d 416 (2nd Cir. 1945).* Right now the GBS is the only service provider of the digitized books. What impact will it have on the court's opinion?

When LePage's started making inroads into 3M's sales of Scotch-brand tape, 3M responded by creating "loyalty discounts" *(LEPAGE'S INC. v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY) United States Court of Appeals for the Third Circuit, 324 F.3d 141.(2003))*. The court held that to be a predatory conduct because it is hard for a single-line producer to compete with the cost savings available over multiple lines. So excluding all competitors is a violation of §2.

The opinion on operation and path breaking steps of very successful companies are divided. Alan Greenspan, economist and former Federal Reserve chairman criticized the judgment of monopoly against Alcoa, "It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel." Greenspan believes that the characterization of Alcoa as a threat to competition is erroneous, as "ALCOA is being condemned for being too successful, too efficient, and too good

a competitor. Whatever damage the antitrust laws may have done to our economy, whatever distortions of the structure of the nation's capital they may have created, these are less disastrous than the fact that the effective purpose, the hidden intent, and the actual practice of the antitrust laws in the United States have led to the condemnation of the productive and efficient members of our society because they are productive and efficient." Greenspan grants that Alcoa was a monopoly, but maintains that it was not a coercive monopoly and, hence, should not have been subject to anti-trust action. (Source: *Capitalism The Unknown Ideal*)

Comparison with ASCAP and BMI: American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc (BMI) have classic example of the collective marketing of the copyrighted works and the similar antitrust concerns. The analogy has few similarities only but differs to a great extent. The court applied 'rule of reason' while looking at the ASCAP and BMI case and took note of the enhanced productivity through the collective marketing of the fragmented and scattered copyright holders *(Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979))*. *BMI* involved the fixing of prices through a blanket licensing agreement that did not allow for publishers to negotiate new prices for the rights to music or other media. The court applied the test was whether this arrangement promoted competition by increasing efficiency.

- Reasonably necessary to achieve cost-reducing efficiencies.
- Is the restraint on trade that follows necessary for the strategy
- Balance the efficiency against the adverse effect of the restraint.

Without such arrangements the getting permissions would have been prohibitively high. ASCAP and BMI model is just another opportunity of marketing. This model simply creates a new product and thus is a reasonable business practice. The cable, radio and others can approach for individual licenses. So even though there is market concentration for the songs but that is in addition. The court ruling for the ASCAP and BMI came favorable because it:

- Creates efficiencies and lowers transactions costs.
- It offers a different product than individual music so market creation.

- Individual copyright owners can sell compositions separately from blanket license
- So supply/output was not restricted by the license

Department of Justice accepts the similarity but dismisses the analogy as the Registry didn't negotiated the same only for Google rather than others online sellers.

Like every contract, this settlement explicitly states the authorized rights are with Google and its partners. The cost and time resource needed for the next entry into the space should be drastically lower to encourage competition.

- Entry Barrier: If the due process is followed and all the current and future issues addressed then the settlement lowers the barrier. The entrant should not bear the legal risk, test the demand of the digital books by consumers, gain from the identified authors of Orphan books, buy the digitized books from library in one go etc.
- Books not in Copyright: The comprehensive GBS settlement will bring clarity on books from 1923-63 and the reduced legal risk and transactional cost will facilitate the entry in the market place in this category.
- Orphan Books: Orphan books are the most contentious issue of the GBS. If the settlement for GBS doesn't happen then it is zero sum game for the stakeholders. With the settlement definitely some of the authors will get money and many more will be identified and should come forward to claim. Practically, GBS will reduce the risk and make the zero game into positive for authors and subsequently new player.
- Out of print books: Books not in demand and in print will continue to be so if the GBS couldn't offer through settlement and so will be the future competitors. Market will not be able to assess the demand by increasing the reach for research, historical references or any other purpose.
- In print Books: The advantage of dominant place of Google in search creates value for bringing the in print books to the large number of audience around the world. The institutions subscribers will have real benefits as they are heavy user and at one place they will get the maximum available in print books.

Conclusion: Since the suit is going on so I would not like to predict the outcome based on limited research done so far. I would like to conclude with impact and worries of stakeholders.

There is no doubt that e-book era has come and access to books is going to be necessity rather than luxury. The approval of the GBS will bring enormous educational, intellectual, economic, cultural, social, and environmental benefits at large. The out of access along with in print books will be clicks away all over the world. The marginal value will be more to the remote locations than the big cities. Once the GBS is linked to open platform, it should mushroom the development of new technical applications and manufacturing devices like Kindle and Nook and a new business model to be adopted by the corporations in cyber space.

Since Napster, file sharing, disregard of copyright law and redundancy of intermediaries with advent of Internet are fresh in memory so the publishers are worried. Authors are worried of fast losing control of monetization of their works. Authors have been dealing with publishers and now they have to learn to deal with online sellers may be cutting publishers all together. The complex impact is that publishers and authors are worried about decreasing sale, reduced price and academic institutions and libraries are worried about higher cost. The libraries have to learn to get away with the costly and cumbersome handling of the paper copies but don't yet know the nuisances of digital subscription. Legal fraternity wonders the changing scenario of the first sale doctrine and hidden role of the censorship. Attorneys and economists are keen to know the competition and success and adoption of new business model. Non government organizations worried about the true representation of the class action and some of them like Pamela Samuelson settlement of market and IP rights are against the democracy *(DOJ statement, supra note 3 at 2 "A global disposition of the rights to million of the copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement")*.

GBS has generate sufficiently enough interests in the society that one can predict that if settlement is difficult then the congress may enact Orphan Works Legislation *(T*he Shawn Bentley Orphan Works Act of 2008 S. 2913) and the digitization will happen at the private and public initiatives.

Professor Grimmelmann has rightly said, "the Google book search settlement serves respectable ends through questionable means".
