Presentation to the Academic Senate Coordinating Committee
UCSF Committee on Library and Scholarly Communication

- Overview
- Open Access Primer
- Google Books Settlement Article (“Hurtling Towards the Finish Line”)
- Supplemental Academic Author Objections to the Google Book Search Settlement
- Letter from Larry Pitts Regarding Public Access Policies for Science and Technology Funding Agencies Across the Federal Government

Overview

LIBRARY SPACE

The Academic Senate plays a central role in advising on the allocation, reallocation or redesign of library space.

MISSION BAY CAMPUS

Currently, there are two small libraries at Mission Bay - in Genentech Hall and the Community Center. The Genentech Hall Library is available 24/7 but that space will be repurposed into a Teaching Lab once the funds are raised. Even with both libraries the spaces are inadequate for the growing Mission Bay population. COLASC participated in the development of a Long Range Plan that outlined the need for a larger library to serve the population working at Mission Bay now and the expected growth with the opening of the Medical Center in 2014. The plan was developed with COLASC and reviewed by the EVC/Provost Washington prior to his departure. We are asking for Senate endorsement before forwarding the document officially to the EVCP.

PARNASSUS CAMPUS

24/7 STUDENT STUDY SPACE (Hearst Reading Room)

In FY 10 Parnassus and Mission Bay Library hours were reduced to address a 13% budget reduction. At the same time the Library began looking at the possibility of opening part of the Parnassus Library as a 24/7 study area. Plans are underway to raise funds to install a bathroom for late evening/overnight use. In the meantime the Hearst Reading Room, just off the 3rd floor entrance, will open for Saturday study by UCSF students on February 27th.

THE TEACHING AND LEARNING CENTER

The Teaching and Learning Center, opening in January 2011, will provide a technology-rich environment in support of interprofessional and transdisciplinary learning programs at UCSF. The programs will focus on training future health professionals and scientists to become leaders in delivering high quality care to underserved communities.

The second floor of the Parnassus Campus Library will be transformed to house this new facility, enhancing Library education space with a simulation and clinical skills education center; new teaching and learning space, including technology-enhanced active-learning classrooms and computing labs; and communications technology to facilitate interaction with health care providers, students, and support teams at other sites.

The project is funded by the Telemedicine and PRIME-US Education Facilities initiative, part of California State Proposition 1D. All four professional schools and the Library have
collaborated on planning the new center, which will support the curricula for Dentistry, Medicine, Nursing, Pharmacy, and other clinical programs. More information is available at: http://tlc.library.ucsf.edu/

FY 11 UCSF LIBRARY BUDGET PLANNING
The UCSF Library depends upon state funds for 80% of its budget. To address the state budget crisis the Library has reduced its permanent budget by 13.29% over the past two years and projects a permanent reduction next year somewhere between 16 and 26%. At the advice of COLASC a high priority has been protecting journal subscriptions. With the magnitude of projected cuts on top of reductions to date we must undertake large scale journal cancellations. To the extent possible we will consult with faculty. The situation is complicated because the majority of UCSF journals are systemwide licenses requiring agreement from all campuses for individual cancellations.

If the projected cuts are realized we expect a significant reduction in library services and programs. We will continue to work with COLASC as proposals are developed.

SCHOLARLY COMMUNICATION
Current scholarly publishing models are not economically sustainable. Researchers and students have access to a diminishing fraction of relevant scholarship due to continued escalation in the cost of journals. The state budget crisis will reduce the availability even further. The UC Libraries have worked with faculty to developed strategies to reshape scholarly communication.

- Encouraging faculty to publish in open access journals
- Supporting faculty compliance with the NIH Public Access Policy
- Advocating for national initiatives to mandate open access for other governmental agencies
- Negotiating open access to content written by UC authors for journal licenses (Springer Open Choice)
- Providing open access repositories for faculty publications (eScholarship)
- Subsidizing faculty publications in open access journals (PloS and Biomed Central)
- Consulting and educating faculty about options to retain their copyrights

The UCSF faculty has led the effort to support open access initiatives. We will work to find new ways to achieve greater open access, which will raise the visibility of our faculty and help contain costs.

GOOGLE DIGITIZATION
In October 2008, Google announced a settlement of a class action lawsuit by the Authors Guild of America and a separate suit by representative members of the Association of American Publishers. Both organizations sought to bar Google from scanning copies of in-copyright books held in the collections of major U.S. libraries as part of its Google Book Search Library Project.

The University of California became the sixth Google partner library in August 2006 when UC signed an agreement with Google to digitize 2.5 million volumes from UC library collections. Earlier partner libraries include the University of Michigan, Stanford University, Harvard University, the New York Public Library, and Oxford University. An Amended Settlement Agreement was filed with the court on November 13th, 2009.

Some UCSF Library books, located at the Regional Library Facility in Richmond, have been scanned as part of the UC Libraries digitization project. COLASC has started discussing a USF library proposal for Google to scan books from the Parnassus shelves. Books out of copyright (generally before 1923) would be available without restrictions. While one will be able to search the entire text of in-copyright material the full text is not displayed. An FAQ is available at: http://osc-s10.cdlib.org/google/faq.html
Open Access Primer

Open-access (OA) literature is free, digital, and available to anyone online. An open-access article has limited copyright and licensing restrictions which means anyone, anywhere, with access to the Internet may read, download, copy, and distribute that article. As with any scholarly article — traditional or otherwise — authors of an open-access article should be properly acknowledged and cited.

More readers, greater impact

Open access provides barrier-free access to information. Researchers from anywhere in the world can read scholarly output that has been made available in an open-access journal. A wider audience, in turn, has the potential to increase the impact of the research presented in an open-access article. A 2006 study by a University of Southampton researcher, Evaluating Research Impact through Open Access to Scholarly Communication, found that authors receive 50-250% more citations.

The economics of open access

While open access is free to readers, open access is not free of production costs. As with traditional academic journals published by commercial firms, articles published in open-access journals must be peer-reviewed, edited, distributed, marketed, etc.

There are two main economic models for open-access publishing:

**Publication fees:** Also referred to as "author fees," some OA journals charge publication fees. Similar to page charges, a publication fee is required as payment – usually in the range of $1000 to $2500 – to publish an article. Think of publication fees as part of the cost of doing research, and the cost can be borne by the funding agency. If an author cannot afford the fee, most OA publishers, are willing to waive the cost. Many funding agencies support open access.

**Institutional fees:** Some open-access journals are funded by institutional fees. The University of California pays an institutional membership to BioMed Central and the Public Library of Science (PLoS) which gives UC authors a discount on their publication fees.

Three ways to make your article open access

**Submit your article to an open-access journal:** An open-access journal is one that makes its articles available *immediately* upon publication. OA journals conduct peer review and allow authors to retain their copyright.

**Publish in a hybrid open-access journal:** Variations on OA have emerged including the concept of "hybrid open access." Blackwell, Springer, Oxford University Press, Nucleic Acids Research, PNAS, and other traditional, subscription-based journals or publishers, will make articles immediately available to the public if the author pays an additional open-access fee. These publishers have come up with a variety of terms to describe their open access policies including "sponsored article" (Elsevier), "open choice" (Springer), and "funded access" (Wiley).

**Deposit your article in open-access archives or repositories:** A repository can be a subject repository such as PubMed Central, or UC's eScholarship Postprint service.
Hurtling Toward the Finish Line: Should the Google Books Settlement Be Approved?

February 16, 2010

Ivy Anderson, Director of Collections
California Digital Library

Late last week, Google and the plaintiffs filed their final briefs in defense of the Google Books Amended Settlement Agreement (ASA) that is before the New York Southern Federal District Court. As the rhetoric around the Settlement heats up to white-hot intensity in the final days before the Fairness Hearing on February 18th, I’d like to offer a few personal thoughts from my vantage point at the California Digital Library.

The University of California Context

CDL and indeed the UC Libraries as a whole bring what is perhaps a unique perspective to this dispute. The University of California Libraries are Google’s second-largest library digitization partner; we are also the second-largest book digitization partner of the Internet Archive, thanks to generous funding in the past from Microsoft, Yahoo, the Alfred P. Sloan and Kahle/Austin foundations, and other sponsors. In all, UC Libraries have now digitized 2.5M books from their collections through these projects, both in- and out of copyright.

CDL also occupies an unusual position in this debate within our own community of scholars at the University of California, where some of our closest faculty colleagues are also among the Settlement’s most prominent critics. While many assume this to be an uncomfortable position, I don’t find it so. Like any complex enterprise, the Google Books project is appropriately viewed from many perspectives. The proposed settlement is hardly perfect; as Google acknowledges in its brief, it’s a compromise among parties with differing agendas and motivations. CDL is a staunch supporter of the underlying aims of the Google Books project to make the knowledge enshrined in the world’s great libraries discoverable and accessible across the globe, and we support the public benefits that will ensue, including the benefits to libraries, if the Settlement is approved. At the same time, public criticism has been good for the Settlement, producing very

(This piece was published on the California Digital Library website on February 16, 2010. For the original posting, see http://www.cdlib.org/cdlinfo/2010/02/16/hurtling-toward-the-finish-line-should-the-google-books-settlement-be-approved/)
real improvements in the amended version that is now before the court; improvements that would not have been made without that criticism. Long live democracy!

**Digitization Partnerships: The Promise and the Peril**

Like many of the objectors, participating libraries went through their own period of outrage and indignation when details of the Settlement first came to light. What! We would have to buy back access to our own books?? Why did Google let us down in abandoning its fair use defense?? Why should the parties be allowed to create an artificial revenue model for works that are long out of print, books that would no longer exist at all outside of used bookstores if the libraries themselves hadn’t purchased and maintained them at great expense over decades and indeed generations?? How can they do this without our agreement as to terms, since it is we who have made these books available to them in the first place?? Hasn’t our stewardship paid for these books many times over?? Isn’t this why copyright law contains unique exceptions for libraries, in recognition of our mission to further the public good?? Wasn’t the appropriate use of our own copies in light of fair use principles our decision to make??

The problem with this view, of course, is that libraries did not initiate this enterprise, and we are not its only beneficiaries. The Google project placed two sets of commercial interests at loggerheads, with copyright law in the middle. Admittedly, libraries took a risk in engaging in a partnership so legally entangled.

But let’s be honest: though few seem willing to admit it, revitalizing the world’s heritage of books for a digital age – a task that many considered impossible only a few short years ago – appears within reach today almost entirely due to Google’s enterprising vision. Even the Open Content Alliance, which CDL joined a year before becoming a Google partner, was in some sense a response to GBS (although it had other important antecedents as well, thanks to Brewster Kahle’s equally inspired vision). When Google’s competitors withdrew their support for that project, no other funders stepped in to fill the breach. The plain fact is that despite the idealistic adjurations of some, the resources required to digitize our cultural book heritage on a grand scale are not likely to be marshaled in the U.S. by libraries and the public sector alone.

At least, not in our lifetimes. At CDL, we’ve done some estimating of what it would take to convert the roughly 15 million unique books in University of California library collections to digital form absent the Google enterprise using the best alternative technology available today. The answer? Half a billion dollars, and one and a half centuries.

And that is just the University of California’s books.

I like to compare this to the building of the great Temple of the Sagrada Familia in Barcelona, a city with which my family has an ancestral connection. When my husband’s grandmother left Barcelona as a young girl in the late 19th century, the Sagrada Familia had barely erected its first stone. In 2006 more than 125 years later, her great-granddaughter traveled to Barcelona for the first time, where she was able to observe Gaudi’s monumental edifice, still under construction. At this writing, completion is projected for 2026.
Like the Sagrada Familia, without the Google Books Project we could still be building the digital library of the future 100 years from now.

The speed at which Google is converting this content is not without costs of its own. Google’s iterative approach to building large-scale services has drawn criticism from some scholars accustomed to work that is honed and polished before it is released. This is in part an argument about means, not ends. Like those progressive JPEG images that start out blurry on the screen and become sharper as the details fill in, Google’s services are improving over time as it continually upgrades and enhances its images and metadata. Over time we will be able to replace those missing or still-blurry pages with better versions. Where the value of the content warrants it, we can selectively invest in more meticulous rendering, textual markup, and other enhancements.

Two cases are illustrative here. CDL has digitized a large number of public domain books with the Internet Archive, some of which have also been digitized in our Google partnership. Although CDL had to suspend its Internet Archive book scanning project earlier this year after Microsoft withdrew its support and additional grant funding proved elusive, we have every expectation that we will take up comparable projects with Internet Archive in future, because its technology is better suited to certain types of uses (better artifactual rendering, for example). The Early English Books Online (EEBO) database marketed by ProQuest is another example in which through an innovative partnership with libraries and scholars basic scans are enhanced with detailed markup for a subset of carefully-selected works.

In the meantime, a great deal of value is already being derived from the Google work as it stands today. Students and scholars report finding much formerly-hidden material, journalists and etymologists are mining its content for historical information, and even some of Google’s severest critics have said that they can no longer imagine life without GBS. This is neither an either-or proposition nor a zero-sum game. All of these services are fulfilling a niche, along with libraries, in a new information ecology that we are only beginning to understand even as we participate in its unfolding.

EEBO, by the way, is also a good example – of which there are countless others that one can point to – of the long history of successful library-vendor partnerships to make content available to a wider audience. Like the much-feared Google Institutional Subscription, most of these products have a monopoly over the particular aggregations they market; it simply makes no economic sense to digitize certain corpora over and over again, particularly when libraries themselves are the primary consumers. Somehow, libraries have survived (and even thrived) through these arrangements, and students and scholars have benefited.

### Settlement Pro and Con

So in the long run, is the Google Settlement a good thing, or a bad thing? Before answering that question, let’s look at just a few of the major criticisms that have been levied against the Settlement.
The Institutional Subscription will become too expensive because it has no meaningful competition. Well, it’s hard to know that, of course. In fact, we don’t even know today how many books it will contain, nor what the scan or OCR quality of the content will be given the variability of the overall corpus. But we do know that there are at least three checks on the institutional subscription price that should mitigate price-gouging. First, the broad distribution requirement in the Settlement’s dual objectives means that prices cannot become so high that few choose to subscribe. Second, libraries themselves are savvy evaluators and negotiators of online content who can be expected to evaluate this offering rigorously and skeptically, and to eschew a subscription unless the price is acceptable for the benefit derived. Since none of us knows how our users will engage with this material, these assessments ought to be conservative. Third, the provisions for pricing arbitration built into the agreements between Google and the participating libraries will allow them to challenge price increases that they deem unwarranted; a provision that is intended to be exercised not on the basis of narrow self-interest among a small set of contributing libraries but on behalf of all libraries.

Academic authors want to release their books, not see them locked up. Indeed, no disagreement here; and the amended Settlement now explicitly provides for this (according to Google and the plaintiffs, this was always possible, but in the ASA it is now called out). We intend to work proactively with rights holders who would like to enable broader access to their books and to develop mechanisms that can help to make this straightforward.

The Settlement will give Google a monopoly over orphan works and is anti-competitive. It’s hard for me to see how Google’s activities to date can be viewed as anti-competitive when GBS is almost single-handedly responsible for the ebook explosion that is swirling all around us, with new entrants popping up every day. That may be a controversial assertion, but ebooks and ebook readers were a languishing backwater until Google stimulated the market by putting books online through its library and publisher partner programs. If anything, Google’s entrance into the retail space is likely to engender even fiercer competition. It seems cynical at best for rival behemoths Microsoft and Amazon to decry Google’s impending monopoly over a sliver of the ebook market – much of it of uncertain commercial value – under the noble-sounding rubric of the Open Book Alliance. But then, competition makes strange bedfellows. As to orphan works, the Settlement should if anything goad us all the more toward a legislative solution. It is as irksome to me as it is to other critics that Google should be uniquely empowered to collect royalties on behalf of absent rights holders who may have long ago relinquished any economic interest in their works. Still, the ASA addresses this in a far more satisfying manner than its predecessor. Finding a better long-term solution to the orphan works problem is something we all can get behind.

When the purposes that we first envisioned when embarking on these projects – all arguably fair uses of this content – are reviewed against the Settlement impacts, it’s hard to view the Settlement as anything but a positive development. More books will be available in full view, both to libraries and to consumers. New services will be developed for print-disabled users and for largescale computational analysis, further unlocking digitization’s transformative potential. Disclosure of rights information through a central registry (at least for U.S. books) is likely to have far-reaching impacts, facilitating the eventual orderly release of books into the public domain. Google’s competitors are likely to join the push for orphan works legislation,
increasing its chances of success. And with the Settlement behind us, we can all proceed in an environment of greater certainty.

**What if the Settlement is not approved?**

For libraries, failure of the agreement would hardly be a crisis. The benefits that we initially envisioned – improved discovery and full text search of our vast legacy collections, and broad public availability of works that are out of copyright or otherwise released by their copyright owners – will still be realized. The fears of some Settlement objectors – of monopolistic pricing and the forced commercialization of materials that are long out-of-print – will melt away like the elusive Vancouver snow. Participating libraries may still choose to undertake novel services, without the unwelcome restrictions imposed by the Settlement. As long as Google and others continue to partner with us, we will go forward in reinvigorating our collections for a new digital age.

The Google Settlement is fundamentally about whether Google and rights holders will be allowed to implement a particular set of business models for a certain set of books. I believe the Settlement should be approved, because it will create new and valuable services for libraries as well as consumers. But many of Google’s participating libraries have their own plans for these books, plans that do not ultimately depend on the outcome of the Settlement. The greatest risk for libraries if the Settlement is not approved is that further legal setbacks might lead Google to abandon its interest in library digitization altogether. If that were to happen, a unique opportunity would be lost that is not likely to be repeated in our lifetime.

**Life Beyond Google Book Search**

What of our relationship to the Google Books project itself? Some of the concerns we hear from faculty have nothing to do with the Settlement per se, but rather with the long-term implications of GBS for library collections and services. Let me close with a few words about some of those concerns.

To our scholars who worry that we are about to throw our physical collections overboard in favor of digital surrogates of sometimes uneven quality, I want to say: not to worry. True, libraries everywhere find themselves having to consign more and more of their physical collections to remote storage as campus space grows increasingly scarce and user preferences migrate online. And some libraries – the UCs far less than others – are addressing the space crunch by de-accessioning low-use materials that are widely held with the knowledge that they can borrow these items from another library if need be. (Many cooperative initiatives are now underway to share such information and ensure that enough copies are retained throughout the nation’s system of libraries to protect the integrity of the scholarly record.) That train has already left the station, and it’s happening independently of largescale digitization. What digitization offers is a valuable complementary mitigation strategy: we can now make those remote collections eminently browsable, saving time and expense both for users and for libraries. As a library user, you can now determine whether that book is really what you’re looking for before you request it, not afterward – and in some cases, the digital surrogate may indeed be all that you need. Libraries can promote these ‘hidden’ volumes more effectively to their users, while
limiting delivery costs to just those items that are truly wanted. This browsable and/or searchable digital surrogate – which is the quality level that most of the Google mass digitized scans are aimed at – is not a replacement for the original print book, and was never intended to be.

To our scholars who worry that we are outsourcing our library collections and services to Google, again I want to say: please don’t worry on this score either. Far from abrogating our mission as stewards of the cultural record, we who have opened up our collections to digitization are shouldering this role with vigor. While Google and others are making these books discoverable online to a general audience, the University of California along with other peer institutions is creating a robust shared access and preservation service for our mass digitized books, one that adheres to professional standards, through our partnership in a ground-breaking enterprise called the HathiTrust. If you haven’t heard of HathiTrust yet, you soon will. No UC library user need go to Google to search the full text of our books, or to find accurate bibliographic information, or to view and download those that are in the public domain; s/he can go to http://catalog.hathitrust.org/ and be reassured that those books will be there, in ever-improved versions, for the long-term. HathiTrust now numbers 5.4 million volumes from 26 libraries and is growing at a rapid rate, all searchable, all viewable if in the public domain (or otherwise rights-cleared), and all designed to inure to the long-term benefit of the nation’s libraries and their users. The digital library of the future resides not with Google, but with us. And we are building it today.

At the same time, Google, Internet Archive, and others, are providing an invaluable service in bringing the vast holdings of the great research libraries to a worldwide audience and integrating that content with general-purpose internet search services and other content. As one colleague has written, “Who among us has not benefited from a Google search?” In participating in these efforts, we are fulfilling our long-standing public service mission. The Google Settlement, if approved, will further these aims by providing more content, in more ways, to an even wider audience.

But in the end, approval of the Settlement is not a make or break event for libraries. Despite the claim that the Google Settlement promises to build “the greatest library in history,” libraries are not leaving the future of information to Google and these other partners alone. Nor need we wait, Godot-like, for fugitive national legislation to begin the work of serving up our cultural heritage in digital form. Through a combination of efforts, including public-private partnerships such as that of libraries with Google, we can go forward in this transformative enterprise together.
27 January 2010

Office of the Clerk, J. Michael McMahon
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York NY 10007

Attention: The Honorable Denny Chin

Re: Supplemental Academic Author Objections to the Google Book Search Settlement, Authors Guild, Inc. v. Google, Inc., No. 1:05-CV-8136 (S.D.N.Y.)

Dear Judge Chin:

The vision of a universal digital library containing the accumulated knowledge embodied in books from the collections of major research libraries—a library that would last forever—is unquestionably an inspiring one.\(^1\) The academic author signatories of this letter understand the appeal of this vision and heartily hope that it will come to pass. However, for reasons explained in this letter, we do not believe that approval of the Proposed Amended Settlement Agreement (PASA) in the *Authors Guild v. Google* case will fulfill this lofty ambition.

The Google Book Search (GBS) initiative envisioned in the PASA is not a library.\(^2\) 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 Book Rights Registry (BRR) or the Google Partner Program to exercise any control over Google’s use of their books. The litigants who spent two and a half years negotiating the initial Proposed Settlement Agreement (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. It is thus unsurprising that hundreds of authors and other rights holders have objected to the settlement and even more, we believe, have opted out. Nor is it surprising that several public interest organizations have expressed opposition to the settlement,\(^3\) for there were no consumer or public interest advocates at the negotiating table either. Because of this, the PASA is fundamentally tainted.

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This letter supplements one submitted to this Court on September 3, 2009, on behalf of sixty-five academic authors and researchers, which set forth numerous objections to the PSA. Among other things, that letter expressed concerns about the lack of meaningful constraints on price increases for the Institutional Subscription Database (ISD), the de facto monopoly that Google would obtain to orphan books, inadequate user privacy protections, and excessive restrictions on non-consumptive research.

The present letter reaffirms the earlier academic author objections to the PSA because the PASA does not adequately respond to objections set forth in that letter. It states some new objections because certain amendments to the PASA are contrary to the interests of academic authors who are members of the Author Subclass.

Our continued and new objections are rooted in the same fundamental flaw in the GBS settlement process: the Authors Guild and the named author plaintiffs have not fairly and adequately represented the interests of academic authors in negotiating either the PSA or the PASA. Simply put, the Authors Guild and its members do not share the interests, professional commitments or values of academic authors. Only a small fraction of Authors Guild members are scholars, and few write books of the sort likely to be found in major research libraries. Nor does the Association of American Publishers (AAP)


5 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, § 4.2 (a)(i). However, we remain 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.

6 While our letters have concentrated on our substantive objections to the PSA and the PASA, we have been enlightened by our study of Scott Gant’s objections to the PSA as to class action notice deficiencies and other Rule 23 problems with the PSA. See Objection of Scott E. Gant to Proposed Settlement, and to Certification of the Class and Subclasses, Authors Guild, Inc. v. Google, Inc., No. 05 CV 8136 (S.D.N.Y. Aug. 19, 2009), available at http://thepublicindex.org/docs/objections/gant.pdf We agree with him that the Guild did not adequately represent the interests of the Author Subclass and that notice of the settlement has been inadequate. Signatory Pamela Samuelson, for instance, did not receive a copy of the initial notice of the PSA, and regards the supplemental notice that she did receive as seriously incomplete in explaining the PASA and its implications, especially as to the unclaimed works fiduciary provisions.

7 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 Authors Guild Membership Guidelines, available at http://www.authorsguild.org/join/eligibility.html 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, § 4.8(a)(ii), which 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 Author Letter, supra note 4, at 2-7.

8 The Authors Guild website links to approximately 3000 of their member’s websites. A review of those websites reveals that slightly over 10 per cent 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 we can tell from these websites, the Guild’s members primarily write works aimed at non-scholarly audiences. They write, for instance, romance
share the commitments and values of scholarly authors, as is evident from its recent efforts to thwart open access policies for government-funded academic research, policies which scholars generally support. 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. (This issue necessarily forms the basis on which any settlement must be based.) 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.

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. While this letter focuses on academic author objections to the PASA, we are aware that we are not the only rights holders who believe the Guild and the AAP had interests quite different from and/or in conflict with theirs. Indeed, when we consider the diverse complaints about the settlement expressed in the hundreds of objections already filed in this matter, we question whether the Rule 23 standards have been or 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 U.S., UK, Canada, or Australia.

That said, we believe that the perspectives of academic authors on the PSA and the PASA should be given particular weight in this 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. Not

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10 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.


12 See, e.g., Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary, 110th Cong. 1-3 (2009) [“Hearing”] (Prepared Statement of David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google, Inc.) (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). A transcript of this hearing is available at [http://judiciary.house.gov/hearings/printers/111th/111-31_51994.PDF](http://judiciary.house.gov/hearings/printers/111th/111-31_51994.PDF)
surprisingly, a large majority of those books were written by scholars for scholarly audiences. Academic authors also far outnumber the members of the Authors Guild. There are about 800,000 full-time academics working at colleges and universities in the U.S., 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 we write are also of the sort likely to be found in the collections of major research libraries.

We acknowledge that 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, we believe, may well be new and unforeseen uses of their works, rights in which would seem to reside in authors under Random House, Inc. v. Rosetta Books L.L.C., 283 F.3d 490 (2d Cir. 2002). 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. Many publishing 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, we believe that academic authors hold a relevant copyright interest in many books and inserts in the GBS corpus.

We recognize that approval of the GBS settlement would bring about some public benefits, chiefly by providing significantly improved access to books. But the Court should be careful 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. The Court can either reject the settlement altogether or condition approval on the parties’ willingness to make changes to the PASA that address meritorious objections.

Part I discusses our objections to new provisions in the PASA as to anticipated uses of funds from unclaimed works and to certain powers that the “fiduciary” for unclaimed works has and some it lacks.

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13 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, at 14, available at http://www.dlib.org/dlib/november09/lavoie/11lavoie.html, 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.

14 The court considered the widely used contractual language in book publishing contracts—“to publish the work in book form”—as a limited grant, not a grant of all copyright interests. Random House, 283 F.3d at 491. 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, set forth in Appendix A, that address serious conflicts that exist between authors and publishers over rights to control and be compensated for e-book publications. This is reflected in testimony that Paul Aiken, Executive Director of the Authors Guild, gave before 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.” Transcript of Hearing, supra note 12, 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 Appendix 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. Appendix 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.
Part II 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).

Part III objects to amendments that omit 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.

Part IV raises concerns about whether the parties’ professed 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 our last letter, sent on September 3, 2009, that undermines our confidence that the settlement will bring about the public benefits the litigants say they intend.

Part V 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, we recognize that 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 public interest, and whether approval of this settlement is an appropriate exercise of judicial power. These questions have been addressed in numerous other submissions, and while our supplemental objection does not discuss them, we do share the misgivings that others have expressed.

I. We Object 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.16 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.17 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 23.18

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 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.16

17 PSA, § 6.2(a).
18 DOJ Statement, supra note 16, 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.
holders of unclaimed works.\textsuperscript{19} 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.\textsuperscript{20}

The academic signatories of this letter object to these provisions for several reasons.

First, there are no meaningful guarantees of independence for this so-called fiduciary, and insufficient criteria for how he/she should perform a fiduciary role in respect of the unclaimed books. The UWF is, for example, to be chosen by a supermajority of the BRR Board,\textsuperscript{21} and will apparently be housed in the BRR offices. The BRR, not the fiduciary, will hold onto the unclaimed funds; after five years, 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.\textsuperscript{22}

Second, the powers 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,” but not the reverse.\textsuperscript{23} The UWF also has the power to approve changes in pricing bins for unclaimed books available through the consumer purchase model,\textsuperscript{24} but seemingly no power to set prices for individual unclaimed books nor to provide input about price-setting of institutional subscriptions. This seems strange to us 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,\textsuperscript{25} but apparently not to recommend discounts.

Of particular importance to academic authors, the UWF lacks power to make unclaimed books available on an open access basis.\textsuperscript{26} While divining the preferences of unclaimed rights holders may be challenging as to many others, we believe that most unclaimed books in the GBS corpus will prove to be books written by scholars for scholars, and that 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.\textsuperscript{27} We object to this limit on the UWF’s powers.

\begin{itemize}
\item \textsuperscript{19} PASA, § 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. \textit{ld.}
\item \textsuperscript{20} \textit{ld.}, §§ 6.2(b)(iv), 6.3(a).
\item \textsuperscript{21} \textit{ld.}, § 6.2(b)(iii).
\item \textsuperscript{22} \textit{ld.}, § 6.3(a)(i).
\item \textsuperscript{23} \textit{ld.}, §§ 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.
\item \textsuperscript{24} \textit{ld.}, § 4.2(c)(i).
\item \textsuperscript{25} \textit{ld.}, § 4.5(b)(ii). We worry also that there will be little incentive for the UWF to agree to discounts as it would reduce the revenues over which he will have some control; BRR may also not want unclaimed works to be discounted, as these books will compete with those of registered rights holders.
\item \textsuperscript{26} 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.
\item \textsuperscript{27} \textit{See Random House}, 283 F.3d 490 (2d Cir. 2002), discussion, \textit{supra} note 15.
\end{itemize}
One power the PASA grants to the UWF to which we strongly object is the power to authorize Google to alter the texts of unclaimed books.\textsuperscript{28} We 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 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.\textsuperscript{29} 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.\textsuperscript{30} (We discuss below how we think orphan books should be treated.)

Fourth, the PASA would intrude upon Congressional prerogatives in respect of its consideration of 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.”\textsuperscript{31} 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 Congress, presumably through the passage of orphan works legislation.

By establishing a private escrow regime for collecting and distributing revenues 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 this Court. A substantial restructuring of rights under copyright law is the constitutionally mandated domain of the U.S. Congress.\textsuperscript{32} The orphan works legislation that Congress has considered up in recent years has not adopted the escrow model.\textsuperscript{33} Indeed, these bills are

\begin{itemize}
\item \textsuperscript{28}PASA, § 3.10(c)(i).
\item \textsuperscript{30}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). We are concerned that these actors will 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, § 6.3(b).
\item \textsuperscript{31}Id., § 6.2(b)(i).
\item \textsuperscript{32}Eldred v. Ashcroft, 537 U.S. 186, 222 (2003).
\end{itemize}
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.\textsuperscript{34}

The treatment of orphan books is no small matter. No one knows how many books will ultimately be unclaimed in the aftermath of a GBS settlement. \textsuperscript{35} 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.\textsuperscript{36} 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,\textsuperscript{37} and the proportion of out-of-print and orphan books remained stable, that would mean that about 7.5 million books would be orphans.\textsuperscript{38}

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,\textsuperscript{39} are especially likely to be unclaimed. In the 30 years or more since the publication of these books, the publishers may have gone out of business and authors may have passed away (and heirs may be ignorant about rights in their forebears’ books or too numerous or dispersed to track down), 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.\textsuperscript{40} The goal of the PASA pricing algorithm is to maximize revenues for each book.\textsuperscript{41} 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,\textsuperscript{42} and as we have noted before, we are deeply worried that prices for the ISD will rise over time to astronomical levels.\textsuperscript{43}

\textsuperscript{34} See Orphan Works Report, \textit{supra} note 29, at 11. 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. \textit{id.} at 115.

\textsuperscript{35} See Statement of William Morris Endeavor Entertainment, Aug. 2009, \textit{available at \[http://thepublicindex.org/docs/commentary/wme.pdf\]} noting a Financial Times estimate that between 2.8 and 5 million of the 32 million books protected by copyright in the U.S. are likely to be orphans).

\textsuperscript{36} Hearing, \textit{supra} note 12, at 6.

\textsuperscript{37} \textit{See, e.g.,} Letter from Paul Courant to Judge Denny Chin at 1, \textit{Authors Guild, Inc. v. Google, Inc.,} No. 05 CV 8136 (S.D.N.Y. Sept. 4, 2009), \textit{available at \[http://thepublicindex.org/docs/letters/Courant.pdf\]} estimating that Google will scan 50 million unique books for GBS).

\textsuperscript{38} 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.

\textsuperscript{39} Roughly half of the books in U.S. library collections were published before 1977 and one-third before 1964. Lavoie & Dempsey, \textit{supra} note 13, at 4-5. Moreover, research library collections tend to include a higher percentage of older books. \textit{id.} at 12.

\textsuperscript{40} PASA, § 4.2 (setting percentages for algorithmic pricing bins).

\textsuperscript{41} \textit{id.} at § 4.2(c)(ii)(2).

\textsuperscript{42} \textit{id.}, § 4.1.

\textsuperscript{43} Academic Author Letter, \textit{supra} note 4, at 3-5.
The PASA provides that after 10 years of collecting profit-maximizing revenues for orphan books, the UWF would become a philanthropist, 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. With all due respect to the eleemosynary impulse underlying these provisions, we think the PASA takes the wrong approach to making orphan books available.

While we believe that Congress is the proper governing body for decisions about what to do about orphan works, we also 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 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.\(^\text{45}\)

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. We object to this treatment for orphan works.

Finally, we note 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 interested parties.

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

Many academic authors have contributed chapters for edited volumes or written book forewords, which fall within the PASA’s definition of “inserts.”\(^\text{46}\) 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

\(^{44}\) PASA, § 6.3(a)(i)(3).

\(^{45}\) 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](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 [http://books.google.com/books?id=Ww1B9O_yVGsC&sitesec=buy&source=gbs_navlinks_s](http://books.google.com/books?id=Ww1B9O_yVGsC&sitesec=buy&source=gbs_navlinks_s) This book is widely used by Java programmers.

\(^{46}\) PASA, § 1.75 (defining “insert”).
appeared had been registered with the U.S. Copyright Office. The PASA has amended the 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. If this interpretation of the PASA is correct, we object to this change.

Newly published books are commonly registered with the U.S. Copyright Office because of certain benefits of registration. 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 editor 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. Copyright protection does not depend on registration under current law.

We surmise that the 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. 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.

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 decided to review that ruling. If the Supreme Court reverses the Second Circuit in Reed Elsevier v. Muchnick, it would become possible for owners of copyrights in unregistered books and inserts to participate in class action settlements of copyright lawsuits; indeed, it would then probably be unreasonable to exclude them. The PASA ineluctably defines the settlement class in 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. This definition of the settlement class would be unreasonable but for the Second Circuit’s ruling.

This Court should withhold its decision about whether to approve the settlement until the Supreme Court has resolved this issue. If the Supreme Court decides that unregistered rights holders can participate in copyright class action settlements, this Court should ask the litigants to renegotiate the PASA to address

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47 PSA, § 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.
49 17 U.S.C. § 412. Prompt registration allows owners to be eligible to be awarded attorney fees and statutory damages.
50 Id., § 102(a).
51 Id., § 4.08(a).
the unregistered rights holders issue. Indeed, the lawyers for the Author Subclass should *sua sponte* make a request for reconsideration of the settlement terms if the Supreme Court reverses the Second Circuit ruling. However, if they do not do so, this Court should refuse to approve the settlement until the class is redefined, as it would be unfair to deny unregistered copyright owners an ability to decide whether they wish to participate in the PASA (or to opt out) if the *Reed Elsevier* case allows their inclusion.

It is unclear to us what uses Google plans to make of inserts (or for that matter, unregistered books, such as doctoral dissertations on the shelves of many research libraries) 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 Court should ask the litigants to clarify this matter.

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

Finally, we note that the Authors Guild did nothing, so far as we can tell, to encourage book or insert rights holders to register their claims of copyright before the Jan. 5, 2009, cut-off date for 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 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. We object to any change in the PASA that alters our rights in our inserts.

III. 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.

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. We believe that it is impossible for this Court to determine if the PASA is fair, reasonable, and adequate without having access to the whole agreement, which necessarily includes terms highly relevant to the pending settlement agreement insofar as it sets forth termination conditions and consequences. We cannot accept that a separate termination agreement which so deeply affects the interests of class members would not be revealed to us, or to the Court.

The existence of a termination agreement is especially important to academic authors because an important reason many of us are staying in the settlement and not opting out is because we expect our books and inserts, as well as those of other scholars, to be available through GBS for decades to come. We also care about our institutions having the access to books in GBS through the ISD. That the
settlement agreement could terminate at some point in time without our knowing on what basis this could occur is deeply troubling.

The PASA has “intentionally omitted” Article XVI. We are puzzled about 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.

IV. 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.54

While academics were not expecting approval of the settlement to mean that in-print books would be available through ISD subscriptions to our universities, we 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. Our research 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 inclusion of the books in the ISD.55 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.56

The DOJ Statement of Interest, filed on September 18, 2009, alerted us to 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 has predicted,57 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

54 See, e.g., Hearing, supra note 12, at 4, n.3 (Statement of Paul Aiken, Executive Director of the Authors Guild: “We expect the settlement to make at least 10 million out-of-print books available”).
55 PASA, § 3.2.
56 See, e.g., Hearing, supra note 12, 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, § 3.5(b)(iii).
57 See Brin, supra note 1.
represent the interests of those who are not fully protected and whose rights may be compromised as a result.\footnote{58}

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.\footnote{59} The PASA does nothing to rectify this problem. 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 at least their out-of-print 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.\footnote{60} We do not know at this point how many books have already been removed, excluded, or opted out, but this Court should require the parties to make information of this sort available before the fairness hearing. 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.\footnote{61}

The Publisher Plaintiffs seem not to be the only ones excluding their books from the settlement.\footnote{62} Most authors and author groups that have spoken out about GBS have urged authors to oppose or opt-out of

\footnote{58} DOJ Statement, \textit{supra} note 16, 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.

\footnote{59} \textit{See also} Statement of William Morris Endeavor Entertainment, Aug. 2009, available at \url{http://thepublicindex.org/docs/commentary/wme.pdf} (“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.”)

\footnote{60} \textit{See} PASA, § 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-Anglophone foreign books scanned from major research library collections. \textit{See}, \textit{e.g.}, Lavoie & Dempsey, \textit{supra} note 13, at 8 (estimating that half of the books in major research library collections are foreign-language books). Some librarians mourn this loss. \textit{See}, \textit{e.g.}, Kenneth Crews, \textit{GBS 2.0: The New Google Book (Proposed) Settlement}, Columbia University Libraries, Copyright Advisory Office, Nov. 17, 2009, available at \url{http://copyright.columbia.edu/copyright/2009/11/17/gbs-20-the-new-google-books-proposed-settlement.pdf} (“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”).

\footnote{61} 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.

\footnote{62} Authors Guild Executive Director Paul Aiken testified before Congress on Sept. 10, 2009, about his expectation that publishers would not to want to participate in the settlement. Hearing Transcript, \textit{supra} note 12, at 143. We understand, for instance, that Reed Elsevier and Warner Books are among the major publishers that have opted their books out of the settlement.
the GBS settlement because they regard it as unfair.\textsuperscript{63} 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.\textsuperscript{64}

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 10 million book database will materialize.

V. Conclusion

Melding together the grounds for our objections to the PSA and PASA, we reiterate:

1) We object to provisions of the PASA which do not create true independence for the fiduciary for unclaimed works, nor criteria for accomplishing the fiduciary responsibilities and objectives for this role. In particular, we think 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 terms. The UWF should not have the power to authorize Google to alter the texts of books.

2) We object to provisions in the PASA that would continue to monetize books unclaimed after ten years. If the BRR and the unclaimed works fiduciary are unable to locate an appropriate rights holder by then, these books should be deemed orphans and made freely available to all. It is for Congress, not for the litigants or the Court, to address orphan work issues.

3) We object to the PASA’s seemingly narrowed definition of “inserts,” and more generally to the narrow definition of “book” in both PSA and PASA. This court should withhold approval of the PASA until after the Supreme Court decides the Reed Elsevier v. Muchnick case. If the Supreme Court rules 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


\textsuperscript{64} See, e.g., Objections of Harold Bloom, et al. to Settlement Agreement, \textit{Authors Guild, Inc. v. Google, Inc.}, No. 1:05-CV-8136 (S.D.N.Y. Sept. 8, 2009).
settlement.

4) We object to the failure of the litigating parties to provide this court and members of the class with access to the termination agreement which they negotiated amongst themselves, which was referred to in the PSA.

5) We object to the PASA because it, 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.\(^\text{65}\)

6) We object to the insufficient privacy protections for GBS users.\(^\text{66}\)

7) We object to the fee that the PSA and PASA requires 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.\(^\text{67}\)

8) We object to the PSA and PASA restrictions on annotation-sharing and non-consumptive research,\(^\text{68}\) and the weakness of Google’s commitment to improve the quality of GBS book scans and metadata associated with them.

9) We object to the PASA for its grant of power to Google to exclude books from the corpus for editorial reasons and for its grant of power to exclude up to 15% of books eligible for the ISD from that database.\(^\text{69}\)

10) We object to the PASA because it, like the PSA, 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.\(^\text{70}\) The PASA should be amended so that fully participating library partners in the GBS enterprise have the authority to take

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\(^{65}\) Academic Author Letter, supra note 4, at 2-5.

\(^{66}\) Id. at 6-7. We endorse the Privacy Authors’ Objection and its 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. 1:05-CV-8136 (S.D.N.Y. Sept. 4, 2009), available at [http://thepublicindex.org/objections/privacy_authors.pdf](http://thepublicindex.org/objections/privacy_authors.pdf). We acknowledge that 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.

\(^{67}\) Id., § 4.8(a)(ii). Academic Author Letter, supra note 4, at 7.

\(^{68}\) Id. at 6, 8.

\(^{69}\) Id. at 9-10.

\(^{70}\) Id. at 10-11.
over or reassemble from their library digital copies a corpus of books for continuing
to provide the ISD to university research communities.\footnote{The HathiTrust would seem to be an appropriate entity to take on this responsibility for the nonprofit research library community. \textit{See} HathiTrust, Welcome to the Shared Digital Future [http://www.hathitrust.org/](http://www.hathitrust.org/) (last visited Jan. 25, 2010).}

We conclude this letter, as we did our earlier letter, with the thought that whatever the outcome of the
fairness hearing, we believe strongly that the public good is served by the existence of digital repositories
of books, such as the GBS corpus. We feel equally strongly that it would 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. We do not
believe that the settlement of a class action lawsuit is 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.

Respectfully submitted,

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Re: Public Access Policies for Science and Technology Funding Agencies Across the Federal Government

Dear Sirs:

Based on consultations with stakeholders throughout the University, the University of California supports providing increased public access to federally-funded research results via open access policies. As a large, multi-campus research University and recipient of numerous federal grants, UC (the administration and faculty) believes that unfettered access to scholarly work is critical to the University’s mission to advance scholarship and the public good. The faculty of the University expressed their support for open access in a letter from the Academic Council to University President Mark Yudof on June 16, 2009. While the practical implementation of open access policies is not easy or straightforward, there is no question that the current journal publishing models have become increasingly unsustainable, and that they do not tap the full potential of digital technology to support the aspirations and obligations of the University and the faculty to disseminate research and scholarship widely and broadly. UC has been a leader in experimentation with alternative models of publishing and scholarly communication, and supports innovative solutions and initiatives on the campuses and systemwide (see http://www.ucscholarship.org, for example).

Who should enact public access policies?
Any research made possible by federal funding, aside from classified information, should be subject to the public access law/regulations/directive. Therefore, all federal agencies should promulgate public access policies as part of their funding. UC agrees with the recommendation of the Scholarly Publishing Roundtable in its final report (http://www.aau.edu/policy/scholarly_publishing_roundtable.aspx?id=6894) that “Each federal funding agency should expeditiously but carefully develop and implement an explicit public access policy…”

How should a public access policy be designed?

1. Timing
The NIH Policy calls for submission of articles in PMC within 12 months. While more immediate access is desirable in many fields, we understand that other fields where there are lengthier delays between publications may demand a full year embargo period. According to the Scholarly Publishing Roundtable report, embargo periods currently vary between fields, and have changed over time according to changing circumstances. The 12-month delay adopted by the NIH has proven effective, and should be adopted as a
recommended standard for other federal agencies. If necessary, individual agencies could be given latitude to evaluate shorter or longer embargo periods during a development and implementation period.

2. **Version**

Ideally, the final, peer-reviewed, published article should be available (also known as the "Version of Record"). Right now, it is generally the author's peer-reviewed manuscript that is deposited to open access repositories, and is acceptable within the NIH policy. Problems with version control that arise when different versions of an article are deposited in different repositories, or when an article is edited or corrected before or after publication, would be minimized by requiring that the Version of Record be made publicly accessible.

3. **Mandatory v. Voluntary**

The policy needs to be mandatory. As the NIH experience showed, requesting voluntary compliance will have little impact.

4. **Other - implementation**

We have two primary concerns about implementation. The first is that inconsistency between policies and repositories at federal agencies could lead to additional staffing time and costs for researchers and especially for research administration, which would be a financial burden on the University. Agencies should work together to ensure consistency in how public access plans are developed so that there is consistency in implementation and to minimize administrative burden. The second concern is that federal agencies are sufficiently funded to pay for the start-up costs associated with establishing and implementing the public access policies and mechanisms. Research funding should not be diverted to pay for this expense.

Thank you for this opportunity to respond to this important issue. We are pleased to see discussion of open access to federally funded research in both the legislative and executive branches of government, and look forward to seeing positive results.

Sincerely,

[Signature]

Lawrence H. Pitts
Interim Provost and Executive Vice President
Academic Affairs

Cc: President Mark G. Yudof
    Vice Provost Daniel Greenstein