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D Is for Digitize: An Introduction

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For out of olde feldes, as men seyth,
Cometh al this newe corn from yer to yere,
And out of olde bokes, in good feyth,
Cometh al this newe science that men lere.

– Geoffrey Chaucer[1]

This symposium issue of the *New York Law School Law Review* collects seven articles springing from the *D Is for Digitize* conference on the Google Books lawsuit and settlement, held at New York Law School October 8–10, 2009. In the spirit of Chaucer's "good feyth," thirty panelists and over one hundred attendees (plus dozens more watching online) gathered to discuss the legal and social issues raised by the proposed settlement. For three days, lawyers, academics, librarians, programmers, and public-interest advocates met for a rich, respectful, and wide-ranging conversation on this once-in-a-lifetime settlement. These articles continue that conversation.

Everything about Google Books is larger than life. It began with an audacious plan—Google's "moon shot"—to digitize every book ever published, tens of millions of them.[2] The litigation that followed was equally breathtaking: a class action on behalf of millions of copyright owners alleging that Google's book-scanning project violated copyright law.[3] These facts alone would have made any settlement a big deal; this one didn't disappoint. Google will sell digitized books to individuals and institutions on a grand scale, sharing the revenue with authors and publishers. Millions of copyright owners, tens of millions of books, hundreds of millions of dollars: numerically, it's a tremendous settlement.

The numbers alone, however, don't tell the whole story. The settlement has been called "magic" and a "trick"; love it or hate it, it's one of the most creative pieces of legal engineering in memory. The basic scheme—using a class action settlement to generate a new industry-wide publishing program that will let Google sell online editions of digitized books—is startling. It has opened many people's eyes to unexpected possibilities: for old and out-of-print books, for copyright law, and for class actions. But many of the great many details that flesh out the idea are also notably clever: open the settlement to a random page and you'll probably find a surprising solution to a practical problem.

This combination—a far-reaching settlement that affects many people (and the law itself) in significant and surprising ways—makes it a natural issue of public concern. But the settlement's complexity also makes it intimidating and inaccessible.

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1. Geoffrey Chaucer, *The Parliament of Fowls*, *in* The Riverside Chaucer 385 (3d ed. 2008).

2. Jeffrey Toobin, *Google's Moon Shot*, New Yorker, Feb. 5, 2007 at 30.

3. *See* Complaint, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136, 2005 WL 2463899 (S.D.N.Y. Sept. 20, 2005); *see also* Complaint, McGraw Hill Cos. v. Google, Inc., No. 05-CV-8881, 2005 WL 2778878 (S.D.N.Y. Oct. 19, 2005). The reader interested in learning more about the claims made in the lawsuits and the basic terms of the settlement should consult Professor Matthew Sag's article in this volume, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. Sch. L. Rev. 19 (2010–11), or Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 8 J. Marshall Rev. Intell. Prop. L. 227 (2009).

How many people have the time, motivation, and knowledge needed to read through hundreds of densely cross-referenced pages of intricate legalese? Everyone who writes or reads has a reason to care about the settlement. The worst thing that could happen to such an important settlement—whether it is approved or rejected—would be for the public's voice to be absent from the discussion over it.

It was in this spirit that New York Law School established the Public-Interest Book Search Initiative (or PIBSI, as we like to call it) in the spring of 2009. A faculty-student collaboration, PIBSI is dedicated to promoting public discussion and understanding of the proposed settlement. We aim to provide the public with accurate and comprehensive information on the settlement, provide forums for conversation about the issues it raises, and encourage the production of clear and helpful analyses of it. PIBSI's members have varied opinions on the settlement, but we agree that every point of view ought to be part of the larger conversation.

PIBSI's flagship project, launched in the summer of 2009, is the Public Index, a website of settlement-related resources.[4] Its centerpiece is an online version of the settlement itself which lets readers create links to individual sections, leave comments on any paragraph, and click on a simple hyperlink to follow any cross-reference or look up any defined term. We hoped that this interactive settlement (along with discussion boards and a wiki) would become a home for rich public discussion of the settlement. As it turned out, another feature of the site—the simple repository of PDF versions of the legal filings in the case—turned out to be the most important part. Just making the primary documents readily available for public download has been both a significant undertaking (the number of filings is now approaching one thousand, making for an organizational challenge), and a service in high demand. The Public Index now facilitates public participation in legal processes by providing access to primary legal documents and secondary commentary in the press, on blogs, and in scholarship.

D Is for Digitize was our next major attempt to create conversations. It was originally scheduled for the middle of October 2009. At the time, the court was on schedule to hold its fairness hearing in June, meaning that the conference would provide an ideal opportunity for academics to bring their informed perspectives to bear on the larger implications of a settlement that would, by then, be far along the procedural pipeline. The court upended that original plan when it delayed the opt-out period and the fairness hearing by four months.[5] With the new hearing scheduled for October 7, 2009 we quickly rearranged the schedule to hold *D Is for Digitize* on October 8–10, 2009. This change allowed us to take advantage of the presence in New York of the same advocates who would be arguing for and against the settlement that week in a courtroom just a few blocks from New York Law School. The revised schedule held for the conference—but not for the case. The parties withdrew their

4. The Public Index, http://thepublicindex.org/ (last visited Oct. 12, 2010).

5. *See* Scheduling Order, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Apr. 28, 2009), *available at* http://thepublicindex.org/docs/motions/approval/order_allowing_extension.pdf.

original settlement in September, promising to offer a revised version soon.[6] The October 7th fairness hearing became instead a short status conference, and *D Is for Digitize* went ahead with the very terms of the settlement up in the air. That added a third, timely perspective to the academics and advocates already accounted for: activists weighing in with their thoughts on what the revised settlement *ought* to say.[7]

The result was that, over those three days in October, an intensely engaged group came together for a sophisticated and extensive discussion of the case, the proposed settlement, and the digital future of books. The keynote featured Paul Courant, the University of Michigan economist and librarian who negotiated the first university scanning agreement with Google and became its most prominent academic proponent, in conversation with Pamela Samuelson, the University of California law professor and copyright reformer who has become its most prominent academic skeptic. A pair of tutorials on the history and terms of the settlement led into panels on its implications for class actions, the publishing industry, culture, the public interest, the availability of orphan works, and antitrust law. The atmosphere was intellectually charged and the competing views at times sharply argued, but the overall tone was one of curiosity, engagement, and shared commitments: to books and book culture, to the beneficial use of digital technologies, to the rule of law, and the public interest.[8]

The articles in this volume, in their various ways, share those commitments and further those conversations. They've been arranged roughly thematically. We hope that readers will enjoy the connections among them, and see them all as part of the larger discussion to which everyone is invited.

Matthew Sag's *The Google Book Settlement and the Fair Use Counterfactual* serves as an introduction to the settlement and the legal issues it raises.[9] Sag uses his prediction of the likely outcome of the underlying lawsuit—a fair use ruling in favor of Google—as a baseline against which to measure the settlement. He finds that its terms mirror this fair-use baseline in important ways. But in a few crucial places, including, most critically, its defaults allowing Google to distribute complete copies of books, the settlement creates new systems that could not have resulted simply from litigation over fair use. By anatomizing the settlement and identifying its unique features, Sag neatly frames the conversation over it.

The next three articles continue the copyright theme. Lateef Mtima and Steven D. Jamar's *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information* goes back to the purposes of copyright, "the possible production and dissemination

6. *See* Motion to Adjourn, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC, 2009 WL 5576331 (S.D.N.Y. Sept. 22, 2009).

7. The rescheduled fairness hearing was held on February 18, 2010. Transcript of Fairness Hearing, Authors Guild, Inc. v. Google, Inc., No. 05-CV-8136-DC (S.D.N.Y. Feb. 18, 2010), *available at* http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf. As of this writing, the court has not ruled on the parties' motion for approval of the settlement.

8. An archive of the *D Is for Digitize* conference is available at http://www.nyls.edu/disfordigitize. The website includes links to video and audio of the conference sessions.

9. 55 N.Y.L. Sch. L. Rev. 19 (2010–11).

of creative works to society's benefit."[10] On this view, Mtima and Jamar argue, the settlement is strongly to be supported. Never before has a single project promised to put so many books before so many people. Even more importantly, through programs like the Public Access Service, which will place free terminals in public libraries, the settlement is engineered to make these books widely available to disadvantaged individuals and communities, making it a rare opportunity to extend a digital hand to the least well-off. Further, based on an institutional analysis of the roles played by Congress, the courts, and private actors in the copyright system, this settlement is an appropriate way to advance the goals of copyright social justice.

Bernard Lang's *Orphan Works and the Google Book Search Settlement: An International Perspective* moves from domestic copyright to international.[11] His point of departure is the orphan works problem: the difficulty faced by a would-be user of a work who is unable to locate the copyright owner. The settlement will make many orphan works widely available to the public again, but Lang questions whether it does so consistently with the Berne Convention for the Protection of Literary and Artistic Works. His answer—probably not—leads him to come at the same two themes Mtima and Jamar explored (the purposes of copyright and the appropriateness of using a class action settlement), but to reach very different conclusions. In the end, Lang sees neither the settlement nor the Berne Convention, which stands in its way, as providing a fully acceptable answer to the orphan works problem. He argues that a properly amended settlement, coupled with a "rethought" Berne Convention, could offer a productive way forward.

Katharina de la Durantaye's *H Is For Harmonization: The Google Book Search Settlement and Orphan Works Legislation in the European Union* also describes the proposed settlement as a game-changing development.[12] She explores the legal mechanics and political economy of orphan works in Europe in a post-settlement world. Even though the settlement no longer directly covers most European works, and even if the settlement itself is rejected, it has already shifted European debates over orphan works. It has led to a new consciousness that orphan works issues are international, not merely national—in turn, giving the European Commission a renewed sense of its own role in breaking orphan works logjams, and a new institutional toolkit (featuring, for example, a greater role for private initiatives) from which to draw as it considers whether to legislate regarding orphan works in Europe.

Christopher Suarez's subject is not copyright, but antitrust. An early public critic of the settlement on antitrust grounds, he remains critical in *Continued DOJ Oversight of the Google Book Search Settlement: Defending Our Public Values and Protecting Competition*.[13] He sees the settlement's pricing schemes as per se violations of the Sherman Act. By concentrating millions of books under Google's control, the settlement will both enable copyright owners to conspire in raising prices and also enable Google

10. 55 N.Y.L. Sch. L. Rev. 77 (2010–11).

11. 55 N.Y.L. Sch. L. Rev. 111 (2010–11).

12. 55 N.Y.L. Sch. L. Rev. 157 (2010–11).

13. 55 N.Y.L. Sch. L. Rev. 175 (2010–11).

to gain undeserved advantages over its competitors in multiple markets. He recommends ways for the Department of Justice to intervene to protect consumers.

The remaining two articles place the proposed settlement in a larger cultural context. Mary Murrell's *Digital + Library: Mass Book Digitization as Collective Inquiry* is a meditation on the meaning of the "library" Google is building.[14] The disputes over the settlement are also, in part, disputes over the kind of library it might become or supplant. A book is a social object embedded in a system of social relations; a library is a nexus of social meanings as much as it is a physical collection of bound sets of paper. Google's library will inherit, inflect, and challenge these social meanings. Murrell traces the intertwined history of book digitization projects and the concept of the "digital library." She shows how one of the animating themes in debates over the settlement, "access" to books, is "less a straightforward, transparent 'democratic' principle than a fluid set of practices that regulate, limit, and/or allocate who reads what."[15]

Finally, Daniel Reetz's *The Why in DIY Book Scanning* offers perhaps the most fundamental reframing of the settlement.[16] Reetz isn't a lawyer or a copyright scholar, just an ordinary guy who built his own book scanner from cheap consumer cameras and basic parts. (A later version of the scanner, which fits in carry-on luggage, was by popular acclaim the biggest star of the conference.) His essay is a passionate defense of book digitization—and a political argument that scanning should be a personal technology, under the control of individuals, who can adapt it to their communities' varied needs. This argument, which echoes points made by generations of computer pioneers, implicitly asks a deep question about the settlement: Does Google matter?

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Thank you for your interest in the Google Books settlement, and in this collection of articles. Whatever your background and point of view, I hope you'll find something in here to spur your thoughts and inspire your own response. *D Is for Digitize* may have come and gone, but the conversation continues, like new corn, from year to year.

14. 55 N.Y.L. Sch. L. Rev. 221 (2010–11).

15. *Id.* at 245.

16. 55 N.Y.L. Sch. L. Rev. 251 (2010–11).