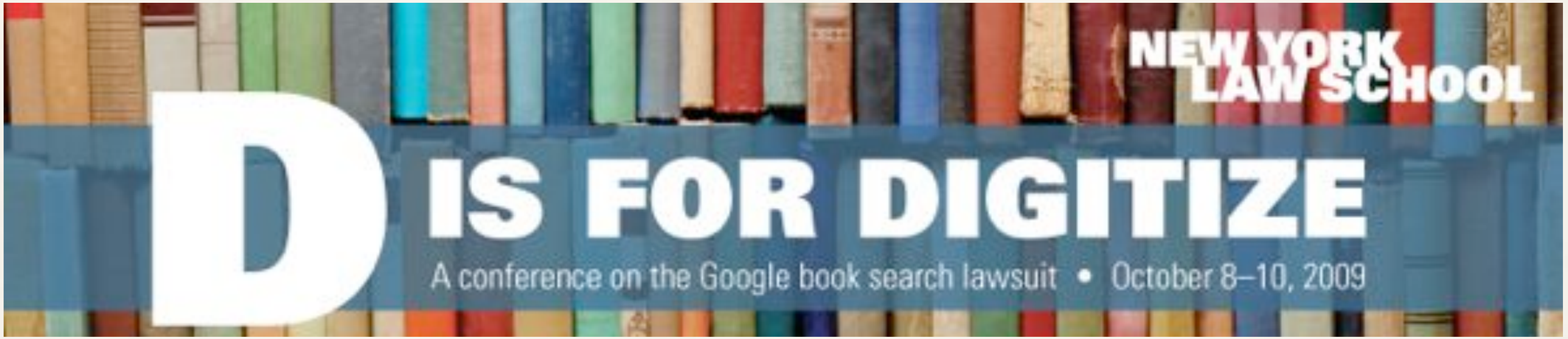

Objections to the Settlement: A Field Guide

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The nature of this talk

- I'm going to try to map out some of the issues at stake.
- I apologize for the long parade of bullet points, but I'm a list-maker by nature.
- This is an overview, not a careful unpacking. And even then, I'll miss some issues.
- I'm trying to describe the arguments, rather than endorse them (which is just as well, since many of them are obviously inconsistent with each other.)
- But this is ultimately one observer's idiosyncratic and sometimes opinionated take.

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I see six broad headings of discussion

- Benefits to authors, publishers, libraries, and readers
- Unfairness to copyright owners
- Misuse of the class action
- Unfairness to libraries and readers
- Unfairness to competitors
- Institutional choice

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Settlement benefits

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New services for readers

- Free full-text, nearly comprehensive book search
- Free preview uses to read excerpts online
- Consumer purchase: buy online access to individual titles
- Institutional subscription: all-you-can-eat access through paying libraries, schools, etc.
- Public access service: one free terminal in each public library building
- Plus potential new models including print-on-demand, coursepacks, downloadable PDFs, and who knows what else?

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Particularly sweet aspects for readers

- Most books weren't born digital; the settlement provides digital editions.
- Orphan books wouldn't have been available in authorized digital editions at all.
- Google doesn't have a Kindle memory hole problem.

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Access advantages

- Access to knowledge is deeply inequitably distributed, but numerous advocacy groups have noted that the settlement programs (esp. Public Access) can help.
- The settlement raises its own issues—particularly in regard to pricing—but it massively expands the reach of books in large research-library collections.
- Poorer, disabled, and rural users particularly stand to benefit.
- It's only a partially a settlement-specific benefit, but the increased availability of public-domain works (e.g. in PDF forms) is also significant.

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Benefits to authors and publishers

- $60 right off the bat.
- Then 63% of Google's gross revenues from the book programs: sales, subscriptions, advertising on individual book pages, etc.
- The programs are purely optional; you can opt out of the Display uses at any time.
- The Registry serves as a new, potentially powerful collecting society, capable of negotiating good new deals and in helping channel revenue to copyright owners.

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Benefits at large

- Research corpus provides amazing dataset.
- Clarified rights information for many copyright owners, and even stronger evidence that orphan owners truly are unfindable.
- Significant clarity on many works that are actually in the public domain.
- Google has a decent track record on supporting common, interoperable formats.

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And, of course, benefits to Google

- 37% of the revenue from all of the above uses.
  - Plus 100% of the revenue from multi-book search pages
- Book search drives traffic to web search (or is it vice-versa?).
- Data analysis opportunities in excess even of what the Research Corpus permits.

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Objections from rightsholders

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The view from the angry rightsholders

- If you believe that Google's initial scanning was infringement, then $60 is too small.
  - Plus, it's bad optics to "reward" the infringement with a profitable deal.
  - Some class members believe they have stronger claims: those whose works have already been scanned, or who asked in vain for Google to stop.
- 63% is also seen as too small a share going forward.
  - Particularly given that the Registry's expenses will come out of that 63%.
- There is a streak of moral rhetoric in these arguments alongside the economic claims.

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Authors versus publishers

- Parts of the author community are also furious about the Author-Publisher Procedures.
  - Claim: Rosetta Books settled the e-rights issue definitively in favor of authors.
  - Accordingly, publishers shouldn't have any of these rights under the settlement unless they produce a contract proving it. (Of course, publishers would beg to differ.)
  - The arbitrations are binding, and expensive; depending on the licensing involved, some authors are afraid of being cut out of the deal entirely.
- Institutional suspicion is directed at all of the principals to the negotiation.

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At what cost?

- Some objectors raise the question of the scope of the releases in the settlement.
  - The settlement gives Google a general release for Non-Display Uses.
    - Is that where the real value is? And do copyright owners have any right to object?
  - The settlement doesn't let authors control context (e.g. objectionable advertisements) .
    - So it pushes up against moral-rights-style concerns.
  - The settlement releases trademark and other non-copyright claims (think AdWords).

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The Berne irony

- The settlement was negotiated in the wake of the Second Circuit's decision in *Muchnick* that it lacked jurisdiction over a copyright class action including unregistered works.
  - Thus, the settlement class excludes copyright owners of unregistered works.
- Except, per Berne, the United States dropped registration entirely for foreign owners.
  - Since unregistered foreign works holders would have been able to sue Google, they were jurisdictionally proper class members, and the settlement sweeps them in.
- Thus Berne's no-formalities rule, thought of by copyright owners as a rule for their benefit, becomes an instrument by which they can be bound to the settlement!

Objections to the class action

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The theory of the class action

- Due process ordinarily requires that a court have personal jurisdiction to sit in judgment over you, that you have a full and fair chance to litigate the issues yourself, and that you can be bound only by settlements that you yourself have opted into.
- Class actions relax all three of these protections: *Shutts* allows plaintiff classes in courts lacking personal jurisdiction over some class members; class members don't have a right to represent themselves; opt-out settlements can be imposed on the class.
- These shifts are justified by a theory that the named class representatives' counsel represent the interests of the class as a whole, not just their individual clients.
- Due to obvious risks of abuse, the court must monitor class counsel's performance.

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Constraints on class actions

- Class actions are allowed under Rule 23 of the Federal Rules of Civil Procedure, which also sets limits on how and when they can be used.
- The Federal Rules themselves are procedural; the Rules Enabling Act says they shall not "abridge, enlarge or modify any substantive right." This may or may not put its own independent limits on the use of class actions, beyond the limits in Rule 23 itself.
- The Due Process Clause is also waiting in the wings. Rule 23 incorporates many of its concerns, but not necessarily all of them.

Notice I: Tracking down everyone

- Rule 23 requires reasonable notice to class members.
- *Eisen* specifically requires individual mailings to class members with known addresses.
  - Whether the parties here did that is disputed, and we don't have the full facts yet. That some class members didn't *receive* a letter doesn't mean that one wasn't *sent*.
- More generally, there are claims that notice—particularly outside of the U.S.—was not reasonably calculated to reach class members, e.g., publication in inappropriate newspapers, later than intended, etc.
- The four-month delay was triggered by these concerns.

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Notice II: The quality of notice is not strained

- There are also complaints about the readability of the notices themselves
  - This is a 140-page settlement (not counting attachments); the notice itself was 30 pages—the short "Summary Notice" couldn't help but be incomplete.
  - Query whether notice here was that much less readable than in typical class actions.
- Foreign class members are particularly upset about what they describe as incomprehensibly poor translations of the notice.
  - The motion to approve the settlement appears to require translations of the settlement itself, which don't appear to have been done.

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Opting out is hard to do?

- Google asks that copyright owners claim their books through its online database.
  - But the "metadata train wreck" makes it hard to locate your books, and even if the metadata were clean, there are a *lot* of books (and especially inserts) kicking around.
  - Read carefully, the settlement doesn't actually require this, and the music publishers have refused to, on the grounds that opt-out applies to *parties* rather than to *works*.
- According to some class members, the administration site lacks confirmation screens.
- Opt-out touches a raw nerve for many copyright owners, particular foreign ones, who're accustomed to Berne's no-formalities rule.

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The once and future cause of action

- Typical settlements are retrospective: compensation for past harms.
  - This one is prospective: it creates ongoing programs and releases Google from liability for its future conduct (including actions not mentioned in the complaint).
  - This would be unproblematic in a normal settlement, but in a class action?
- The general idea isn't unprecedented—cf. a class action over power line easements that ends in a prospective right to use—but it hasn't been taken this far.
- This issue captures some of the anger some class members feel at being *surprised* by the settlement negotiations.

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The shape of the class

- Not everyone is happy with the (somewhat amorphous) contours of the class.
- The original complaint named a determinate class based on books at the University of Michigan Library, but the settlement complaint reaches all copyright owners of books.
  - Registration provides a threshold for U.S. authors (because of the *Reed-Elsevier* issue), but not for foreign ones (much to the anger of foreign objectors).
- The boundaries of the class are ambiguous in places (periodicals), have varied over time (illustrators were out of the class, then in it, and then out again), and show some gerrymandering (e.g. children's book illustrations).

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A class divided against itself?

- Rule 23 requires that the named class representatives be "typical" and that class counsel "fairly" represent the interests of all of the class members.
- The Supreme Court has held that some classes have directly conflicting interests, so that subclasses with separate representation may sometimes be necessary. (Some groups are so heterogenous that they can't be proper classes at all.)
  - The settlement recognizes one such division: authors vs. publishers.
  - But are there other divisions so fundamental that one subgroup or another of the class has not been sufficiently represented in the lawsuit and settlement?

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One obvious candidate: orphan work owners

- By definition, they can't represent themselves, which means they need the class to defend their rights but also can't defend themselves *from* the class and its counsel.
- The fairness of the deal to them is justified, in part, by their commonality of interest in having a market for their works.
  - But do the unclaimed funds clauses pit orphan owners against claiming owners?
  - Does a settlement with "internal opt-outs" provide the right structural protection?
  - And would they *want* to join in a settlement that favors revenue over access, has consequences for privacy, etc? Imputing "interests" to absent orphan owners is tricky.

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Another obvious candidate: foreign owners

- The settlement is territorially U.S.-only; it controls only U.S. copyright interests and deals only with acts that would constitute infringements under U.S. law.
  - But plenty of foreign copyright *owners* have a U.S. copyright *interest* in a Book, and not all of them realize it.
- There are no foreign authors or publishers among the representative plaintiffs.
- There was—until recently—no commitment to foreign members on the Registry board.
- The definition of "commercially available"—until recently—was phrased only in terms of the U.S. market.

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Some less obvious candidates

- Insert owners receive only small fixed payments, not ongoing revenue—but some of them are highly valuable (e.g. “Minority Report”).
  - And Insert owners have much weaker control rights than do book owners.
- Academic authors and publishers often have an interest in open access rather than control and revenue maximization.
  - Google has implemented CC licenses, but this isn’t in the settlement itself.
- Complicating all of these questions, the Authors Guild is obviously a key architect of the settlement, but its actual legal role in the lawsuit and settlement is ambiguous.

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The unclaimed funds tangle

- The Registry will hold unclaimed funds for five years, after which they're used to pay Registry expenses, then diverted to other copyright owners and to charity.
- The settlement payments made by Google are a settlement pool, so presumably *cy pres* rules apply to them. But what of the revenues generated from uses of unclaimed works?
- Some suggestions on the table: indefinite escrow by the Registry, library funding, or return to buyers (on the theory that the works are effectively public-domain).
- Some states are claiming they're unclaimed property, which state laws typically require to be escrowed and registered by the state itself. This has legitimacy advantages, but is the characterization correct, how do we know *which* state, and will states do any better?

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Objections from readers and libraries

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Will Google respect reader privacy?

- My favorite reasons why readers need privacy: *The Theory and Practice of Oligarchical Collectivism*, *The Easy Way to Quit Drinking*, and the Index Librorum Prohibitorum.
- Electronic delivery creates some privacy issues; a hosted service magnifies them.
- How strongly will Google resist governmental and civil demands for readers' identities?
- Can you "throw away" your books? Can you buy them "as gifts?"
- How extensively will book-reading information be linked to other online activity?
- Google has moved on these issues, including by announcing a privacy policy.

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How much does Google control the corpus?

- Google can remove books from its collection, raising obvious censorship concerns.
  - (Note that these concerns presume a kind of market and cultural dominance.)
- The settlement commits Google to notify the Registry if it excludes books for "editorial" reasons, and lets the Registry engage an alternate partner to make the books available.
  - Google has also promised to notify the public if it does so.
- There remain concerns that Google might disguise exclusions as being "non-editorial."
- Some objectors have raised familiar arguments about algorithmic bias and transparency.

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Will library subscriptions stay affordable?

- Libraries fear that the subscription will be a must-have item, and priced accordingly.
  - The settlement contains a goal of pricing for "broad access" and has a detailed, tiered pricing strategy, but how will these commitments be enforced?
  - Michigan negotiated an audit-and-arbitration procedure, but it only provides for refunds of Google's share, which is not much help if the prices are off by 10x.
  - There are substitutes (purchase, ILL), but not always very good ones.
- Is this really a story about libraries' own poor long-term planning? Or perhaps one about larger problems in our public information policy?

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How public is the public access service?

- The settlement comes with an extra scoop of ice cream for libraries and colleges: free terminals for the Institutional Subscription (one per library building or per 10,000 FTEs).
- Some, particularly librarians, are complaining about the portion size.
  - Some concerns focus on the perceived stinginess of the terms (no free printing allowed) or the hidden costs to the institutions (e.g. user support).
  - Others are driven by anger at what they see as a naked attempt at a bribe.
- On the other side, some of the copyright owner objectors think the public access service will dangerously undercut sales.

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What might have been

- In the lawsuit as filed, Google would have mounted a vigorous fair use defense.
  - The settlement deprives us of a determination on the fair use question—and the parties dispute vigorously how it might affect future fair use arguments.
- Google's scanning technology is very clever, but the results are not always legible.
  - The messy metadata doesn't help, either.
  - Does the settlement effectively foreclose other, higher-quality scanning projects?

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Objections from competitors

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Exclusive access to orphan works

- Under the settlement, Google will be the only source for new copies of orphan books.
  - In theory, the licenses it gets are non-exclusive. In theory. These *are* orphan books.
- The Registry can license books from claimed authors, but not the unclaimed orphans.
  - The Department of Justice has suggested this as a potential fix to the settlement.
  - But doing so could complicate the class-action issues, and anger copyright owners.

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Barriers to entry for orphan books

- If Google is the only seller of new copies of orphan books, is that a problem?
  - Some scholars see it as increasing consumer options, thus automatically good.
  - Others see the settlement as preferentially dropping a barrier to entry for Google.
- Are legal barriers to entry categorically different than economic ones? Or, put another way, to what extent is the settlement a legitimate reward for superior business acumen?
- The answer to these questions may hinge on how easy or difficult we believe it would be for a Google competitor to replicate the settlement. And that would appear to turn on the same huge tangle of civil procedure questions affecting the current settlement.

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Antitrust policy, meet copyright policy

- The underlying incentive structure of copyright complicates the orphan analysis.
- We can't just seek to find the efficient level of production for books that already exist—that would imply that we should simply put them in the public domain.
- The reason is that we need to care about copyright as a *dynamic* system, and a pattern of abrogating the rights of past authors undermines the incentives of future authors.
- Although many orphan owners are unfindable, some of them would and will turn up.
- The settlement creates a valuable product using their works, but it's not clear to what extent Google is legitimately entitled to lay claim to that value in an antitrust analysis.

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Settlement controlled pricing

- Putting the orphans aside, we also need to talk about pricing.
- The settlement contemplates that Google will algorithmically set prices for all books.
- How is this not price-fixing, dressed up to look like a class action?
- Perhaps because Google's algorithm is supposed to mimic competitive pricing.
  - Or is it? This provision of the settlement is potentially ambiguous.
  - And this fact might not save the agreement from the strictness of the *per se* rule.

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Counterarguments on the algorithm

- One reply is that the individual purchase option is just one sales channel.
  - How much does this matter?
- Another reply is that copyright owners can choose to set their own prices.
  - This arguably makes any potential cartel unstable.
  - But again, the orphans complicate things, since they can't defect.

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How about the institutional subscription?

- Here, the coordinated price—one price for the whole collection—is blatant.
  - But *BMI v. CBS* blesses blanket copyright licensing.
  - And this settlement offers what BMI was sued for not offering: individual sales.
- On the other hand, BMI and ASCAP live under consent decrees with pricing review, which would suggest treating the Registry as an official, regulated collecting society
  - Scholars are divided on whether collecting societies are pro-competitive.

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Advanced antitrust wrinkles

- What about the scans themselves?
  - Some critics think that Google should forfeit its control of the scans, either because it's necessary to enable real competition, or because it would be more efficient.
  - These arguments are harder to make than the arguments targeting licensing or pricing, because Google's database of scans is more easily replicated by a competitor: we know (roughly) what scanning costs.
- There was some fear that settlement approval might shield the parties from antitrust review, but they explicitly waived any *Noerr-Pennington* immunity.

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Institutional choice

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The settlement isn't taking place in a vacuum

- Congress looked at orphan works legislation last term, and is likely to again
  - That legislation was broader in types of works, but perhaps narrower in ambition
- Is the settlement in keeping with the spirit of Congress's efforts? Improperly doing what Congress deliberately decided not to? Threatening to preempt Congress's attempt to solve the issue for real? Producing a purer policy result because it avoids the sausage machine? Creating its own, even less democratically legitimate sausage machine? Breaking a legislative logjam? Or simply using the class action rules as designed—so this isn't a copyright policy issue at all?
- Plus, of course, other countries and the EU are thinking about the orphan works issue.

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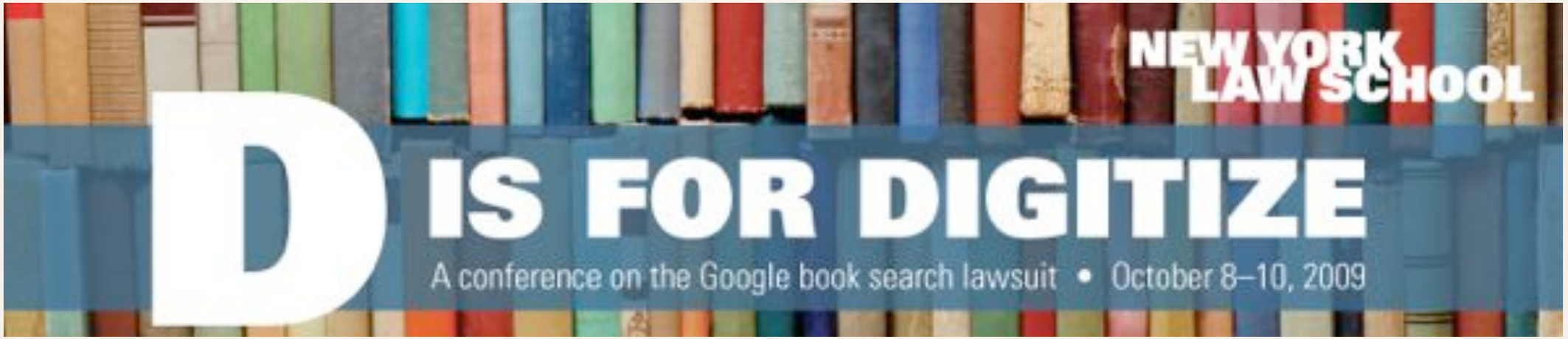
That's an awful lot of questions.



Let's try to find some answers.